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STUDIES

NATION – DELEGATION – CONSTITUTION: RECONSIDERING ROLE OF RELIGION IN POLISH IDENTITY DEVELOPMENT[1]

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Abstract: Democratic politics creates a specific 'chain of representation'. According to Article 104 of the Polish Constitution, the MPs are the representatives of the entire Nation. The understanding of the "entire Nation" allows to determine whether national identity is open and inclusive, or closed and exclusive. One can distinguish two ideal types of a nation: heterogeneous and homogeneous. The first type is connected to the universalist understanding of "constitutional essentials", the second to the particularistic one. In the paper, we pointed out the elements of heterogeneity in the text of Polish constitutions as well as the elements of homogeneity in the constitutional practice. Religion becomes an important factor influencing the interpretation and application of the constitution. The heterogeneous concept of the nation and the universalist "constitutional essentials" can be narrowed down in the political practice. The particularistic elements of the constitution and the homogenizing tendencies present in the application of the constitution might lead to polarization. In such a case, there would be a radical reinterpretation of the entire chain of delegation.

Key words: delegation, religion, heterogeneity, homogeneity, nation, "constitutional essentials"

1 INTRODUCTION

In this article we present partial results of the research on the legislative delegation in a representative democracy. We point to the existence of a bond between a nation (demos) and a constitution. At the same time, we assume that depending on the understanding of the concept of a nation, the meaning of constitutional institutions may change. In this paper, we refer to the existence of a dominant religion in an open society (its nature stated in a constitution), the religion being one of the factors of the homogenization of a nation. Due to the institutionalization of religion, a church emerges as a powerful political figure. In consequence, religion (through institutional church) is able to change the national identity and further affect the reinterpretation of constitutional provisions.

Thus, in the first section the meaning of a nation and democratic delegation is described (2). Then the two ideal concepts of the nation are presented (3) and put in the context of constitutional essentials (4) as well as the struggle of the two values in Polish political thought: religion and democracy (5). The theoretical explanation is illustrated by a variety of examples rooted in the periods of the Second (6) and Third Republic of Poland (7). Finally, we conclude the findings briefly in section 8.

[1] The article has been prepared as a part of the grant "Law-making delegation in a representative democracy" financed by the National Centre of Science, contest Opus 11, registration no. 2016/21/B/HS5/00197.

2 NATION AND DEMOCRATIC DELEGATION[2]

In the most general and almost intuitive sense, democracy means the rule of the people who are defined as "all the citizens" or as "a nation". In this very system, using the words of J. J. Rousseau, "the legislative power belongs to the people and can belong only to them".[3] Similarly, I. Kant states that "The Legislative Power, viewed in its rational Principle, can only belong to the united Will of the People".[4] In this approach, democracy is identical with the principle of self-determination of the people, i.e. being subject only to such a law that the people gave themselves. However, this democratic principle is not a description of a real political situation, but just an idea that in a highly abstract form is to express the democratic mechanism of legitimacy of the law-making process.[5] This mechanism consists not so much in the personal participation of the people in the legislation process, but in the form of delegating the legislative competence to their representatives. The law established by these representatives is to be seen as an expression of "the will of the people". K. Strøm, W. C. Müller and T. Bergman describe delegation within democratic politics as a process of delegating where the entity with the authority to make political decisions (people – the sovereign authority) conditionally points to the entities that make decisions on their behalf (representatives).[6] In such a model all levels of taking political decisions ought to be oriented to the preferences of citizens. The election of representatives in general elections that fulfil specific democratic criteria may be viewed as a specific embodiment of such a delegation as well as a form of holding them responsible.

Democratic politics within the system of representation creates a specific 'chain of representation': "1. Delegation from voters to their elected representatives. 2. Delegation from legislators to the executive branch, specifically to the head of government (the Prime Minister). 3. Delegation from the head of government (Prime Minister) to the heads of different executive departments. 4. Delegation from the heads of different executive departments to civil servants".[7] In constitutional democracy, the aforementioned "chain of law-making delegations" is not an authorization of a purely formal nature since the act of delegation is not limited to the composition of a legislative body. First of all, as far as political views are concerned, representatives should have the same preferences as their electorate, which is important in the context of regaining a mandate. Secondly, the delegation procedure itself is legally established at the constitutional level, at least as to the rules according to which it should be carried out. Thirdly, the result of the legislator's action cannot violate the constitution but, on the contrary, it should let the constitutional norms be implemented and clarified. From the legal point of view, it is important for both the election of representatives and the actions of the "body of representatives" (according to E. J. Sieyès' words "le corps des délégués"[8]) to be

2 This paper develops the ideas presented in: The nation, delegation and constitutional change in Poland (under publication).

3 ROUSSEAU, J.-J. The Social Contract and The First and Second Discourses. New Haven – London : Yale University Press, 2002, p. 193.

4 KANT, I. The Philosophy of Law. An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right. Edinburgh : T. & T. CLARK, 1887. AA VI 314, p. 166.

5 See PRZEWORSKI, A. Democracy and the Limits of Self-Government. New York : Cambridge University Press, 2010, p. 17 – 20.

6 STRØM, K. – MÜLLER, W. C. – BERGMAN T. Parliamentary Democracy: Promise and Problems. In STRØM, K. – MÜLLER, W. C. – BERGMAN T. (ed.): Delegation and Accountability in Parliamentary Democracies. Oxford : Oxford University Press, 2006, p. 3 – 32.

7 Ibid., 20.

8 SIEYÈS, E. J. What Is the Third Estate? In SIEYÈS E. J. Political Writings. Including the Debate between Sieyès and Tom Paine in 1791. Indianapolis, Cambridge : Hackett Publishing Company, 2003, p. 134.

normatively defined in the constitution, that is in the so-called "higher legislation". Therefore, this so-called "normal legislation" is dependent, to some extent at least, upon the "higher legislation".[9]

"The chain of law-making delegations" laid down in the constitution is to implement all the fundamental principles and values for a given society. This democratic character of the chain is connected with the fact that through political institutions and legislative procedures, the ideas of social freedom and equality that comprise both the concept of individual and collective autonomy are implemented.[10] Although they may be interpreted in various ways, in general they constitute a universal element of a democratic state. The introduction of systemic inequalities and limitations of freedoms, for instance limiting the possibility of active participation in democratic procedures or preventing arbitrarily selected groups from independent political activity, which in consequence leads to the situation that a system that is characterized by such limitations can at best be described as not a fully democratic one. These universal ideas are implemented in a specific context of a given constitutional culture.[11] One of the fundamental components of this culture is the way in which the collective "We", meaning the people, is interpreted. Are we then united in having equal rights and freedoms and in striving to implement all the abstract ideas that we share, or do we have the same blood ties, history, culture and religion? In other words, what factors constitute a nation? Should we presume that a nation communicates in many voices, metaphorically speaking, and democratic procedures are to help us to communicate, or does the national bond mean that as a collective being we speak with a single voice? In the first case, the 'chain of law-making delegations' will be a form of political coexistence within pluralism based on universal principles, whereas in the second case it will become a form of national unity and identity.

According to Article 104 of the Polish Constitution,[12] the MPs are the representatives of the entire Nation, not only their voters. To determine a common understanding of the "entire Nation" allows one to define whether national identity is open and inclusive, or closed and exclusive. In other words, it helps to decide whether the legislative delegation allows for peaceful coexistence in diversity, or it is just an expression of one will of the nation.

3 TWO IDEAL TYPES OF A NATION IN THE CONTEXT OF RELIGION

As far as the concept of a nation is concerned, two ideal types can be given, a nation which is homogeneous and a heterogeneous one.[13] This distinction will allow us to determine which type domi-

9 See ACKERMAN, B. We the People. Foundations. Cambridge, London : The Belknap Press of Harvard University Press, 1995, passim.

10 For instance, H. Kelsen points to the constitutive meaning of freedom for a democratic system (See KELSEN, H. The Essence and Value of Democracy. Lanham, Boulder, New York, Toronto, Plymouth: Rowman & Littlefield Publishers, 2013), whereas R. Dahl writes about the "logic of equality" (See DAHL, R. A. On Democracy. New Haven, London : Yale University Press, 1998). Generally speaking, both ideas are important for a democratic identity, whereas preferences for the one or the other may result from either factual circumstances, e.g. the need for redistribution, or ideological factors (e.g. the idea of a state as a night watchman or a welfare state). At the level of constitutional rights and freedoms, a stance that does not give preference for one of these fundamental ideas is also possible, namely, a democratic state should be based on equal freedoms (See RAWLS, J. Political Liberalism. New York : Columbia University Press, 1993; GUÉROT, U. Warum Europa eine Republik werden muss! Eine politische Utopie. Bonn: Verlag J.H.W. Dietz Nachf. GmbH, 2016, chapter 6).

11 Cf. MÜLLER, J.-W. Constitutional Patriotism. Princeton, Oxford : Princeton University Press, 2007, p. 59 – 60.

12 The Constitution of the Republic of Poland of 2 April 1997 [Dz. U. 1997 Nr 78, poz. 483 (The Journal of Law, Number 78, Item 483)].

13 Below we use the very definitions made for our article The nation, delegation and constitutional change in Poland (under

nates in the Polish state. At the same time, some tensions and conflicts can be described caused by the use of the aforementioned types. The first ideal type of the nation may be described as a homogeneous nation. National identity in this sense is associated with a certain condition of homogeneity based on specific "characteristics" that allow to distinguish "natives" from "strangers". From such a perspective the nations perceive "blood, soil, ethnolinguistic peoplehood and religion as necessary or at least central elements of national identity".[14] The stress here is laid on "homogeneity and on cultural assimilation to the dominant paradigm".[15] The homogeneous nation appears to be founded on "the prepolitical unity of a community with a shared historical destiny".[16] This type stresses the ethnic and/or cultural homogeneity of the national identity: "nations are communities of people of the same descent, who are integrated geographically, in the form of settlements or neighbourhoods, and culturally by their common language, customs, and traditions".[17] The second type may be referred to as a heterogeneous nation. The nationality here is based on a community of political ideals and goals. As opposed to the notion based on homogeneity, the nation is understood as a political community that leaves "the door open a crack, since they allow anyone in who can join in the project of "life, liberty, and the pursuit of happiness"- or, in the case of India, of economic equality – that defines the national aspiration".[18] A nationality is understood as a "membership in terms of shared goals and ideals, thus in a way that does not require homogeneity – in dress, dietary custom, religious belief, or even outward religious observance".[19] A heterogeneous nation is a nation of citizens. In such a meaning, "the nation is the bearer of sovereignty. […] The intentional democratic community (*Willensgemeinschaft*) takes the place of the ethnic complex".[20] Politically speaking, a nation becomes a "constitutive feature of the political identity of the citizens of a democratic polity": "The nation of citizens finds its identity not in ethnic and cultural commonalities but in the practice of citizens who actively exercise their rights to participation and communication".[21] The first ideal type is constituent for the concept of the 'nation state' (*Nationalstaat*), whereas the other for the 'state nation' (*Staatsnation*). In this context, a distinction can be made between the legitimacy of legislation based on the common will of a homogeneous nation and the one based on commonly accepted procedures. In the former, the result of legislation is predetermined by the presumed content of this will, whereas in the latter, the procedures are fixed and their outcome is variable.

One of the criteria for determining whether a given nation is closer to a homogeneous or heterogeneous type is the role that religion plays in the way of how its followers perceive the national identity. Namely, whether it is a factor, or one of the factors, constitutive and necessary, or a factor that is neutral and incidental. As E. J. Hobsbawm points out, the role of religion in constituting national identity is not clear, however, "the link between religion and national consciousness can be very close, as the examples of Poland and Ireland demonstrate. In fact, the relation seems to grow

publication) in which we also present a wider explanation of how to understand the concept of a nation referred to as an ideal type.

14 NUSSBAUM, M. C. The New Religious Intolerance. Overcoming the Politics of Fear in an Anxious Age. Cambridge, London : The Belknap Press of Harvard University Press, 2012, p. 13.

15 Ibid., 14.

16 HABERMAS, J. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Cambridge : The MIT Press, 1996, p. 492.

17 Ibid., p. 495.

18 NUSSBAUM, M. C. The New Religious Intolerance, op. cit., p. 16.

19 Ibid., p. 18.

20 HABERMAS, J. Between Facts and Norms, op. cit., p. 495.

21 Ibid., p. 495 – 496.

closer where nationalism becomes a mass force than in its phase as a minority ideology and activists' movement".[22] According to M. Nussbaum "European nations tend to conceive of nationhood and national belonging in ethno-religious and cultural-linguistic terms. Thus, new immigrant groups, and religious minorities, have difficulty being seen as full and equal members of the nation. All these nations are the heirs of romanticism, with its ideas of blood, soil, and natural belonging".[23] The Polish understanding of a nation is distinctive due to the experience of the absence of state (1795 – 1918) and the formation of national consciousness in opposition to the partitioners (the foreign powers – Russia, Prussia and Austria). The nation is perceived as something different and more permanent than the state institutions, and ethnic and cultural national identity as something more important than civic affiliation. "In today's Poland – writes G. Zubrzycki – the nation is primarily understood in ethnic terms. It is conceived as a community of history and culture, whereas the state (and "society") proceeds from an associational-political relation. Nationality and citizenship are thus distinct: the first term has a clear ethnic and cultural connotation, referring to one's tie with a historical and cultural community, a community of descent, "Poland," whereas the second strictly reflects the legal-political relationship between the individual and the state".[24] Catholicism institutionalized in the Catholic Church is of great importance for the ethno-national identity of Poles.[25] This is an element that gives them the homogeneous identity and allows them to distinguish themselves from "Others". Citizenship, on the other hand, is associated with the formal and legal status of an individual, which means that someone with a different ethnical origin can still become a citizen. It may trigger a certain kind of tension between the homogeneous national identity and democratic inclusion of citizenship. Is not therefore this formal-legal civic equality neutralized by the perception of an ethnic nation as a "true sovereign"? Is not the understanding of democratic principles tinged with homogeneous perception of the nation seen as "natural and obvious"? If that were the case, it would be a priori introduced inequality between ethnic Poles and citizens of other ethnic origin, as well as between the homogeneously understood "Polishness" (the Polish identity) of Catholicism and other religions.

4 CONSTITUTIONAL ESSENTIALS – PARTICULARISTIC OR UNIVERSALIST?

The Republic of Poland, as it is laid in the Constitution of 1997, is a "democratic legal state" (Article 2) in which the highest authority belongs to the Nation referred to in the Preamble as "all the citizens of the Republic". At the normative level, it alludes to the heterogeneous type of a nation. This is a "natural" solution when we take all the universalist principles of a democratic system as a reference point. According to J. Rawls a democratic constitution should contain two elements that are understood as

22 HOBSBAWM, E. J. Nations and nationalism since 1780. Program, myth, reality. Cambridge : Cambridge University Press, 2000, p. 67 – 68. B. Anderson argues that a nation can fulfill a sense-creating role similar to religion, but it does not mean that the nation in the era of secularism "replaces" religion entirely. See ANDERSON, B. Imagined Communities. Reflections on the Origin and Spread of Nationalism. London, New York : Verso, 2006, p. 10 – 12. E. Gellner links the rise of nationalism with secularization. See GELLNER, E. Nations and Nationalism. Oxford : Basil Blackwell, 1983, p. 78.

23 NUSSBAUM, M. C. The New Religious Intolerance, op. cit., p. 94.

24 ZUBRZYCKI, G. The Crosses of Auschwitz. Nationalism and Religion in Post-Communist Poland. Chicago, London : The University of Chicago Press, 2006, p. 36.

25 Ibid., p. 22 – 23.

"constitutional essentials": "(a) fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and (b) equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law".[26] We emphasize that it is the second element that determines the democratic character of the system since it also determines the political subjectivity of citizens. The first element relates to the structure of state authorities which should implement the rights and freedoms defined in the second element. Basic rights and freedoms should apply to all citizens regardless of their origin, race, religion or political views.

A democratic constitution is based on a kind of universalist morality that attributes equal rights and freedoms to everyone. The concept of a nation associated with the universalist "constitutional essentials" would be open and pluralistic (heterogeneous), which means that anyone who accepts basic democratic principles and ideas can belong to a democratic state[27]. Regardless of whether one is aware of this fact or not, using the language of universal, equal rights and freedoms adds a moral dimension to the very essence of the democratic constitution. "Most contemporary constitutions – writes R. Dworkin – declare individual rights against the government in a very broad and abstract language (…). The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice".[28] It may be assumed that the implementation of the principles contained in "constitutional essentials" depends on the extent to which these principles correspond with or influence the moral beliefs of a given society as well as of the legal and political elites that interpret and apply this constitution.

The universalist "constitutional essentials" in democratic states are then somehow applied in specific political, historical, cultural and economic conditions in which they are embedded. Nevertheless, even in democratic countries, political figures argue over the interpretation and best implementation of "constitutional essentials".[29] Their interpretation can be influenced by beliefs which we consider to be "natural and obvious", that is those that we do not question and often unknowingly accept as "appropriate". Referring to the theses of M. Nussbaum and G. Zubrzycki we may claim that between the universalist "constitutional essentials" and the real beliefs of the majority or a part of the citizens there may be a conflict in the situation when a nationality is closely bound with the ties of its culture, religion and ethnic origins. In spite of the fact that the universalist "constitutional essentials" are pledged to be applied on the normative and legal level, on the level of real beliefs of both citizens and public office holders, these specific particularistic "constitutional essentials" can

[26] RAWLS, J. Political Liberalism, op. cit., p. 227.

[27] Pluralism in this sense would not be absolute and unconditional. See the concept of "reasonable pluralism", ibid., Lecture II.3. The concept of democratic pluralism is presented by Ch. Mouffe (in MOUFFE, Ch. The Democratic Paradox. London, New York : Verso, 2000), however, it is not absolute because democratic institutions should protect people against violence and domination without preventing people from being engaged in democratic disputes and conflicts. A particular emphasis on a conflict and pluralism is essential because, as argued by P. Bourdieu, universalism supported by state institutions also manifests a tendency to unify, depreciate particular identities or regulate the state of belonging to a universal culture, see BOURDIEU, P. Practical Reason. On the Theory of Action. Stanford: Stanford University Press, 1998, Chapter 4. Democratic, universal "constitutional essentials" would involve to the extent possible both individual and group particular identities without destroying them, and yet transform them enough to let them function within one state.

[28] DWORKIN, R. Freedom's Law. The Moral Reading of American Constitution. New York : Oxford University Press, 1997, p. 2.

[29] MÜLLER, J.-W. Constitutional Patriotism, op. cit., p. 54 – 55.

still prevail over. In such a case, it becomes obvious that the democratic majority should respect the will of the nation constituted by ethnicity, culture and religion. The homogeneous type of the nation adopts this very type of "constitutional essentials" as the supreme power of a democratic state.

Understandably, it cannot be stated a priori that such a nation will be intolerant to minorities, however, the very adoption of such a concept induces a deep polarization between "those who belong to the Nation" and "those who are only the citizens". It introduces the category of the "internal Other", the category which is to exclude people from the rightful participation in democracy, for instance people who are of non-dominant religion or of a foreign origin. This exclusion can be applied to a larger group of people since "Jews have been the traditional »internal Other«, but »bad Catholics«, »cosmopolitan secularists«, and Freemasons (the last two categories, however, working as code words for »Jews«) also have been categories of symbolic exclusion from the nation in ethno-Catholic milieus. (…) Any opponent of the ethnic vision of the nation, therefore, is accused, through a series of associations and double entendres, of being a »Jew«".[30] The heterogeneous concept of the nation adopted in the Polish Constitution 1997 may be distorted by the fact that despite the open and civic approach, the nation will be perceived in terms of a homogeneous unity. Religion can be one of the components of such a unity. The formally open kind of a society would have a real inclination to exclude or discriminate against "internal Others", and a state that is declared to be ideologically neutral could show the features of a religious state.

The tension between the universalist and particularistic "constitutional essentials" can be reflected in the state practices (i.e. political rivalry between parties, legislation and constitutional judiciary). It indicates on which axiological foundation our constitutional identity is based, the foundation of freedom and equality or religion and national culture. Another question is that maybe we are dealing with a conflict, the resolution of which in favour of one of the foundations is not so obvious. Therefore, the following query might be raised in relation to the Polish national identity: Is the nature of the real "constitutional essentials" as a part of the political system of Poland, universalist or particularistic? This question can be simplified to the expression of a concern of whether we are connected by our ethnicity and religion or by the universal democratic principles?

5 DMOWSKI OR KELLES-KRAUZ? RELIGION OR DEMOCRACY?

We may get a partial answer to this question by examining the position of religion and the religion dominant in a society in the constitutions of the Second (1918 – 1939) and in the constitutions of the Third Republic of Poland (1989 –) and the related state practice. However, before we bring these issues up for a discussion, we should point out that the instances of both the homogeneous and heterogeneous concepts of the nation may be found in the Polish political thought. The concepts of R. Dmowski and K. Kelles-Krauz may be used as examples here.[31] Dmowski emphasizes the ethnic and cultural concept of a nation which forms itself into a state for the need of the achievement

[30] ZUBRZYCKI, G. The Crosses of Auschwitz, op. cit., p. 90.

[31] R. Dmowski (1864 – 1939) was an influential Polish politician and a nationalist thinker. K. Kelles-Krauz (1892 – 1905) was an outstanding (albeit less-remembered today) thinker and a socialist activist. For an English-speaking reader, the following works may be of interest: WALICKI, A. The Troubling Legacy of Roman Dmowski. In East European Politics and Societies. Vol. 14, No.1 (2000), pp. 12 – 46 oraz SNYDER, T. Nationalism, Marxism, and Modern Central Europe. A Biography of Kazimierz Kelles-Krauz (1872 – 1905). Cambridge : Harvard University Press, 1997.

of national goals. He associates this unique identity of the Polish nation with Catholicism. What makes Poles a modern European nation is embedded "both in our ancient ethnic background and in the fact that the Polish state has existed for centuries, as well as in our Catholicism which has lasted for ten centuries. Catholicism is not an addition to the Polish identity, only its colouring in a certain way, but is inherent in its essence, and to a large extent forms its essential part. The attempt to separate Catholicism from our Polish identity, to separate the nation from religion and from the Church, means destroying the very essence of the nation".[32] Kelles-Krauz emphasizes the fact that the cultural, historical and linguistic identity is crucial to form solidarity bonds within a democratic state. A nation is "a strong spiritual union of people speaking one language regardless of a given or previous nationality, regardless of history (…), regardless of religion, regardless of the estates and classes".[33] The nation established by the language is not a homogeneous being since it is divided into various groups and social classes, and there are also political and economic conflicts arising. Within the nation, democratic competition and deliberation are possible.[34] The linguistic criterion does not exclude "untrue or not Polish enough Poles" from the national community, nor does it refuse minority citizens the civic rights.[35]

For the homogeneous concept, one of the basic criteria to identify this national identity is religion, and therefore particularistic "constitutional essentials" associated with it will emphasize religion as an important element of the cultural identity. From the point of view of the universalist "constitutional essentials", the religion practiced by the citizens of the state is irrelevant for determining the national affiliation based on the idea of democracy. The language criterion indicated by Kelles-Krauz may be interpreted as a requirement for a common communication tool that can be used to deal with disputes within democratic institutions and procedures.

6 THE SECOND POLISH REPUBLIC: IN SEARCH OF HOMOGENEITY WITHIN HETEROGENEOUS ENVIRONMENT

The key question for our analysis is how the lawmakers of Poland reborn in 1918, managed to govern the relations between the state and the church (and other religious associations), and how this relationship influenced the political activity of that time. The Constitution of March adopted in 1921,[36] was one of the many democratic basic laws that arose at that time in the countries that gained in-

[32] DMOWSKI, R. Kościół, naród, państwo (The Church, Nation, State). In DMOWSKI, R. Wybór pism (Selection of Writings), Vol. 1. Poznań : Zysk i S-ka Wydawnictwo, 2014, p. 765. In his book The Crosses of Auschwitz (chapter 2) G. Zburzycki proves that the above-mentioned way of thinking is still valid for the part of the right-wing politics and representatives of the Catholic Church.

[33] KELLES-KRAUZ, K. W kwestii narodowości żydowskiej (On the issue of Jewish Nationality). In KELLES-KRAUZ, K. Naród i historia. Wybór pism (Nation and History. Selection of Writings). Warszawa : Państwowy Instytut Wydawniczy, 1989, p. 316.

[34] KELLES-KRAUZ, K. Niepodległość polski a materialistyczne pojmowanie dziejów (Polish Independence and Materialistic Understanding of History). In KELLES-KRAUZ, K. Naród i historia, op. cit., p. 348 – 353.

[35] See KELLES-KRAUZ, K. W kwestii narodowości żydowskiej (On the issue of Jewish Nationality). In KELLES-KRAUZ, K. Naród i historia, op. cit., p. 330. As B. Anderson points out "language is not an instrument of exclusion: in principle, anyone can learn any language. On the contrary, it is fundamentally inclusive, limited only by the fatality of Babel: no one lives long enough to learn all languages", ANDERSON, B. Imagined Communities, op. cit., p. 134.

[36] Constitution of the Republic of Poland of 17 March 1921 [Dz.U.R.P. Nr 44, poz. 267 (Journal of Laws of the Republic of Poland No. 44, It. 267)].

dependence after the collapse of the great powers of Central Europe. It drew on the French model and, unfortunately, soon consolidated in the Polish law also the flaws of the Third French Republic's system, such as the instability of cabinets based on fragile multi-party alliances. Certainly, this constitution was open, liberal in tone and displayed a broad catalogue of civic rights (an extensive chapter V). According to the preamble, which stressed the continuity of the constitutional tradition, the aim of the new order was to consolidate "independence, power, security and social order" on the basis of the rule of law and freedom, to ensure "the development of all moral and material forces for the benefit of the entire reviving humanity", and to ensure equality "for all citizens". The regulation of the March Constitution therefore seems to express the concept of a heterogeneous nation. However, the constitutional provisions regarding the attitude of the state towards religious associations, the Catholic Church in particular, are not unequivocal.

Although the preamble opened with an invocation to God, and Article 114 referred to the bizarre formula of the "leading position" of Catholicism among "faiths of equal rights".[37] The subsequent articles (115 – 116) guaranteed to religious associations "whose devices, science and system are not contrary to public order or public morality" (Article 116), separate statutes adopted by parliament after consultation with legal representatives of churches. Associations that were not recognized (without a separate act) operated on the basis of general provisions (Articles 111 – 113) that guaranteed freedom of conscience and religion, the right to freely profess religion in public and private, the freedom from forcing to participate in religious activities and rites, the right to organize public services, the right to own property, run foundations, scientific and charity institutions. For minority churches, Article 95 and 109 could also be of importance since it introduced a prohibition of discrimination against minorities living in the territory of the Republic.[38] Pursuant to Article 120, religious education was compulsory until the age of 18, with "the management and supervision" entrusted to the proper religious associations, subject to the supervision of the state school authorities.

In its formal aspects, the text of the constitution contains an unexpected attempt to combine a universalist and particularistic approach to one of the key "constitutional essentials". Undoubtedly, in the extensive chapter on civil rights, the legislator puts a special emphasis to highlight the presence of the principle of equality. This chapter has a universal character on the whole. Particularism, however, is revealed in one of the articles in which the Roman Catholic Church was awarded a "dominant position" since it was the "religion of the majority of the nation". That specific formulation is also an expression of appreciation of the attitude of many Catholic clergypersons during the partitions when they undertook various forms of actions for the preservation of Polish identity and national culture. It is certain, however, that such a solution should be interpreted as a form of a favour to a particular religion.

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[37] The "leading role" in practice was reflected in the precedence, i.e. the formal priority of the Catholic clergy during state celebrations. Entrusting the function of the Dean of the Diplomatic Corps to the Nuncio Apostolic in Warsaw may be seen as another expression of the implementation of this constitutional assumption. LESZCZYŃSKI, P. A. Centralna administracja wyznaniowa II RP. Ministerstwo Wyznań Religijnych i Oświecenia Publicznego (Central religious administration of the Second Polish Republic. Ministry of Religious Denominations and Public Education). Warszawa : Wydawnictwo Naukowe Semper, 2006, p. 67.

[38] At that time, Poland was a multinational state (according to the census of September 1921, Poles made up about 69% of the population, Ukrainians ["Ruthenians"] 14%, Jews 8 – 10%, Belarusians about 4%) and multi-denominational (Catholics made up 64%, Greek Catholics 11 %, the followers of the Orthodox Church 10%, the followers of Judaism 10%, Protestants less than 3%). Pierwszy powszechny spis Rzeczypospolitej Polskiej z dnia 30 września 1921. Tablice państwowe (The first general census of the Republic of Poland of September 30, 1921. State tables) Statystyka Polski wydawana przez Główny Urząd Statystyczny, 1927.

It is also impossible to advance the thesis on the separation of the state from the church in the interwar period, and as the analysis of constitutional regulation proves, it was not clearly expressed by the legislators themselves. The main political parties had very divergent views on the church-state relationship, different even within certain political groups. At the same time, the mutual relations of the church and state institutions were not harmonious and from time to time deep tensions were generated. Nevertheless, the essence of these specific relations between the state and the Catholic Church may be presented in this case only by giving some selected examples. On the other hand, these examples will show the influence of the dominant religion (of religious institutions and clergy) on legislation. In the longer term, this influence translated into the consolidation of the nation understood as a homogenous one.

First of all, it should be noted that the details of the relations between the Catholic Church and the state were regulated in the Concordat agreed between Poland and the Holy See in 1925,[39] which warranted "free exercise of spiritual authority and jurisdiction", "free administration" and property management for the Catholic Church (Article I). Pursuant to Article V of the Concordat, the clergy was to enjoy "special legal protection" in the exercise of their duties. It is worth mentioning that in the period of the Second Republic of Poland a significant group of priests became members of the parliament. In the first Legislative Sejm, elected in 1919, there were already 23 priests.[40] In the first parliamentary term (since 1922) there were clergymen of various denominations, making up even 10% of the permanent delegation of the Senate.[41]

The issue of the unification of the marriage law in the interwar period may be given as a clear example of the influence of the religious circles on some specific decisions of the state authorities. Due to different legal status in different territories of the Second Republic of Poland, which was the legacy from the days of the partitions (1773/1795 – 1918), in 1919 the authorities decided to establish the Codification Committee. The committee was entrusted with the task of ordering and unifying the law in Poland.[42] It was a violation of the principle of equality since different legal systems were in force in different territories of the country, i.e. post-Prussian, post-Russian and post-Austrian systems. It was particularly vexing for citizens as far as the marriage law was concerned because those three systems had different requirements and forms of contracting marriage, handling divorces (marriage annulment proceedings) and jurisdiction in marriage cases.[43]

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39 The Concordat between the Holy See and the Republic of Poland, signed in Rome on 10 February 1925 (ratified in accordance with the Act of 23 April 1925), [Dz.U.R.P. Nr 72, poz. 501 (The Journal of Law of 1925, Number 72, Item 501)].

40 In the right-wing club of the National Democracy, in the parliament as the ZLN (Związek Ludowo-Narodowy; Popular National Union), they were the most numerous professional group. AJNENKIEL, A. Historia Sejmu Polskiego (The History of the Polish Sejm), Vol. II, Part II: Druga Rzeczpospolita (The Second Republic of Poland). Warszawa : Państwowe Wydawnictwa Naukowe, 1989, p. 28 – 30.

41 Ibid., p. 89.

42 The Act of 3 June 1919 on the Codification Commission (The Journal of Law of 1919, Number 44, Item 315). Cf also: GRODZISKI, S. Komisja Kodyfikacyjna Rzeczyposplitej Polskiej (The Codification Committee of the Republic of Poland). In Czasopismo Prawno-Historyczne. Vol. XXXIII, No. 1 (1981), p. 47 – 81; MOHYLUK, M. Porządkowanie prawa w II Rzeczypospolitej: Komisja Kodyfikacyjna i Rada Prawnicza (The Ordering the Law in the Second Republic of Poland: The Codification Committee and the Juridical Council). In Czasopismo Prawno-Historyczne. Vol. 51, No. 1 – 2 (1999), p. 285 – 300.

43 In the former Prussian territories, there was a secular system with a civil form of contracting marriage and with the admissibility of divorce. Only denominational systems with a minimal role of state judicature were in force in the Russian partition. The system in the Austrian territories was of the so-called mixed character, i.e. it was based on religious marriages for religions recognized by the state and civil marriages for others, and at the same time the system forbade Catholics to divorce and entrusted the custody of the marriage to state courts. Thus, all the rights and obligations in the field of marital law differed significantly depending on where a citizen lived. KRASOWSKI, K. Próby unifikacji osobo-

In 1924, on request of the Council of Ministers, the Codification Committee began work on marriage law. In 1931 a draft[44] of a compromise character was published. The way of contracting marriage was to depend on a bride and groom who could choose between marrying in front of an official or having a religious wedding. Jurisdiction over marriage matters was to be exercised only by common courts. However, the draft was strongly criticised by the religious circles. In his urgent ordinance the Primate Cardinal August Hlond commented on the threat of Bolshevization and legal sanctioning of indecency.[45] There were also numerous petitions from religious associations expressing strong criticism of the project. Finally, the draft was not even submitted to the parliament, nor was it thought to be issued as a President's decree, (as it had been the case with other laws proposed by the Codification Committee). The draft did not get any support from the government. What is more, the lack of unification in the field of civil registry acts made the Church the only authority to order these files, which in turn preserved the *status quo*, and therefore the problems that had been identified since the partitions were not tackled. Reforms failed to be carried out before the outbreak of the Second World War. It was obviously the case when the authorities were influenced by the criticism of the religious circles, giving up the unification and improvement of the existing legislation.

However, not always disputes between the Catholic Church and the state were settled in favour of the Church. The ideas of the so-called "Sanacja" ("Sanation") political movement, which took power in 1926 as a result of the coup d'état by its leader Józef Piłsudski, were based on the key role of a strong state that is at the same time ethnically and religiously inclusive. In the light of this policy, it was the state that was to supervise nominating for the offices in the Church and shape only the policy of education of children and youth.[46] In particular, loyalty to the reborn motherland was expected.

Also, the provisions of the April Constitution,[47] finally adopted in 1935, did not meet the far-reaching demands of the authorities of the Catholic Church which called for the removal of a fragment of the quoted formula: "among all the equally treated religions". The new constitutional act emphasized the key role of the state, indicating that social life is shaped within the state "framework and on the basis thereof" (Article 4(1) of the Act). "The rights of the citizen to influence public affairs" could not be limited because of their origin, religion, gender or nationality (Article

wego prawa małżeńskiego w II Rzeczypospolitej (Attempts to unify personal marriage law in the Second Republic of Poland). In Kwartalnik Prawa Prywatnego. No 3, Year III (1994), p. 467 – 487.

44 Projekt prawa małżeńskiego uchwalony przez Komisję Kodyfikacyjną w dniu 28 maja 1929 (The Draft marriage law adopted by the Codification Committee on 28 May 1929), Komisja Kodyfikacyjna, Podsekcja I Prawa Cywilnego, Vol. I, Nr I, Warszawa 1931, together with: Projekt ustawy o aktach stanu cywilnego uchwalony przez Komisję Kodyfikacyjną w dniu 9 marca 1931 (The Draft Act on Civil Status Records adopted by the Codification Commission on 9 March 1931), Komisja Kodyfikacyjna, Podsekcja I Prawa Cywilnego, Vol. I, Nr II, Warszawa 1931. Cf. also: Zasady projektu prawa małżeńskiego uchwalonego przez Komisję Kodyfikacyjną w dniu 28 maja 1929. Opracował główny referent projektu, Prof. Karol Lutostański (The Rules for the draft of marriage law adopted by the Codification Committee on 28 May 1929. Developed by the chief of the project, Prof. Karol Lutostański.). Komisja Kodyfikacyjna, Podsekcja I Prawa Cywilnego, Vol. I, Nr 3, Warszawa 1931.

45 Zarządzenie J. Em. Ks. Kardynała w powyższej sprawie, z 13 listopada 1931 r. (The Ordinance of His Eminence Cardinal in the aforementioned case, of 13 November 1931) (No. 176). Miesięcznik Kościelny Archidiecezji Gnieźnieńskiej i Poznańskiej, Year 46, No. 11, Poznań, November 1931, 208 – 209. The criticism of the Roman Catholic Church regarding the project was analyzed by, among others, KRASOWSKI, K. Próby unifikacji osobowego prawa małżeńskiego w II Rzeczypospolitej (Attempts to unify personal marriage law in the Second Republic of Poland), op.cit. 492 – 502, or recently by SZCZEPANIAK, D. Stanowisko Kościoła Katolickiego w Polsce wobec projektu osobowego prawa małżeńskiego Karola Lutostańskiego (The Attitude of the Catholic Church in Poland towards Karl Lutostański's draft on personal marriage law). In Kortowski Przegląd Prawniczy. No 2 (2015), p. 96 – 104.

46 LESZCZYŃSKI, P. A. Centralna administracja wyznaniowa II RP, op.cit., p. 28 – 29.

47 Ustawa konstytucyjna z 23 kwietnia 1935 (The Constitutional Act of 23 April 1935) [Dz.U.R.P. Nr 30 Pos. 227 (The Journal of Law of 1935 Number 30, Item 227)].

7). The president, the key element of the new system, made a sacred oath "before God and history". With regard to religious associations, the following Articles of the March Constitution remained applicable: Article 111 (on the freedom of conscience and religion), Article 112 (freedom from forcing to participate in religious activities), Article 113 (on administrative independence of recognized religious associations), Article 114, 115, 116 and 120. It is undoubtedly the constitution of the authoritarian system, however, it is undeniable that the constitution was of an inclusive and universal character since the legislator deliberately did not use the term "the Nation" but the universal term "citizens". According to Article 1, which opens the so-called decalogue expressing 10 key socio-political principles, the Polish state was to be "the common good of all citizens".

After Pilsudski's death in 1935, the attitude of the ruling camp towards the Church changed slightly. The successors of Marshal Piłsudski had a much closer relationship with the Church, which can be explained by the search for a new unifying idea and legitimacy of this camp.[48] This rapprochement was temporarily endangered due to a controversy connected with Józef Piłsudski's place of burial in the seat of Polish kings on the Wawel Cathedra in Cracow. In June 1937, Archbishop Adam Sapieha decided to transfer the coffin of the Marshal from the inside crypt of Saint Leonardo to the crypt under the Tower of Silver Bells with outside entrance. A large crowd worshiping the Marshal at his coffin hindered the celebration of the holy mass in the cathedral. Delegations from outside Crakow also expected that the crypt, to which the only entrance led from the interior of the cathedral, would be available from morning to evening. Archbishop Sapieha, complaining about the progressive dampening of the crypt and the need for its renovation, decided to move the coffin to the outdoor crypt under the Tower of Silver Bells. The transfer of the coffin took place despite the negative opinion of the Commemoration Committee of Marshal Józef Piłsudski, the apostolic nuncio Filippo Cortesi and even the President Ignacy Mościcki. On 23 June 1937, the Council of Ministers was convened immediately, and the bishop's decision was considered an insult to the Republic, disregarding the President and insulting the head of government, as a result of which the latter resigned, along with his entire cabinet. The Sanacja MPs demanded to take over the management of the cathedral. Mass protests were organized during which bishop Sapieha was criticized, and people were called for breaching the concordat and for the full separation of the Church and State. As stated by Tadeusz Schaetzel, Deputy Speaker of the Sejm, at the extraordinary session of the Sejm, "Poland has shaken due to the transfer of this coffin".[49]

In conclusion, it should be pointed out that the provision of Article 114 of the March Constitution stood out from the universal regulations in the field of rights and freedoms, giving *expressis veris* a priority to the largest religious association in Poland, i.e. the Catholic Church. At the same time, however, the attitude of the state towards the Church was not unequivocal and there were a lot of tensions. The Sanacja, being in power after 1926, was in favour of creating a strong state with a recognized authority. The authority was to be expressed in greater control over religious associations and based on decision-making exclusivity in the field of the educational policy. As its own success, the Church could perceive the state's refraining from work on the draft on marriage law. In other cases, however, such as the formula of "the equally treated religions" left unchanged in the text of the following constitution, the political ambitions of the Catholic Church were not fulfilled and its demands were not met. The state, expecting greater loyalty, was able to enforce specific decisions concerning staffing from the Vatican. The reappearance took place again after Piłsudski's death. During

[48] LESZCZYŃSKI, P. A. Centralna administracja wyznaniowa II RP, op.cit., p. 36 – 38.

[49] The verbatim report from the 57th meeting of the Sejm on 20 July 1937. The documents illustrating the course of the described events were collected by GAJEK, B. Konflikt wawelski (The Wawel Conflict). In Karta 96 (2018), p. 40 – 55.

the interwar period, which was very difficult to assess, the Church was undoubtedly a political figure. It contributed to the creation of specific legal regulations, while it blocked those regulations that favoured the implementation of the heterogeneous concept of the nation present in both constitutions.

7 BREAKING DEMOCRACY: A HOMOGENEOUS NATION IN A HETEROGENEOUS COVER?

Undoubtedly, all the political changes initiated in 1989 were made with the strong influence of democratic ideas. Due to the amendment of the Constitution, the name of the state was renamed from the Polish People's Republic to the Republic of Poland. Henceforth, Poland was to be "a democratic state ruled by law". Those democratic changes took place in the society that was ethnically homogeneous, with a clear dominance of the Catholic religion.[50] The Constitutional Tribunal played an important role in the course of the political transformations, as well as in the process of constituting democratic politics. Its case-law had a major impact on determining the nature of the relationship between the state and religion, the Catholic Church in particular, and consequently, it had an influence on the way the concept of the nation was interpreted. It is also possible to look at those events from a slightly different perspective. Perhaps the way in which the Polish constitutional court ruled was influenced by one of the ideal types of nation adopted, consciously or unconsciously as a "natural and proper" one. The material content of the chain of law-making delegation can be interpreted differently when we acknowledge the homogeneous or heterogeneous nature of the nation. In a situation when a nation is perceived as a homogeneous unity, being a member of such a nation, one is able to "deduce" its will. Whereas the will of a heterogeneous nation is shaped in the course of a dispute and debate, and therefore it is of a dynamic and changeable character. In the first case, the constitutional principles may be interpreted in a narrow manner, associating the principles with the "good of the nation" or its "essence". Accordingly, when this particular "essence" belongs to a particular religion, a position of this religion would be distinguished, if not on the constitutional level, then on the level of the constitutional practice (constituted by it the legislation process, the case-law of the Constitutional Tribunal, etc.).

The provisions of the Act (adopted before the first, partly-free[51] elections) on the freedom of conscience and religion[52] and the Act on the State's relation with the Catholic Church in the Republic of Poland,[53] all refer to the universal "constitutional essentials". In accordance with the intention of

[50] The first census after the political changes was taken in 2002. See: https://stat.gov.pl/cps/rde/xbcr/gus/raport_z_wynikow_nsp_ludnosci_i_mieszkan_2002.pdf (p. 35). According to its findings, 36983.7 thousand people (96.74%) declared to be of the Polish nationality. Other nationalities declared were as follows: German – 152.9 thousand people, Belarusian – 48.7 thousand and Ukrainian – 31.0 thousand. Among the social groups, 2 groups dominated: Silesians – 173.2 thousand and Romani – 12.9 thousand people. Subsequently, there were smaller ethnic groups or other communities: Russians – 6.1 thousand, Lemkos – 5.9 thousand, Lithuanians – 5.8 thousand, Kashubians – 5.1 thousand, Slovaks – 2.0 thousand. Jews – 1.1 thousand, Armenians – 1.1 thousand and Czechs – 0.8 thousand people. According to statistics for the period 2009 – 2011, the number of the faithful of the Catholic Church was estimated to be between 86.7% and 95.5%. See: http://stat.gov.pl/cps/rde/xbcr/gus/oz_wyznania_religijne_stow_nar_i_etn_w_pol_2009-2011.pdf, p. 17.

[51] A. Dudek points out that the intention of the authorities of the Polish People's Republic was to ensure the neutrality of the Catholic Church in the June elections which, under the so-called Round Table agreements concluded by the authorities with the democratic opposition, introduced free elections regarding 35% of the seats in the Sejm and completely free elections to the Senate. See: DUDEK, A. Historia polityczna Polski 1989 – 2015 (The Political History of Poland 1989 – 2015). Kraków : Wydawnictwo Znak Horyzont, 2016, p. 35.

[52] Dz. U. 1989 Nr 25 poz. 155 (The Journal of Law of 1989, Number 25, Item 155).

[53] Dz. U. 1989 Nr 29 poz. 154 (The Journal of Law of 1989, Number 29, Item 154).

the legislator, expressed in the Preamble to the first of these Acts, the Act was adopted "with reference to the tradition of religious tolerance and freedom, worth of respect and continuation, the tradition which was clearly demonstrated in the cooperation of Poles of different faiths and worldviews to ensure the growth and prosperity of the Motherland, recognizing the historical contribution of different churches and other religious associations to the development of national culture as well as the propagation and consolidation of basic moral values". The Act ensures basic religious freedoms and equal rights for different churches and religious associations, prohibits discrimination based on religion, and introduces (friendly) separation of the state and different churches and religious associations. Similarly, in the Preamble of the Constitution of 1997, we may find a clear reference to the heterogeneous concept of the nation[54]: "We, the Polish Nation – all the citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources". The understanding of a national belonging is not based either on the fact that one believes or does not believe in God, or that one is a person of a particular religion or political beliefs. However, since 1989, there has been a tendency to strengthen politicies favouring the Church,[55] because religious education was introduced to schools, restrictive abortion laws were adopted and Christian values were given special protection, while issues contrary to the doctrine of the Catholic Church, such as in vitro or same-sex civil partnerships, so to say, "get stuck" in the legislative process. P. Borecki states that "there is an obvious tendency among Polish bishops, to use state law as a tool to implement the religious and moral standards of the Catholic Church".[56] Apparently, this activity seems to disagree with the axiology on which the Constitution of the Republic of Poland was founded. How then to combine the declared heterogeneity of the nation and the universalist "constitutional essentials" with the legislator's favour to a particular religion? It seems that the guidelines for providing answers to this question can be found in the case-law of the Constitutional Tribunal regarding the relations between the state and religion.[57]

In the text of the Constitution of the Republic of Poland, we may find a few fragments that give the possibility for a restrictively interpreted concept of a nation, which would bind it to a particular religion only. In the Preamble, we can find the expression of gratitude to the ancestors "for our culture rooted in the Christian heritage of the Nation and in universal human values". However, there is no reference to other religions practiced in the territories of the Republic, for example to Judaism. As a consequence, the citizens with their culture rooted in another religion are not fully included in the heritage of the nation. They may become a part of the heritage because of universal human values, but not due to their religion, for example Judaism mentioned above. On the one hand, regarding churches and religious associations, the Constitution lays down their equality in

54 On the subject of disputes regarding the understanding of the concept of a nation in the process of adopting the Polish constitution, ZUBRZYCKI, G. "We, the Polish Nation": Ethnic and Civic Visions of Nationhood in Post-Communist Constitutional Debates. In Theory and Society. Vol. 30, No. 5 (2001), p. 629 – 668. On the subject of shaping the model of relations between the state and the churches, see BORECKI, P. Geneza modelu stosunków państwo-Kościół w Konstytucji RP (The Genesis of the Model of State-Church Relations in the Constitution of the Republic of Poland). Warszawa : Wydawnictwo Sejmowe, 2008.

55 However, it does not necessarily mean strengthening social policies – striving to increase the political significance is to compensate for the weakening of the social importance of the Catholic Church, see ZUBRZYCKI, G. The Crosses of Auschwitz, p. 80 – 81.

56 BORECKI, P. Respektowanie polskiego konkordatu z 1993 roku – wybrane problemy (Respecting the Polish Concordat of 1993 – Selected Problems). Warszawa : Instytut Spraw Publicznych, 2012, p. 19.

57 Below we present some theses from selected writings. It is impossible to address fully all the theses as it goes beyond the scope of this article.

Article 25(1), and on the other hand, in Section 4 it favours in a certain way the Catholic Church by stating that "the relations between the Republic of Poland and the Roman Catholic Church shall be determined by the international treaty concluded with the Holy See, and by statute". Relations with other churches and other religious associations are laid down only in statutes.[58] Of course, it does not mean that the Constitution introduces religious intolerance or discrimination based on religion. Nevertheless, in its text we may find a certain expression of favour to Christianity and the Catholic Church. We do not find, however, a similar favour to religions other than Christianity and to churches other than the Catholic Church. It can be claimed that in that way the real domination of Christianity and the Catholic Church in the denominational structure of the Polish society was confirmed in the Constitution.[59] According to the Constitutional Tribunal, "impartiality of public authorities in the Republic of Poland (…) and equal rights for churches and other religious associations (Article 25(1)) cannot (…) mean the actual institutional equality between the Roman Catholic Church, dominant in the Polish society in terms of the number of followers, and other churches and religious associations. At the same time, it cannot mean the consent for such actions of the state (public authorities) that would approve the dominant position of one church while discriminating against other churches or religions. The state's acceptance of the existing *status quo* in terms of the religious structure of the society, cannot, therefore, lead to strengthening the position of the dominant church as a result of the actions of the state itself (public authority)".[60] However, the question arises of whether the state's acceptance of the *status quo* does not at the same time strengthen the figures who are the actual beneficiaries of this *status quo*?

To give the examples of strengthening, determined by the specific "acceptance of the *status quo*", we can point to special protection of the Christian system of values in radio and television broadcasts and making religious education a part of the curriculum in public schools. Article 18(2) of the Broadcasting Act[61] provides that "broadcasts or other messages should respect the religious beliefs of the recipients, especially [Pol. a zwłaszcza] the Christian system of values". In the ruling K 17/93, the Constitutional Tribunal stated that "the indication of the Christian system of values is purely exemplary. Therefore, it does not violate in any way the constitutional principle of equality because it refers to the protection of religious feelings, regardless of religion." The Tribunal made a kind of neutralization of the phrase "a zwłaszcza" ("in particular" or "especially"). According to the Polish Language Dictionary of PWN, "zwłaszcza" ("especially") is an expression "put next to the sentence component to indicate that some of the statements refer to this very component, for example *Heat was bothering us, especially at noon.*" "Especially" is to emphasize the meaning (the importance) of the element used with it, rather than to just give an example. Therefore, it is clear that the legislator in the above-mentioned Article favours a particular religion. The Tribunal also includes a substantive rationalization indicating that the above "exemplary enumeration" is "justified by the fact that the deep roots of these values have put in the tradition and culture of Polish society, regardless of

58 In the Polish system of sources of law, "an international agreement ratified upon prior consent granted by the statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes" (Art. 91 (2)). The Concordat between the Holy See and the Republic of Poland was ratified pursuant to the Act of January 1998, expressing the consent for the Concordat itself. Dz. U. 1998 Nr 12 poz. 42 (The Journal of Law of 1998, Number 12, Item 42).

59 According to M. C. Nussbaum, the democratic principle of equality would require a legal appreciation of religious minorities rather than a religion which already has a dominant position in the society. It is when the law would remove all the inequalities. See. NUSSBAUM, M. C. The New Religious Intolerance, op. cit., Chapter 3.

60 The Ruling of the Constitutional Tribunal, U 10/07.

61 Dz. U. 1993 Nr 7 poz. 34 (The Journal of Law of 1993, Number 7, Item 34).

people's attitude towards religion". The Constitutional Tribunal makes another attempt to neutralize the meaning of the words used, referring to the point 6 of Article 21(2): "programs and other public radio and television services should respect the Christian system of values, adopting the universal principles of ethics". The Tribunal states that "the intention of the legislator, expressed in the parliamentary debate, was to point to those values belonging to the Christian culture, and which at the same time constitute basic, universal principles of ethics". However, it also follows from the text of the Act that there is something else there, namely, on the principles of universal ethics, certain entities should respect the Christian system of values.[62] One could wonder why it is only a Christian system. Do the "universal principles of ethics" not apply to all religions? Would it not be more rational to emphasize the respect for minority denominations (e.g. Islam, Buddhism or non-Christian beliefs in general) in a democratic state dominated by one of the Christian denominations? Or would it not be better not to point to any specific religion at all and introduce a general "religious system of values"? However, this very distinction of the "Christian system of values" gets a different meaning when it is associated with the above-mentioned fact "that the deep roots of these values have put in the tradition and culture of Polish society". It seems that the reasoning of the Tribunal is to bring together the conviction of a deep connection between the Polish identity and Christianity with the principle of neutrality and impartiality of the state regarding churches and religious associations. This may finally justify this specific support of the state for one particular religion by using its special meaning for the "Polish nation" as an argument for. If the systemic practice really moved in this direction, we would see deviating from the universalist democratic principles contained in the Preamble to the Constitution.

The Polish Constitutional Tribunal did not find any contradiction between public school secularism and religious education. In the Instruction[63] introducing religious education into the school curriculum, we can read that "religious education is the vehicle of fundamental values in the educational process, which means that opening up to religion and Christian ethical values will be a significant enrichment of the educational process and will help to shape the right attitudes of the young generation of Poles". The Tribunal stated that it is not some much about the opportunity for the state to include religious education in the curriculum in public schools but rather the state' obligation to "provide such religious upbringing and in such a place that it reflects parents' will".[64] Therefore, there is a close link between teaching religion in public schools and shaping the "attitudes of young Poles" – religion at school has a formative character.[65] At the same time, "the Tribunal realizes that it may happen that, in some specific cases, parents' or students' choice of an additional school subject may not be completely free when facing the domination of the Roman Catholic religion in the denominational structure of the Polish society, and that the choice will

62 The Constitutional Tribunal goes even further by secularizing the "Christian values", when it states that according to the Constitutional Tribunal, religion and the notion of "Christian values" referred to in this provision, cannot be considered equivalent. On the other hand, the notion expresses the universal principles of "ethics of the Mediterranean culture". It can be said that these "Christian values" in the above interpretation are synonymous with the "ethics of Mediterranean culture". Were then Plato and Aristotle Christians or is there no other ethics than that in the Bible or in the doctrine of Christian churches? Is it possible to feel attached to the "ethics of Mediterranean culture" without being a Christian? Or if we feel that we accept the ethical rules, do we automatically become Christians? The Constitutional Tribunal goes further than just to comment on the legislator's distinguishing the "Christian values".

63 Instrukcja Ministerstwa Edukacji Narodowej z 3 VIII 1990 r. (The Instruction of the Ministry of National Education of 3 August 1990).

64 The Ruling of the Constitutional Tribunal, K 11/90.

65 BORECKI, P. Respektowanie polskiego konkordatu z 1993 roku – wybrane problemy, p. 33.

have to be taken under the pressure of the "local" public opinion. The free choice of an additional school subject depends to a large extent on respecting the principles of social pluralism and on the tolerance for different beliefs and denominations in local communities. In some specific cases, if there was external pressure, violating the right to choose freely, it would be the result of a low level of democratic culture".[66] It is therefore assumed that a society with high democratic culture will tolerate deviations from the generally accepted norm of belonging to a dominant religion. However, this does not change the fact that inequalities exist: the majority is to decide whether and to what extent the minority will be tolerated. As stated by P. Bourdieu, the main task of school institutions "is to construct the nation as a population endowed with the same 'categories' and therefore the same common sense".[67] A close connection between shaping religious opinions and public education[68] may lead to a belief that a particular religion is closely related to nationality. This belief, stronger even due to the attitude of the educational system and the state, may become something "self-evident" and taken as a "natural and obvious" thing.

8 CONCLUSION

In the paper we pointed out the elements of homogeneity in the understanding of the nation present in the constitutional practice. This practice can take place on a strictly political level where the Church becomes a political figure that establishes its own agenda. This *modus operandi* was characteristic for the interwar period (the Second Republic of Poland). On the legal level, the practice may be slightly different, which can be seen in the case-law of the Constitutional Tribunal (the Third Republic of Poland). In this situation, internalizing the role of religion becomes a characteristic feature of the way the constitution is interpreted and applied. We do not claim, that the elements of homogeneity are dominant. However, they lead to some reinterpretation of constitution, based on open and pluralistic axiology. In our opinion, such reinterpretation may be dangerous for democracy. The heterogeneous concept of the nation and the universalist "constitutional essentials" can be narrowed down in the political practice. The particularistic elements of the constitution and the homogenizing tendencies present in the application of the constitution might, if intensified, lead to polarization, dividing the society between the so-called "real members of the nation" ("true" members) and "nominal members" ("untrue" ones). In such a case, there would be a radical reinterpretation of the entire chain of delegation, i.e. the legislator would express the will of a "real nation" that could be identified by ethnic, cultural or religious criteria. The place of "the Polish Nation – all citizens of the Republic" would be now occupied by a new homogeneous formation, and that would mean an informal change of the constitution because the entity holding the highest authority would change as well.

66 The Ruling of the Constitutional Tribunal, U 10/07.

67 BOURDIEU, P. Pascalian Meditations. Stanford: Stanford University Press, 2000, p. 98.

68 P. Borecki claims that it is possible to have religious instruction at school without it being included in the state educational system and without violating the Concordat. It is also possible at the same time to implement the principles of equal rights for churches and religious associations, as well as to respect the autonomy and independence of the state and churches and religious associations. BORECKI, P. Respektowanie polskiego konkordatu z 1993 roku – wybrane problemy, p. 34.

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THE 2015 NATIONWIDE REFERENDUM IN POLAND IN MEMES[1]

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Abstract: The aim of the article is to analyze memes associated with the nationwide referendum of 6 September 2015 in Poland. The memes are treated as part of the media discourse. Media discourse encompasses part of public discourse. In the broad sense, we are dealing with a collection of statements functioning in the public space and concerning a specific problem or its scope. There will be analyzed memes connected such issues as the reason/reasons for ordering the referendum, referendum questions, the financial costs incurred, and the referendum turnout. The article is divided into two parts: 1) theoretical consists of mem and referendum definition; 2) practical consists of the 6 September 2015 referendum in Poland in memes analyse. In the course of the research such questions will be answered: whether the memes became part of the general overtone of the discourse; whether they presented the main themes of the discourse and how they did this; which elements of the discourse were emphasized in the memes and which were omitted. In the research process the main themes of the discourse were distinguished, which were reflected in the memes.

Key words: referendum, Poland, memes

1 INTRODUCTION

The goal of the article is to analyze memes associated with the nationwide referendum of 6 September 2015. The memes were treated as part of the media discourse and its complement. In the course of the research process, answers were sought to the following questions: whether the memes became part of the general overtone of the discourse; whether they presented the main themes of the discourse and how they did this; which elements of the discourse were emphasized in the memes and which were omitted. In the research process the main themes of the discourse were distinguished, which were reflected in the memes. These cover the reason/reasons for ordering the referendum, referendum questions, the financial costs incurred, and the referendum turnout. The article is divided into several parts which define the main categories: memes and referendum as well as the analysis of selected memes in the context of the distinguished main themes of the discourse on the referendum of 2015.

2 MEMES

A meme is "a combination of graphics and text, which is a humorous comment on current events, a presentation of views or emotions".[2] In a somewhat different sense it denotes "ideas, behaviors, or

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Mem. [online]. Available at <https://www.semtec.pl/slownik-seo/mem>. [q. 16. 10. 2017].
[2] Mem. [online]. Available at <https://www.semtec.pl/slownik-seo/mem>. [q. 16.10.2017].

the code of conduct under particular circumstances. In a word, everything that culture and civilization have imposed upon over the centuries, inter alia religion: the fact that it is not appropriate to walk naked about town or laugh at a funeral is also a meme. These are patterns of behavior, things associated with a given domain, instilled in us from childhood. We will not get rid of them. They behave like genes – they widely spread from generation to generation of receivers as well as within one generation, they mutate".[3] A meme is therefore treated as "an evolving unit of cultural information. It is created around recurrent subjects or images that are systematically broadened in reference to the current cultural phenomena, events, behaviors of public figures, etc.".[4] Emphasis is also laid on relationships with Richard Dawkins's meme-ethics of 1976.[5] In her book *The Meme Machine*, Susan Blackmore describes the situation when our humming at work spreads virally over the whole office. She gives Blake's *Jerusalem* as an example and says that the whole inspirational song is a meme.[6]

Literature often uses the concept of the Internet meme. As Wiktor Kołowiecki observes, Internet memes are a new language of the Internet.[7] By this he means "a digitized unit of information (text, picture film, sound) spread via the Internet that is copied, processed, and published in the Internet in the processed form".[8] "An Internet meme is distinguished by the fact of being an information unit replicated exclusively via the Internet. It should be remembered that replication in this context does not mean digital copying of a given material. Digital replication is perfect, therefore each copy of this type is an original: this process only spreads one item of information in many copies that can differ at most by the quality of compression or be displayed in different colors and shades depending on the picture settings".[9]

3 REFERENDUM

The referendum institution is perceived as the most widely used instrument of direct democracy: it means that the eligible voters directly decide through voting on important matters of State life or of a particular territory, which are the subject of the vote.[10] As a result, "citizens who have political rights are called on to declare themselves in voting on the Constitution, laws, and major problems of State life".[11] This is how this problem has been regulated at least in Polish legislation.

A nationwide referendum was held on 6 September 2015. The referendum turnout was 7.8% and was the lowest as compared with the turnouts recorded in all the nationwide referendums held

3 Czym jest mem? Wywiad z twórcą encyklopedii memów. [online]. Available <http://arturjablonski.com/czym-jest-mem-wywiad-tworca-encyklopedii-memow-czesc-1>. [q.10. 03. 2017].

4 Mem. [online]. Available <https://www.semtec.pl/slownik-seo/mem/>. [q. 12. 04. 2017].

5 DOWKINS, R. The Selfish Gene. Oxford, New York: Oxford University Press, 1976.

6 BLACKMORE, S. The Meme Machine. New York: Oxford University Press, 1999.

7 KOŁOWIECKI, W. Memy internetowe jako nowy język Internetu. [online]. Available <http://www.kulturaihistoria.umcs.lublin.pl/archives/3637>. [q. 18. 05. 2017].

8 Ibid.

9 Ibid. See also: GACKOWSKI, T., BRYLSKA, K., PATERA, M. (ed.): Memy czyli życie społeczne w czasach kultury obrazu. Warszawa: ASPRA-JR, 2017.

10 BANASZAK, B., PREISNER, A. Prawo konstytucyjne. Wprowadzenie. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1993, p. 139.

11 ZIELIŃSKI, E. Referendum w państwie demokratycznym. In WANIEK, D., STASZEWSKI, M., T. (ed.): Referendum w Polsce współczesnej. Warszawa: ISP PAN, 1995, p. 9.

in Poland.[12] The referendum very clearly showed the instrumental use of this institution by various political actors. In other words, the use of the institution expressed the calculations meant to achieve one's own political goals rather than listen to the voice of the people. This is nothing new in Poland. Previously, after 1989, four referendums were held, in which a crucial role was played by the will of those in power.[13] Both Bronisław Komorowski's proposal to hold a nationwide referendum and Andrzej Duda's rejected proposal to call another nationwide referendum became part of the negative tradition of utilizing this institution by politicians.[14]

4 THE REASON/REASONS FOR ORDERING THE NATIONWIDE REFERENDUM

The nationwide referendum of 6 September 2015 was ordered by the decision of the then President Bronisław Komorowski.[15] The direct cause of the decision to order the referendum was the President's defeat in the first round of the 2015 presidential election. The media discourse widely emphasized the emotional reasons underlying President Komorowski's move. It was pointed out inter alia that the decision was ill-considered, the action was hasty, motivated by the results of the first round of the presidential election unfavorable to President Komorowski, and by the attempt to take over the votes cast for Paweł Kukiz, who supported single-seat constituencies. The presented way of argumentation is reflected in the literature on the subject.[16]

In general, people did not like Bronisław Komorowski's ordering the referendum for purely electoral reasons to take over the votes cast for Paweł Kukiz, and thereby increase his (President's) chances of success in the second round of elections, which he lost anyway. The same motivation was behind the intention of the now incumbent President Andrzej Duda, who wanted to order another referendum. The Internet users correctly and explicitly identified President B. Komorowski's reason: For fear that he would lose his position he blew a 100 million zloty overnight (meme 1).

12 Obwieszczenie Państwowej Komisji Wyborczej z dnia 23 listopada 2015 r. o skorygowanych wynikach głosowania i wyniku referendum ogólnokrajowego przeprowadzonego w dniu 6 września 2015 r. In Dziennik Ustaw, 2015, poz. 2035.

13 MARCZEWSKA-RYTKO, M. Direct Democracy At the National Level in Poland. The Case of Referendum. In Annales Universitatis Mariae Curie-Skłodowska Sectio K: Politologia Vol. XX (2013), p. 103 – 115; MARCZEWSKA-RYTKO, M. Direct Democracy in Poland. In MARCZEWSKA-RYTKO, Maria (ed.): Handbook of Direct Democracy in Central and Eastern Europe after 1989. Opladen, Berlin, Toronto: Barbara Budrich Publischers, 2018, p. 203 – 223.

14 MARCZEWSKA-RYTKO, M. Krytyczna analiza dyskursu "Gazety Wyborczej" na przykładzie referendum ogólnokrajowego w Polsce w 2015 roku. In GACKOWSKI, T., BRYLSKA, K. (ed.): Gry w komunikacji. Warszawa: Oficyna Wydawnicza ASPRA-JR, 2016, p. 75 – 95.

15 Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 17 czerwca 2015 r. o zarządzeniu ogólnokrajowego referendum. In Dziennik Ustaw, 2015, poz. 852.

16 MARCZEWSKA-RYTKO, M. A Critical Analysis of the Media Discourse in Daily Newspaper Gazeta Wyborcza. Based on the Example of the Nationwide Referendum in Poland in 2015. In Politics, Culture and Socialization. Vol. 7, No. 1 – 2 (2016), p. 42 – 56.

Meme 1: For fear that he would lose his position he blew a 100 million zloty overnight.[17]

In other words, no matter at what cost, what mattered was to achieve the set objective and win the election. The nationwide referendum was thus treated instrumentally as a way of maintaining power.

5 REFERENDUM QUESTIONS

President Bronisław Komorowski proposed calling a nationwide referendum, in which he asked the following questions: Are you in favor of introducing single-seat constituencies in the elections to the Sejm of the Republic of Poland? Are you for maintaining the existing way of funding political parties from the State budget? Are you for introducing the general principle of resolving doubts about the interpretation of tax law provisions in favor of the tax payer?[18]

In the media discourse, the sense and constitutionality of the referendum questions was contested.[19] It was stressed that a referendum is not the best solution in tax cases. The prevalent belief was that there is no reasonable alternative to funding political parties from the State budget. It was pointed out that, firstly, the introduction of funding of parties in 2001 civilized the Polish political system; secondly, funding of parties from the State budget is a European norm, thirdly, that the problem was not the way of funding political parties but the supervision over spending this money.

President A. Duda's motion to call a referendum contained three questions: Are you for maintaining the existing system of the operation of the State Forest Holding – State Forests? Are

17 Mem in the author's collections.

18 Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 17 czerwca 2015 r. o zarządzeniu poprzednich. ogólnokrajowego referendum…

19 MARCZEWSKA-RYTKO, M. A Critical Analysis of the Media Discourse in daily newspaper Gazeta Wyborcza, op. cit.

you for the abolishment of the school obligation for six year olds and re-introduction of the school obligation at the age of seven? Are you for lowering the retirement age and combining the pension rights with the job seniority?[20]

In the discourse, there were suggestions that the list of questions should be expanded: Do you want taxes to be lowered? Do you want the State to cover a portion of the costs of your holidays in Ibiza? Do you want to earn more than five thousand zloty net?[21] There were also suggestions of adding questions about the euro, about religion at school, about the use of the in vitro method and NaProTechnology, about funding the Catholic Church, and whether everyone should have at least an 80-square-meter apartment, or whether to abolish so-called junk (i.e. civil law) job contracts?

The proposals to expand the list of referendum questions were reflected in many memes. One of these questions was: Do you support the idea of Poland from sea to sea? (Meme 2). In other words, are you are in favor of Poland's new borders defined by the Black Sea and the Baltic Sea?

Meme 2: Do you support the idea of Poland from sea to sea?[22]

Another example of questions asked in the memes referred to the immigration crisis in Europe. In 2015, four times as many illegal aliens arrived in the territory of the European Union as in the previ-

[20] Ibid.
[21] Ibid.
[22] Czy jesteś za Polską od morza do morza. [online]. Available at <http://memytutaj.pl/referendum-czy-jestes-za-polska-od-morza-do-morza-178237>. [q. 11. 10. 2017].

ous years. As Anita Adamczyk observes, "the growing number of applicants for a refugee status in the EU countries was observable already in 2012. By the end of 2013, however, this increase had not been as spectacular as at the end of 2014 and into 2015. Then the number of applicants rose from 627,780 to 1,255,640".[23] The attitudes of EU societies, including the Polish society, towards immigrants, the stance of the European Union and the policy of the Polish authorizes in this area became a significant element of the media discourse. Katarzyna Andrejuk stresses that "studying the attitudes towards immigrants is becoming particularly important in the context of intensified immigration to Poland (as well as to other European countries) and in connection with the refugee crisis in the European Union. This issue embraces both the questions of perceiving immigrant communities living in a given EU country and the views and expectations concerning the question of the policy of multiculturalism, for example the obligation to take in foreigners (including refugees)".[24] In this context, the memes also contained the question: Are you for taking in immigrants to Poland? (meme 3).

Meme 3: Are you for taking in immigrants to Poland?[25]

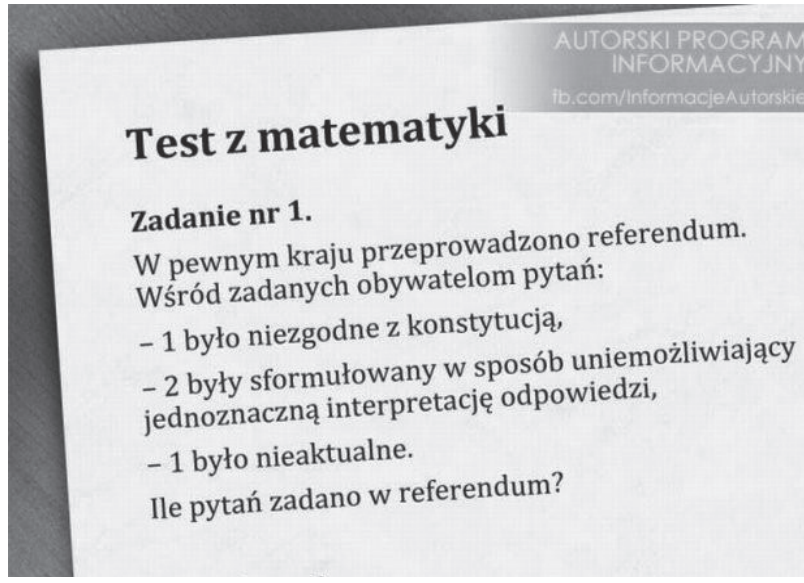
[23] ADAMCZYK, A. Kryzys migracyjny w Europie a polska polityka imigracyjna. In Studia Migracyjne – Przegląd Polonijny. No. 1 (2017), p. 308.

[24] ANDREJUK, K. Postawy wobec imigrantów w świetle wyników Europejskiego Sondażu Społecznego 2014 – 2015. Polska na tle Europy. [online]. Available at <http://www.ifispan.pl/wp-content/uploads/2015/12/Postawy-wobec-imigrant%C3%B3w-w-%C5%9Bwietle-wynik%C3%B3w-Europejskiego-Sonda%C5%BCu-Spo%C5%82ecznego-2014-2015.-Polska-na-tle-Europy.pdf>. [q. 10. 04. 2017].

[25] Jako obywatele żądamy następującego pytania w referendum. [online]. Available at <http://bibsy.pl/owq0jozG/jako-obywatele-zadamy-nastepujacego-pytania-w-referendum-czy-jest-panpani-za-przyjeciem-imigrantow-do-polski>. [q. 13. 10. 2017].

One more example of a referendum question included in the memes is Bronisław Komorowski's reflection, who says: Damn, I could have also called a referendum on TV license (meme 4).

Meme 4: Damn, I could have also called a referendum on TV license.[26]

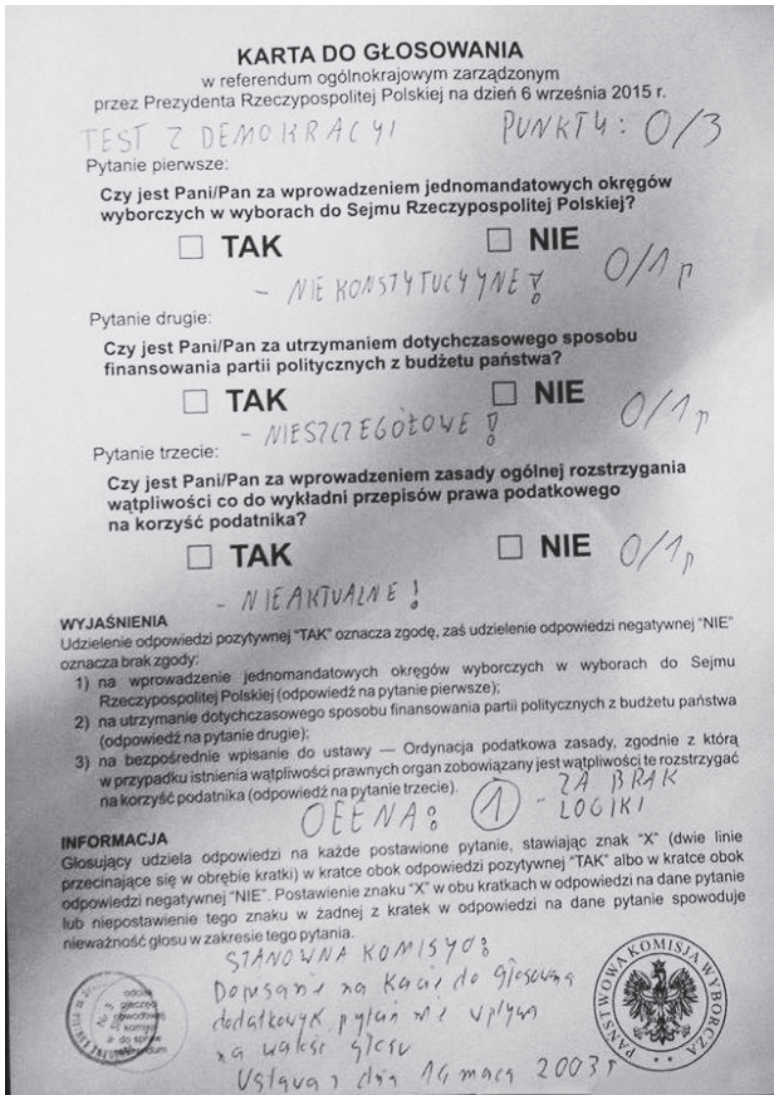


Meme 5: How many questions were asked in the referendum if the first was unconstitutional; in the second, an unambiguous interpretation was impossible, and the third one was no longer topical.[27]

[26] Kurcze mogłem jeszcze. [online]. Available at <https://fabrykamemow.pl/uimages/services/fabrykamemow/i18n/pl_PL/201505/1432285132_by_anonymous_500.jpg?1432285132>. [q. 4. 10. 2017].

[27] Referendum poniosło klęskę. [online]. Available at <http://buzz.gazeta.pl/buzz/56,156947,18721774,referendum-poniosło-kleske-tak-na-to-zapatruja-sie-uzytkownicy.html>. [q. 19. 10. 2017].

In Poland, the TV/radio license fee levied by the Act of 21 April 2005 on license fees is a payment meant to enable public TV and Radio to carry out their mission. The amount of the TV/radio license fee is set by the National Broadcasting Council (KRRiT), and the institution responsible for collecting is the Polish Post (Poczta Polska).[28] The Civic Platform (Platforma Obywatelska), the party from which President B. Komorowski came, supported its reduction, and the next step would be to abolish the fee. Prime Minister Donald Tusk termed it "archaic" in 2008 called it an "imposed charge". The question of TV/Radio license fee has always provoked great controversy in Poland.[29]



KARTA DO GŁOSOWANIA

w referendum ogólnokrajowym zarządzonym
przez Prezydenta Rzeczypospolitej Polskiej na dzień 6 września 2015 r.

TEST Z DEMOKRACJI PUNKTY: 0/3

Pytanie pierwsze:

Czy jest Pani/Pan za wprowadzeniem jednomandatowych okręgów wyborczych w wyborach do Sejmu Rzeczypospolitej Polskiej?

☐ TAK ☐ NIE 0/1 p

- NIEKONSTYTUCYJNE ?

Pytanie drugie:

Czy jest Pani/Pan za utrzymaniem dotychczasowego sposobu finansowania partii politycznych z budżetu państwa?

☐ TAK ☐ NIE 0/1 p

- NIESZCZEGÓŁOWE ?

Pytanie trzecie:

Czy jest Pani/Pan za wprowadzeniem zasady ogólnej rozstrzygania wątpliwości co do wykładni przepisów prawa podatkowego na korzyść podatnika?

☐ TAK ☐ NIE 0/1 p

- NIEAKTUALNE !

WYJAŚNIENIA

Udzielenie odpowiedzi pozytywnej "TAK" oznacza zgodę, zaś udzielenie odpowiedzi negatywnej "NIE" oznacza brak zgody:

1) na wprowadzenie jednomandatowych okręgów wyborczych w wyborach do Sejmu Rzeczypospolitej Polskiej (odpowiedź na pytanie pierwsze);
2) na utrzymanie dotychczasowego sposobu finansowania partii politycznych z budżetu państwa (odpowiedź na pytanie drugie);
3) na bezpośrednie wpisanie do ustawy — Ordynacja podatkowa zasady, zgodnie z którą w przypadku istnienia wątpliwości prawnych organ zobowiązany jest wątpliwości te rozstrzygać na korzyść podatnika (odpowiedź na pytanie trzecie).

OCENA: (1) - ZA BRAK LOGIKI

INFORMACJA

Głosujący udziela odpowiedzi na każde postawione pytanie, stawiając znak "X" (dwie linie przecinające się w obrębie kratki) w kratce obok odpowiedzi pozytywnej "TAK" albo w kratce obok odpowiedzi negatywnej "NIE". Postawienie znaku "X" w obu kratkach w odpowiedzi na dane pytanie lub niepostawienie tego znaku w żadnej z kratek w odpowiedzi na dane pytanie spowoduje nieważność głosu w zakresie tego pytania.

STANOWNA KOMISYO?
Dopisania na kacie do głosowania dodatkowych pytań nie wpływa na ważność głosu
Ustawa z dnia 14 marca 2003 r.

PAŃSTWOWA KOMISJA WYBORCZA

Meme 6: A ballot card.[30]

[28] Ustawa z dnia 21 kwietnia 2005 r. o opłatach abonamentowych. In Dziennik Ustaw, 2014 r. poz. 1204.

[29] pap, ss: Tusk: abonament rtv to haracz. In Wprost, 29. 04. 2008.

[30] Lawina memów po wczorajszym referendum. [online]. Available at <https://joemonster.org/art/33380>. [q. 18. 10. 2017].

Apart from the proposals for new questions, the memes contained the analysis of the questions asked in the referendum. One such meme contains an example of a mathematics test. The task consists in a logical puzzle containing the question: How many questions were asked in the referendum if the first was unconstitutional; in the second, an unambiguous interpretation was impossible, and the third one was no longer topical (Meme 5).

In another meme, the basis for a test in democracy was a ballot card (meme 6).

It had Grade 1 (Fail) given for the lack of logic (meme 6) because Question One was assessed as unconstitutional, Question Two as non-specific, and Question Three as not topical (irrelevant).

6 THE COSTS OF THE REFERENDUM

The total cost of holding the referendum amounted to 84 million zloty. Questions were asked in the media discourse about funding, the waste of public money being pointed out first of all.

The memes referred inter alia to Lech Wałęsa and his hundred million old zloty (meme 7).

Meme 7: Lech Wałęsa and his hundred million old zloty.[31]

Lech Wałęsa and Tadeusz Mazowiecki ran for the office of the Head of State in the presidential election of 1990. During his presidential campaign L. Wałęsa made many promises while seeking election. One of them was the promise to allot one hundred million old zloty to each citizen, the average wages not exceeding one million zloty at that time. The money would come from the privatization of State-owned enterprises. The promise of one hundred million old zloty for each citizen remained a mere election promise, and was never fulfilled.

The memes also referred to Madonna's concert at the National Stadium in Warsaw in 2012.[32] Joanna Mucha of the Civic Platform, the then Minister of Sport, says: Waste of money. I could have organized twenty Madonna concerts for that amount (meme 8).

[31] Frekwencyjny niewypał referendum. [online]. Available at <http://www.newsweek.pl/polska/porazka-referendum-memy-,galeria,370051,1,1,6.html>. [q. 16. 10. 2017].

[32] MALINOWSKI, P. Ogromne straty po koncercie Madonny w Warszawie. In Rzeczpospolita, 08. 05. 2013.

Meme 8: Waste of money. I could have organized twenty Madonna concerts for that amount.[33]

Madonna's concert took place on 1 August 2012 and was the first non-sporting event organized at the National Stadium after Euro 2012. The concert cost five million zloty. It provoked many controversies, mainly because of the date (it was held on the anniversary of the outbreak of the Warsaw Uprising) and the financial losses involved. Attendance at the concert was far lower than the organizers had expected. Nor were any sponsors found. Ultimately, the financial losses were covered by the Ministry of Sport.[34]

The memes also emphasized the carefree spending of public money, mismanagement, and "throwing money down the drain" (memes 9 and 10).

[33] Zmarnowane pieniądze [online]. Available at <https://demotywatory.pl/4546075/Aska-Mucha-(PO)--Zmarnowane-pieniadze-Moglam-zorganizowac-za-to-20-koncertow-Madonny>. [q. 14. 10. 2017].

[34] Umorzono śledztwo w sprawie koncertu Madonny na Stadionie Narodowym. [online]. Available at <http://www.rmf24.pl/fakty/polska/news-umorzono-sledztwo-ws-koncertu-madonny-na-stadionie-narodowym, nId,1451341#utm_source=paste & utm_medium=paste & utm_campaign=firefox>. [q. 19. 05. 2017].

Meme 9: You've got 100 million and don't know what to do with it? Hold a referendum.[35]

Meme 10: A cash-register receipt made out for the President with the words: My country is so beautiful, or how to throw a hundred million zloty down the drain.[36]

[35] Referendum. Najlepsze memy. [online]. Available at <https://www.wprost.pl/galeria/7231/5/Referendum-Najlepsze-memy.html>. [q. 15. 10. 2017].

[36] Referendum. Najlepsze memy. [online]. Available at <https://www.wprost.pl/galeria/7231/11/Referendum-Najlepsze-memy.html>. [q. 10. 10. 2017].

7 REFERENDUM TURNOUT

The level of turnout in the 2015 referendum became the subject of both in-depth studies and jokes and derision in the media discourse, including the presented memes. One of the memes showed B. Komorowski leaning over the microscope. Below is the caption: Bronisław Komorowski is admiring the turnout in the referendum (meme 11).

Meme 11: Bronisław Komorowski is admiring the turnout in the referendum.[37]

Another meme refers to the Paweł Kukiz, the main advocate of the idea of single-seat constituencies in the election campaign. Surprised by the turnout, Kukiz asks: What do you mean? They don't want single-seat constituencies? (meme 12).

Some of the memes referred to associations with manipulations with votes. In one meme Jarosław Kaczyński says: The referendum was rigged! Just kidding (meme 13).

In this case references were also made to the problems that arose in connection with holding local government elections. The first round of the election took place on 16 November 2014 and the second round on 30 November. When the votes were counted, the computer system failed and it was necessary to wait for the results much longer than in the case of earlier elections. This prompted opinions in the public debate that the election had been rigged.

A comparison was also made with the scores of the Polish football team (meme 14). It was pointed out that the result of the match was higher than the referendum turnout.

[37] Frekwencyjny niewypał referendum. [online]. Available at <http://www.newsweek.pl/polska/porazka-referendum-memy-,galeria,370051,1,1,4.html>. [q. 10. 10. 2017].

Meme 12: What do you mean? They don't want single-seat constituencies?[38]

[38] Referendum. Najlepsze memy. [online]. Available at <https://www.wprost.pl/galeria/7231/Referendum-Najlepsze-memy.html>. [q. 16. 10. 2017].

Meme 13: The referendum was rigged! Just kidding.[39]

Meme 14: The scores of the Polish football team.[40]

[39] Referendum poniosło klęskę. [online]. Available at <http://buzz.gazeta.pl/buzz/56,156947,18721774,referendum-poniosło-kleske-tak-na-to-zapatruja-sie-uzytkownicy.html>. [q. 10. 10. 2017].

[40] Reprezentacja nie zawodzi. [online]. Available at <https://demotywatory.pl/4546584>. [q. 16. 10. 2017].

In the media discourse, reflective memes also appeared. One of them is a meme showing a child saying between his teeth: We don't want a referendum. We want a playground (meme 15).

Meme 15: We don't want a referendum. We want a playground.[41]

The voters are presented here as children. What needs to be emphasized is the fact that in the media discourse this theme appeared many times: the citizens are not capable of directly participating in the decision-making process.

8 CONCLUSION

The conducted analysis allows several conclusions. Firstly, memes are a significant part in the media discourse covering individual stages of the conduct of the nationwide referendum in 2015. Secondly,

[41] Nie chcemy referendum. [online]. Available at <http://pl.memgenerator.pl/mem/nie-chcemy-referendum-chcemy-plac-zabaw-pl-ffffff>. [q. 14. 10. 2017].

in the course of the investigation it turned out that the specified main themes of discourse (embracing the reason/reasons for ordering the referendum, referendum questions, the financial costs incurred, and the referendum turnout) were fully reflected in the memes. Thirdly, the conducted research confirmed that the memes became part of the general undertone of the discourse unfavorable to those in power and the referendum institution itself. It should however be emphasized that some of them also highlight the unfavorable image of the voter. It should also be observed that the memes illustrated the main themes of the media discourse, interpreting them in a sarcastic, jocular but also reflective manner that became embedded in one's memory. In general, all the most important elements of the media discourse were manifested in the memes.

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THE FREE MOVEMENT OF ECONOMICALLY INACTIVE EU CITIZENS: THE RIGHT TO RESIDE TEST

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Abstract: The question of free movement rights of economically inactive citizens and their access to social assistance is a legally controversial and a politically sensitive issue. This is well illustrated by the CJEU's recent case law which signals a shift in its former jurisprudence towards a more restrictive approach relating to access to social assistance benefits for economically inactive EU citizens. Moreover, the Court's case law appears to be moving away from the concept of EU citizenship as a general value and common solidarity. The present article aims to give a brief overview of the relevant case law with the aim of seeking answer the question whether this turn in the CJEU's case law predicts a real paradigm shift or just a consolidation phase in the Court's jurisprudence.

Keywords: free movement, union citizenship, economically inactive citizens, social assistance, social security, solidarity, principle of proportionality

1 INTRODUCTION

The EU institutions are forced ever more often to protect the fundamental principle of free movement of European citizens from political and legal attacks. The citizens' right are contested both politically and legally. First, it is questioned politically in several member states, mainly due to its alleged impact on the welfare state. The question of welfare benefits became "one of the hottest political topics in the public debate prior to the Brexit referendum"[1]. The ongoing debate on free movement focuses on the access of economically active EU citizens to social benefits. Nothing illustrates this better than the political statements – sometimes taking a threatening tone – aiming to vigorously cut back the entitlements associated with free movement. For example let us take the claim of the former British Prime Minister David Cameron that foreigners working in the UK should only be able to access the British social assistance system after four years of continuous residence and employment. Current political statements also suggest that the UK will not mince its words when it comes to its future immigration policy, so free movement of workers from the EU will no longer apply. But it is not only the British who are sceptical. The German and Austrian governments also promised to reduce incentives for migration and take steps towards reducing benefits by adopting more restrictive laws. This is well illustrated by the fact that the new Austrian government intends to cut family benefits for workers whose children live abroad, a decision that would mostly affect employees from Central European countries such as Poland, Slovakia and Hungary. The Visegrád countries, with Poland the leading way, on the other hand, take the opposite and express a clear

[1] THYM, D. The judicial deconstruction of Union citizenship. In THYM, D. (ed): Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU. Oxford : Hart Publishing, 2017, p. 2.

commitment to the principle of free movement "promising strong support for a cornerstone of EU integration".[2]

The current political climate however, has also had an impact on the Court's recent jurisprudence in respect of economically inactive citizens. In the last few years, the European Court of Justice has increasingly faced with the question whether economically inactive EU citizens are also entitled to claim social assistance and special non-contributory benefits.

From 2013 to 2016 five important ECJ judgments have been delivered on this topic in the Brey, Dano, Alimanovic, Garcia Nieto and Commission v UK cases which all deal with the limits of social solidarity to which mobile EU citizens are entitled. The above cases apparently signal a shift in the CJEU's former jurisprudence towards a restrictive approach relating to access to social assistance benefits for economically inactive EU citizens. While the Court in its classic jurisprudence on citizenship has been "the most vocal actor in stretching the right to free movement in both depth and breadth, also against member states' preferences", now it seems to have reconsidered its former approach on free movement, increasingly yielding to the Member states' discretion to protect their public finances. In some authors' view this predicts "a narrow type of solidarity being promoted in the EU", since it is available only for those who do not really need it. Furthermore, some argue that the new case law "destroys any residual hopes that citizens might have equal treatment rights stemming from EU citizenship". Is this really the case?

In the following we give a brief overview of the case law concerned with the entitlement of economically inactive EU citizens to social rights in their host states, first with the aim of seeking answer the question whether the change in the CJEU's case law relating to access to social benefits for economically inactive citizens is as drastic as it is argued above – or is this just a consolidation phase in the Court's jurisprudence without any real paradigm shift.

Secondly, we make an attempt to reveal the underlying reasons behind these changes in the CJEU's interpretation of the free movement directive. However, before turning to the analysis of the case law it is useful to provide a short summary of the free movement regime in the EU.

2 THE FREE MOVEMENT REGIME UNDER DIRECTIVE 2004/38

Before all, we must establish that free movement has never been a right for everyone and has always been conditional. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states[3] (hereinafter free movement directive) makes a distinction between economically active and inactive persons. For residence longer than three months, economically inactive EU citizens must have sufficient resources in order not to become an unreasonable burden on the social assistance system on the host member state during their period of residence and have comprehensive sickness insurance.

However, this piece of legislation contains uncertain notions such as the requirements of "unreasonable burden" or "sufficient resources".[4] Instead of giving specific guidelines, it prescribes a case

[2] Ibid.

[3] Commission Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member states OJ L 158, 30. 4. 2004, p. 77–123.

[4] Dir. Artivle 7(1)b.

by case analysis by the national authorities.[5] Thus, it is unclear when an EU citizen becomes an "unreasonable burden" to the social assistance system. The confusion gets even deeper looking at the provision of the Directive according to which an expulsion measure shall not be the automatic consequence of a EU citizen's or his or her family member's recourse to the social assistance system of the host Member state.[6]

This inherent tension in the free movement regime provokes debate: while, in order to prevent an unreasonable burden on the social assistance systems of the Member states, self sufficiency is demanded as a residence condition; not possessing sufficient resources does not necessarily mean losing one's right to residence and to equal treatment, rather a proportionality test is ultimately decisive. This tension also brings legal uncertainty into the free movement regime – a situation for which not only the Court's jurisprudence on EU citizenship may be blamed, but also the Union legislator having transformed it into indeterminate provisions of secondary law.[7]

In any case, it poses a challenge for determining free movement and equal treatment rights of not economically active actors under the current EU rules.[8] The challenge is to find a balance between the requirement to fulfil the condition of sufficient resources and the possibility to apply for social assistance, as it is clearly demonstrated by the Court's recent jurisprudence presented below.

3 THE CJEU' S RECENT JURISPRUDENCE ON ENTITLEMENT OF EU CITIZENS TO SOCIAL RIGHTS

3.1 The Brey case

The Court's change of trend began in 2010 with the Brey ruling. In this case, the European Court of Justice had to interpret EU law as regards to the application for compensatory supplement of a retired couple. The Brey case concerned a German couple that moved from their home country to Austria in 2011 in order to reside there. Mr Brey had an 862 € pension in Germany. Given that the couple did not have any other income or assets, they applied for compensatory supplement, the granting of which was made conditional by the Austrian authorities upon fulfilling the requirements for the right to residence. The German couple had to prove that their residence fulfilled the requirements set out in the free movement directive and that they did not place an unreasonable burden on the social assistance system of Austria.

5 Dir. Article 8(4).

6 Dir. Article 14(3).

7 The "voluntarily obscure phrasing" which was presumably some sort of a compromise during the drafting of the legislation – comes at a price. That price is the burden on those who enforce the law to define in which cases a claim for social assistance means that the economically inactive person has the necessary sources for their lawful residence without putting an unreasonable burden on the social assistance system of the host country. THYM, D. The elusive limit of solidarity: residence rights of and social benefits for economically inactive Union Citizens. In Common Market Law Review. Vol. 52, No.1 (2017), p.18.

8 According to some views it would be much clearer if the provisions of the Directive excluded economically inactive EU citizens from all social assistance, moreover, social benefits until they obtain their long-term residence status. VERSCHUEREN, H. Preventing benefit tourism in the EU. A narrow or broad interpretation of the possibilities offered by the ECJ in Dano? In Common Market Law Review. Vol. 52, No.2 (2015), p. 381.

The Austrian authorities however refused to grant this benefit because in their view, Mr Brey did not meet the conditions required to obtain the right to reside as he lacked sufficient resources.

In its Brey decision the CJEU emphazised that the fact that an economically inactive citizen from another member state may be eligible, in the light of a low pension, to receive that benefit, could be an indication that the national in question does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member states.[9] At this pont however, it is important to stress that "we are only in the presence of an indication, not of an established fact"[10] and that – as it is clearly pointed out by the Court[11] – any limitation upon the free movement must be construed in compliance with the principle of proportionality. According to the Court' reasoning denial always requires a prior assessement of the claimant's individual circumstances and such an automatic character of the refusal- which characterised the specific case- prevents the national authorities from carrying out that test.

It was also emphasised by the Court that the member states'margin for manoeuvre may not be used in such a manner as to compromise the attainment of the objective of Directive 2004/38, more specifically to facilitate and strengthen the primary right to free movement.[12]

At first sight, the Court maintained a protective approach towards the rights of the non- economically active claimant as it applied a purposive interpretation of the norms of the directive ensuring rights to union citizens. Recognising the discrepancy of the directive, it explicitly highlighted the necessity of the "effet utile" of the provisions therein and of the strict interpretation of the restrictions on free movement.[13]

However, it also made clear that nothing prevents member states from subjecting the eligibility of inactive citizens for social benefits to a test of legal residence.[14] This statement, while arguably well-supported in EU Treaty and secondary law, demonstrated a first important concession to member states' discretion.

In the following cases the Court went further in recognising a margin of discretion to the member states in excluding an economically active European citizen.

3.2 The Dano case

The Dano case concerned two Romanian citizens living on benefits in Germany, without ever having worked or studied in the host member state. At the end of 2010, Ms Dano moved to Germany, to her sister who provided them with food and lodging. The documentation reveals that Ms Dano did not enter Germany in order to look for work nor was she actively seeking work in that country. Despite all this, she approached the Leipzig Jobcenter claiming basic social assistance benefit for jobseekers. The authority refused this claim by reference to the limitation contained in the German legislation that is specifically aimed at those who come to the country solely in order to benefit from the social assistance scheme. The case came before the European Court of Justice for preliminary ruling. In

[9] Brey judgment para 63.
[10] MINDERHOUD, P., MANTU, S. Access to social assistance, op. cit., p. 197.
[11] Brey judgment para 64.
[12] Ibid., para 71.
[13] VERSCHUEREN, H. Free movement of benefit tourism. The Unreasonable burden of Brey. In European Journal of Migration and Law. Vol.16, No.2 (2016), p. 158; Brey judgment para 65 – 71.
[14] Brey judgment para 44.

its judgment, the CJEU after having declared that the benefits in question are social assistance, established a very important thesis: if the economically inactive citizens, such as Dano, do not engage in any professional occupation, neither are they looking for employment, so far as access to social benefits is concerned, they can only claim equal treatment with nationals of the host member state if their residence in the territory of the host member state is lawful, and complies with the conditions of Directive 2004/38.[15] This is in full compliance with the wording of the equal treatment clause[16] of the Directive which states that Union citizens who reside on the basis of the Directive -that is it fulfil the conditions described above- enjoy equal treatment with nationals of the host member states within the scope of the Treaty.

Thus, the question was whether Ms Dano complied with the requirements set out in the Directive.The citizens in the case, Ms Dano and her son – at least according to the referring court – did not meet that requirement laid down in the directive as they lacked sufficient resources pursuant to Article 7(1)(b) of the directive. In accordance with the decision of the CJEU, they were therefore not entitled to a right of residence in Germany, nor were they entitled to claim equal treatment and so the benefit in question. In brief, the Court ruled that unequal treatment was an 'inevitable consequence' of the EU rules.[17]

As we saw, the initial jurisprudence of the CJEU and its subsequent codification in the free movement directive have introduced a certain flexibility regarding the application of the economic criteria. The above mentioned Brey case constitutes a recent example of this approach. If in Brey applying for a benefit was "only an indication of lack of sufficient resources, in Dano has become certainty".[18] What is more, in the Dano case the Court did not even make a mention about the test of proportionality set out in the directive and its previous case law. The CJEU's ruling seems to reflect a strict reading of the economic residence criteria, it does not discuss any relativisation in view of proportionality requirements. Moreover, it emphasises the Directive's goal to protect the social system of the host member state. Unfortunately, the Court did not explain the circumstances under which the application of the proportionality test was set aside.

It can be assumed however, that the absence of social integration could play an important role in the outcome of the Dano case. This point is confirmed by CJEU's case law that is increasingly emphasising the requirement of social integration in the field of free movement. In its jurisprudence concerning economically inactive citizens and job seekers, the Court has been applying for nearly one and a half decades the requirement of a "real link"[19] and of a "certain degree of integration"[20] as the objective norm to justify the derogation from equal treatment.[21] Moreover, the test of integration/real link is not only applied in relation to economically inactive citizens anymore. In the Court's most recent jurisprudence concerning free movement it is used generally, as guidance in every case with regards to the interpretation of the principle of non-discrimination.

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15 Dano judgment para 68.

16 Directive Art. 24(1).

17 Dano judgment para 77 – 78.

18 MINDERHOUD, P., MANTU, S. Access to social assistance, op. cit., p. 199.

19 C- 224/98, D'Hoop v Office national de l'emploi, ECLI:EU:C:2002:432, para 38.; C- 138/02, Collins v Secretary of State for Work and Pensions, ECLI:EU:C:2004:172, para 67.

20 C- 209/03, Dany Bidar v London Borough of Ealing and Secretary of State for Edu, ECLI:EU:C:2005:169, para 57.

21 MANTU, S., MINDERHOUD, P. Solidarity (still) in the making or bridge too far? In Nijmegen Migration Law Working Papers Series. Vol.1 (2015), p. 20.

With particular regard to the Court's decisions concerning the granting of permanent residence permit[22] and the application of the exception concerning public order /public security/expulsion[23], a significant shift can be observed from the "equal treatment as an instrument of integration" model towards the "rights granted according to the degree of social integration" approach.[24]

This concept is also reflected in Directive 2004/38/EC itself, insofar as it promotes a "gradual system" for equal treatment and protection against expulsion, including through permanent residence status with wide-ranging guarantees after five years of lawful residence.[25]

3.3 The Alimanovic case

In the Alimanovic decision that followed the Dano judgment and was similar to it in subject matter, the Court referred expressis verbis to the „gradual system" of retaining the worker status established by the Free Movement Directive as the basis of its decision. According to the Court's judgment that system seeks to safeguard the right of residence and access to social assistance by taking into consideration itself the various factors characterising the individual situation of each applicant for social assistance.[26]

The Alimanovic case concerned a Swedish woman and her daughter who had worked in Germany briefly, then lost their jobs. They applied for a special benefit in Germany, and the national court asked the CJEU if they were entitled to it.

To decide whether they had access to those benefits, the Court – as in the case of its former Dano judgment- interpreted the equal treatment rule of the Directive[27] which states that equal treatment applies to all those EU citizens 'residing on the basis of this Directive' and their family members.[28] Having thoroughly examined the question, the Court however established that the applicants no longer enjoyed their former worker status under the Directive by the time they were refused entitlement to the benefits at issue.[29] Article 7(3)(c) of the Directive says[30] that those who work in the host State for less than one year – as in their case- retain 'worker' status for at least six months after becoming unemployed. After that point, a member state can terminate their worker status, which means they are no longer covered by the equal treatment rule. In this case they can be classified un-

22 "…the integration objective which lies behind the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member state." C- 325/09, Secretary of State for Work and Pensions v Maria Dias**,** ECLI:EU:C:2011:498, para 64.

23 C- 145/09, Land Baden-Württemberg v Panagiotis Tsakouridis, ECLI:EU:C:2010:708, C- 348/09 P.I. v Oberbürgermeisterin der Stadt Remscheid, ECLI:EU:C:2012:300

24 It is possible to distil two potentially opposing approaches to migrant integration policies, the first one concentrating on equal rights as an end in itself irrespective of the actual degree of social integration, while the second approach focuses on social integration as an objective to be achieved and expects the individual to actively pursue incorporation into societal structures. Success or failure of this venture may regulate the degree of residence security and equal treatment under EU law. THYM, D. Legal framework for EU immigration policy. In HAILBRONNER, K., THYM, D. (ed.): EU Immigration and Asylum Law. Commentary. München, Oxford, Baden Baden : C.H. Beck/Hart/Nomos, 2016, p. 291.

25 THYM, D. The elusive limit of solidarity, op. cit., p. 36.

26 Alimanovic judgment para 60.

27 Dir. Art.24.

28 The CJEU thus re-established that only EU nationals who have a right of residence under the Directive are entitled to equal treatment with nationals of the host Member state.

29 Alimanovic judgment para 55.

30 Dir. Article 7(3)(c).

der Article 14(4)(b) of the Directive as first-time job-seekers. A job-seeker cannot be expelled from that member state for as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged. However, first-time jobseekers are not entitled to social assistance, therefore the host member state may refuse to grant any social assistance. This approach is understandable in light of the wording of the Directive's equal treatment clause and the Court's emphasis on the need for a significant level of legal certainty. [31]

It is interesting however that the Court, similarly to Dano – and contrary to the previous Brey case- did not apply the test of proportionality in this case either. The Court in its reasoning simply states that in the present circumstances no proportionality test in the form of an individual assessment of the person concerned is required. This statement is justified by the above mentioned argument that the citizens' Directive itself already took account of the individual position of workers.

Following its strict findings in the Dano and Alimovic judgments, the Court of Justice of the European Union "could not but state the obvious" [32] in case García-Nieto and others that is member states may exclude economically inactive EU citizens from social assistance who are residing in the host member state for a period not exceeding three months. Again, the Court opted for legal certainty in severe and explicit terms and stressed the objective of preventing the foreign EU citizen from becoming an unreasonable burden on the host member state's social assistance system.

3.4 The Garcia Nieto case

The Garcia Nieto case concerned a Spanish couple with two children. Ms Garcia Nieto moved to Germany in April 2012, and shortly after the mother began working as a kitchen assistant. In June 2012, her unmarried and not registered partner and his son joined the other two in Germany. The family applied for social benefit, which was refused for the father and his son, because at the time of the application they had resided in Germany for less than three months and did not have the status of worker or self-employed person.

The Court upheld its Dano and Alimanovic decisions and reestablished that Union citizens can claim equal treatment under the equal treatment clause of the Directive laid down in Article 24(1) of the Directive only if their residence in the territory of the host member states complies with the conditions of the Directive. The Directive provides that as a general rule Union citizens have the right of residence in the territory of the host member state for a period of up to three months without any conditions. However, in such a case – as it was mentioned above – the host member state may rely on the derogation in Article 24 (2) of the Directive in order to refuse to grant that citizen the social assistance sought. It seems reasonable that EU citizens who move to another Member state can not ask for social assistance during the first three months and Article 24(2) is clear on this.[33]

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[31] According to Article 24(2) of the Directive EU citizens who move in search of employment can be excluded from social assistance for as long as they are looking for a job, that is the host Member state shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b).

[32] KRAMER, D. Short-term residence, social benefits and the family, an analysis of case C-299/14 (Garcia Nieto and others) [online]. Available at <https://europeanlawblog.eu/tag/c-29914-garcia-nieto-and-others/> [q. 2018-09-12].

[33] Despite the judgment's "clear contribution to legal certainty" concerning the application of article 24 (2) to economically inactive EU citizens, the judgment is confusing with respect to the possible status of the father and his son as family members of a worker. Since the Court speaks throughout of a 'family' it is noteworthy that the possible eligibility of the

The Court in the Garcia Nieto case applies similar logic as in case Alimanovic: although the Directive requires host member states to take account of the individual situation of the EU citizen when it considers one to be a burden on the social assistance system, this is not required in the current situation. Just like the job-seeking EU citizen who lost his/her worker status, the Free Movement Directive itself provides for the economically inactive in their first three months of residence a 'gradual system […] which seeks to safeguard the right of residence and access to social assistance', taking into consideration 'various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity'.[34]

As we see the Court in Alimanovic and Garcia Nieto qualified its Brey ruling, holding that, in the case of jobseekers and in the case of migrant Union citizens in the first three months of residence in a host Member state, a claim for social assistance can be automatically denied without further individual assessments.[35]

3.5 The Commission v. UK case

The most recent example of giving room to Member states's discretion is the Court's Commission v UK decision in which the CJEU upheld the UK ordinary residence test for the grant of social benefits to migrant Union citizens.

The Commission had received several complaints about the UK's right to reside test which excludes EU nationals from eligibility for several welfare benefits unless they meet the criteria laid down in the Free Movement Directive. Thus, the UK legislation made the grant of these benefits conditional upon having a right to reside in the UK, in addition to being habitually resident. Unlike the benefits at issue in Brey, Dano, Alimanovic or Garcia Nieto, these benefits are not special non-contributory benefits, which are categorised as social assistance within the meaning of the free movement directive. The benefits at issue, namely child benefit and child tax credit are social security benefits, falling within Regulation 883/2004[36] (hereinafter referred as social security coordination regulation).[37] In short, they must be workers, or have retained worker status, or be the family members of EU national workers.

The Commission had two heads of claim. First, it challenged that the test added a condition that does not appear in the social security coordination regulation. Secondly, it argued that the right to reside test is a form of direct discrimination based on nationality, because EU national claimants must show that they fulfil the conditions of the Directive while UK nationals automatically have a right to reside.

father to social benefits as a family member of an economically active citizen under the Directive is not addressed. See more about this in Kramer.

34 Garcia-Nieto judgment para 46 – 48.

35 STRUMIA, F. Chronicles of a Troubled Narrative, op. cit., p. 155.

36 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30. 4. 2004, p.1.

37 As it is emphazised by Steve Peers these benefits "are squarely in the material scope of Regulation 883/2004, and so subject to the equal treatment provision therein." In this way the Regulation offers some protection to the children in migrating families, since they are typically subjects rather than agents of migration, and it has usually been accepted that they should not be penalised for changes in their parents' work status. [online]. Available at <http://eulawanalysis.blogspot.com/2016/06/dont-think-of-children-cjeu-approves.html> [q. 2018-09-12].

The Court dismissed the action of the Commission. Regarding the first ground the European Court of Justice decided that the Social coordination Regulation is only a conflict of law rule which does not set up a common scheme of social security, but allows different national social security schemes to exist.[38] In its reasoning thefore, the Court established that it does not affect the power of member states to determine their own conditions. It agreed however with the Commission with regard to the second ground, namely that the the condition requiring a right to reside in the UK gives rise to unequal treatment, namely to indirect discrimination (failing to examine the case of direct discrimination[39]) because UK nationals can satisfy it more easily than nationals of the other Member states.[40] According to the Court, however, it can be justified by a legitimate objective such as the need to protect the finances of the host State, if it complies with the principle of proportionality, and does not go beyond what is necessary to attain the objective. The Court finally concluded that as the verification is not carried out systematically by the UK authorities for each claim, but only in the event of doubt, it follows that the contested measure is proportionate.[41] Surprisingly, the Court decided that it was the Commission's responsibility to show that the checks were disproportionate, or went beyond what was necessary.[42]

The Court thus came to the conclusion that the UK is entitled to apply the 'right to reside' test to claimants for child benefit and child tax credit which suggests that the line of the German cases discussed above, is now not only extended to special non- contributory benefits which are categorised as social assistance within the meaning of the free movement directive, but also to certain social security benefits under the Social Coordination Regulation. [43] Setting aside the examination of the directly discriminatory nature of the test, and accepting automatic exclusions contrary to Brey we can rightly assume that the Court has released Member states from an obligation to apply limitations to social security in a proportionate way.[44] This also points to the increased discretion of the member states in the field of free movement of economically inactive union citizens, even if the the decision has been adopted in a politically sensitive period, nine days before the UK referendum on EU membership.

In any case, the Commission in its new proposal intends to revise the coordination of social security systems making possible the exclusion of economically inactive citizens from all social benefits, irrespective of their qualification for social assistance or social security. According to the new proposal a Member state may require that the access of an economically inactive person residing in that Member state to its social security benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC.

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38 Commission v. UK judgment para 67.

39 In Verschueren's view this qualification makes posibble the Court to accept the protection of a host Member state's public funds as justification. VERSCHUEREN, H. Economically inactive migrant Union citizens: only entitled to social benefits if they enjoy a right to reside in the host State. In European Journal of Social Security. Vol.19, No.1 (2017), p. 81.

40 Commission v. UK judgment paras 76 – 77.

41 Ibid., para 85.

42 This is a problematic reversal of the burden of proof, which requires the Commission to provide information that is in possession of the UK. O'BRIEN, C. R. The ECJ sacrifices EU citizenship in vain, op. cit., p. 227.

43 MINDERHOUD, P., MANTU, S. Access to social assistance, op. cit., p. 205 – 206.

44 This conclusion is more finely phrased by Verschueren who opines that judgment leaves a number of questions unanswered, such as the question regarding the application of a proportionality test when an economically inactive migrant Union citizen claims a social benefit in the host Member state. VERSCHUEREN, H. Economically inactive migrant Union citizens, op. cit., p.81.

4 COMMENTS

These lines of cases have been received as a reversal of the Court's classic position protective of rights of free movement and as a betrayal of some of the Court's main doctrine. Moreover, some of the Commentators described it as a "well-established project of EU citizenship-deconstruction".[45]

Truth to be told, the Court is indeed partially retreating from its "most daring pro free movement stances".[46] This is well reflected in its Dano judgment from which we can conclude that a Union citizen whose lawful residence in the host country is not based on the Directive itself but on some other EU source, such as the provisions of the Treaty[47], a European Union regulation[48] or the more favourable provisions contained in the national legislation[49] would not be entitled to equal treatment concerning social benefits. Indeed, there is a conspicuous gap between the Court's position in the present cases and the previous cases such as Martinez Sala and Trojani where the Court ruled that an EU citizen, residing legally on the basis of national legislation in the territory of a host Member state could rely on the equal treatment provision.

In some Commentators view the Court's narrowly employed test of legal residence, under which a Union citizen can claim equal treatment only if his residence in the territory of the host member state complies with the Directive and the shift we note in the case law- from asking for social assistance being an indication of lack of resources to becoming a certainty that no longer requires an individualised examination of the case- may even lead to an effective exclusion of most economically inactive EU citizens from free movement.[50]

First, we must keep in mind however, that free movement has always been subjected to limits and conditions. The recent jurisprudence of the Court is moving just within this framework laid down by the EU Treaty and secondary law. The Directive in its article 24(2) clearly sets out the exceptions to the equal treatment rule: during the first three months of residence EU citizens are not entitled to any social assistance; EU citizens who move in search of employment can be excluded from social assistance for as long as they are looking for a job; and finally, the host Member state is not obliged to award maintenance aid for studies.

This would not be the first case where the CJEU were adhering to the text of the Directive. Let us think of the Ziolkowski[51] and Dias[52] cases dealing with the issue of permanent residence or the Förster case[53] which concerned the award of maintenance grants for students who are nationals of other member states.

Second, we must see, that apart from some issues, the ECJ's recent line of case law brought more clarity into the free movement regime which greatly enhances legal certainty. Clear rules in directive have been confirmed as proportionate and thus have not been subjected to an individual as-

45 O'BRIEN, C. R. The ECJ sacrifices EU citizenship in vain, op. cit., p. 240.

46 STRUMIA, F. Chronicles of a Troubled Narrative, op. cit., p. 156.

47 On Article 45 TFEU (C- 507/12 Jessy Saint Prix. v. Secretary of State for Work and Pensions) or Article 20 TFEU.

48 C- 480/08 Maria Teixeira v Secretary of State for the Home Department, ECLI:EU:C:2010:83, C- 529/11, Alarape and Tijani v Secretary of State for the Home Department, ECLI:EU:C:2013:290.

49 C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles, ECR 2004 I-07573, C- 85/96 Maria Martinez Sala v Freistaat Bayern, ECLI:EU:C:1998:217.

50 MINDERHOUD, P., MANTU, S. Access to social assistance, op. cit., p. 206.

51 C-424-425/10, Ziolkowski and Szeja and Others v Land Berlin, ECLI:EU:C:2011:866.

52 C- 325/09, Secretary of State for Work and Pensions. v. Maria Dias, ECLI:EU:C:2011:498.

53 C- 158/07, Jacqueline Förster kontra Hoofddirectie van de Informatie Beheer Groep, ECLI:EU:C:2008:630.

sessement when applying them.[54] That was the case in Alimanovic, where the Court suggested that the provisions on worker status retention in Directive 2004/38 themselves provided a sufficiently gradual system itself taking into account various factors characterising the individual situation such that no more proportionality would be required for those falling through the gaps. Similarly in Garcia Nieto, where the claimants could not ask for social assistance during their first three months of stay, as article 24(2) of the Directive is clear on this.

However, in cases where the Directive contains ambigious provisions – such as the case of the right to residence for economically inactive persons before having acquired a right to permanent residence – the issue of legal uncertainty remains. Thus, with regard to economically inactive citizens for stays exceeding three months a proportionality test must always be applied. The Court's judgement in Dano is somewhat contradictory to the aboves, as the Court in its decision has completely waived the application of the proportionality test. However, as Wollenschaleger correctly points out, Dano should not be misunderstood as restoring the economic residence criteria as conditions strictu sensu. Instead, it can be assumed that the absence of social integration could play an important role in the outcome of the Dano case.

Considering the aboves – and in addition to the "generous treatment" of former workers having become unemployed after a period of work of more than one year and the broad understanding of the concept of worker, we can establish that economically inactive persons still enjoy "an albeit limited-claim to social solidarity in the host Member state". [55]

Of course, it is undeniable, that the Court, as Strumia describes "watered down its narrative of transnational rights and blended with the narrative of Member states' discretion".[56] The most illustrative example of this is the Commission v UK decision where the Court essentially gave a licence to a member state to discriminate on the ground of nationality.

In the following we will examine briefly the underlying reasons for this restrictive turn in the Court's jurisprudence relating to the free movement of economically inactive EU citizens.

As a starting point, it must be established, that there is a significant difference between the classic position of EU law on the equal treatment of those who are economically active and the integration requirements for other citizens. This is quite understandable since their "constitutional context differs"[57] significantly. While the free movement rules for economically active citizens have been an integral part of the common market, ever since the original Treaty of Rome, the free movement rules for economically inactive citizens are closely linked to the concept of Union citizenship established by the Maastricht Treaty. We must see however, that there is "nothing automatic in the projection of a legal solution from one policy field to another".[58] The equality based reasoning behind economic

[54] According to Article 24(1) of the the Directive Union citizens who reside on the basis of the Directive enjoy equal treatment with nationals of the host Member state within the scope of the Treaty. However, we must keep in mind, that a series of exceptions are listed in the second paragraph that of Article 24: during the first three months of residence EU citizens are not entitled to any social assistance, EU citizens who move in search of employment can be excluded from social assistance for as long as they are looking for a job. Finally, the host Member state is not obliged to award maintenance aid for studies.

[55] WOLLENSCHLAGER, F. Consolidating union citizenship: residence and solidarity rights for jobseekers and the economically inactive in the post-Dano era. In THYM, D. (ed): Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU. Oxford : Hart Publishing. 2017, p. 190.

[56] STRUMIA, F. Chronicles of a Troubled Narrative, op. cit., p. 149 – 168.

[57] THYM, D. (ed): Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU. Oxford : Hart Publishing. 2017, p. 121.

[58] Ibid.

market integration can not justify access to social benefits for those who do not work, especially not in such a crisis period that is just sweeping through Europe.

The twist in EU citizenship jurisprudence occurred in a highly special political and economic context when unprecedented numbers of migrants started arriving from the Middle East. The latter highlighted the failure of the EU's mechanisms to deal with such issues which did not favour the overall legitimacy of the Union. What is more, it increased pressure from different political concerns of the individual member states to control migration more effectively blurring the movement within the EU with that from outside. We must see that the debate surrounding the question of free movement is not new; it has been re-ignited periodically, basically all the way through the entire history of European integration. Let us think of the fears concerning the different rounds of enlargement – especially the accession of the Central and Eastern European countries. [59]In periods of economic recession or high internal political tension due to unemployment, the question of restricting the freedom of movement arises almost routinely.[60] The freedom of movement has gained a "symbolic function" if you will, it serves as a sort of external projection of the currently arisen economic, social and political concerns.

The public discourse, rapidly increasing since the enlargements in 2004 and 2007, took a rather explicit and unfriendly turn in some member states from 2013 onwards. In Germany, Austria and Denmark public debates have emerged on the issue of social benefits for economically inactive EU citizens and study maintenance fees. Similarly, child benefits to mobile EU workers attracted a great deal of public attention in the UK and in Austria in spite of their estimated limited economic relevance. As Sadl and Sankari highlight it very well, in the UK mobility overall became a burden per se. [61]

Thus, it is possible to argue that external political pressure is what prompted the Court to change the direction of the citizenship jurisprudence. Member states wanted more discretion to define the fundamental interest of their own societies and keep under control their public spending.[62] They expected the Court to apply laxer proportionality review to their protectionist measures which limit free movement and individual rights and find them compatible with European law.

However, the external factors such as the change of political climate itself can not be the sole reason of this restrictive turn. The external crisis only speeded up the process which can be briefly described as the crisis of the EU citizenship itself. The introduction of EU citizenship reiterated the "political dream of building some sort of federal Europe, which culminated in the move towards the Constitutional Treaty".[63] In this respect however, a "general deficit of European constitutionalism"[64] became apparent in the last decade. This is well reflected by the fall of the Constitutional Treaty. The latter presented the high point of the "integration through law concept" which employed EU law as

[59] Due to those fears the fundamental freedom of movement of workers could be subject to limitations during the transitional period.

[60] MANTU, S., MINDERHOUD, P. Solidarity (still) in the making or bridge too far?, op. cit., p. 8.

[61] SADL, U., SANKARI, S. Why did the Citizenship Jurisprudence Change? In THYM, D. (ed). Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU. Oxford : Hart Publishing, 2017, p. 106.

[62] With the accession of the Western Balkan countries political fears will intensify due to the massive migration preassure expected from this region. GELLÉRNÉ LUKÁCS, É. The challenges of free movement of persons in the Western Balkan context. In EU Business Law Working Papers, No.2 (2018), p.7. Gellérné Lukács É. – Illés S. Migrációs politikák és jogharmonizáció. 2005. KSH NKI, Budapest.

[63] THYM, D. The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development. In THYM, D. (ed): Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU. Oxford : Hart Publishing, 2017, p. 126.

[64] Ibid.

an instrument for political and social change.[65] As a building stone of this project Union citizenship was destined to be a fundamental status, the most significant means of expanding belonging within the EU. The main purpose of the idea of Union citizenship was to enhance the mobility of member state citizens within the EU while also contributing to the emergence of a common political and symbolic space. However, the symbolic achievements have not developed so quickly: although the idea of EU citizenship was aimed at promoting a supranational identity based upon common cultural values and political symbols, it has not yet succeeded in superseding and replacing member states' national identities, which "remain preeminent compared to what is still considered a supranational and thus secondary, alternative of belonging". [66]

This is well demonstrated by empirical studies[67] aimed to compare the sense of belonging to Europe between movers and stayers. These studies show that citizens either do not use their rights or do not identify with the supranational polity when doing so.[68] As it is pointed out by Recchi intra – EU mobility and individual transnationalism remain minority phenomena and this puts a brake on their culturally integrating effects.[69]

Thus, an underlying reason for the more recent retrogression of Union citizenship may be the inherent limits to what an institutional practice of integration through law can achieve. Union citizenship is traditionally conceived as a tool of constitutional engineering which fosters the link between the integration project and member state citizens. However, we must see that citizenship is not a self-fulfilling prophecy. "Treaty changes, new legislation and innovative court judgments alone are not capable of creating an enhanced degree of pan- European identity or solidarity: they need to be embedded into social and political structures".[70] Union citizenship itself can not justify access to social benefits for those who are ecnonomically inactive and seeks to rely on member states' social welfare system.

5 CONCLUSION

This study aimed to analyse case law relating to the entitlement of economically inactive EU citizens to social rights. The Court in Brey found that the right to reside test should not result in the automatic exclusion of economically inactive persons from entitlement to benefits without assessment of their individual circumstances. However, in judgments following Brey the proportionality principle has been completely set aside by the Court. This is acceptable in cases which deal with particular categories of migrants, such as former workers and jobseekers whose individual situation is already taken into account by the Directive itself. In this respect, the new approach is highly welcomed as it brings more clarity in the free movement regime. However, in cases where the Directive contains

65 Ibid.

66 PEREZ, A. M., FUEMTES, F. J. M. Dealing with loopholes in national and EU citizenship. In GUILD, E., ROTAECHE, C. G., KOSTAKOPOULOU, D. (ed): The reconceptualization of European Union citizenship. Leiden, Boston : Brill publisher, 2014, p.150.

67 RECCHI, E. Cross-state mobility in the EU. In European Societies. Vol.10, No.2 (2008), p. 197 – 224.

68 Surveys show that those exercising their free movement rights are inclined to be more supportive of EU integration.

69 RECCHI, E. The engine of Europeanness? In THYM, D. (ed): Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU. Oxford : Hart Publishing, 2017, p 148.

70 THYM, D. The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development, op. cit., p. 126.

ambigious provisions – such as the case of the right to residence concerning economically inactive citizens for stays exceeding three months – the issue of legal uncertainty remains. It is undeniable, that a slight change can be observed in the Court's recent case law, at least concerning the increased discretion of the member states in the context of the residence rights of economically inactive citizens. However, we must keep in mind that unlike free movement rules for economically active citizens which are rooted in the Treaty of Rome, free movement rules for economically inactives are linked to the concept of Union citizenship. This concept was destined to be a link between the integration project and member state citizens by the traditional method of integration through law. The new approach of the Court signals a kind of departure from its earlier attempts at constituitional engineering by means of enhanced citizens' rights which can even be conceived as a shift to a "more confederal understanding of the European integration".[71]

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[71] Ibid., p. 128.

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SOCIAL CAPITAL: LIMITATIONS OF THE CONCEPT AND PARTICIPATION IN PUBLIC LIFE IN POLAND

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Abstract: The article examines some of the most common and crucial difficulties involved in the use of the concept of "social capital" for research purposes. Some of the limitations of the concept are subsequently exemplified in the ways in which it has been employed to explain the unwillingness of a large part of the Polish society to participate in the public life. Social scientists have often accounted for this by emphasizing the low level of social capital in Poland, i.e. absence of certain skills necessary for active engagement in public life and/or lack of trust (trust in public institutions as well as towards other people in general). The article argues that such explanations are either obscuring important factors which contributed to this state of affairs or might gloss over the resources of social capital which are present in the Polish society.

Key words: Bourdieu Pierre, Coleman James Samuel, Fukuyama Francis, Putnam Robert David, Poland, social capital, trust.

1 INTRODUCTION

The concept of social capital has made quite an astonishing career over the period of, roughly, the last three decades in many fields of scientific enquiry. It has been used extensively in economics, sociology, political science, psychology and in other disciplines to account for an ever-growing list of phenomena. Furthermore, the concept of social capital has also found applications outside the academic circles, in the policy-making and media.

The purpose of this paper is twofold. Firstly, I will argue that a critical appraisal of the concept of social capital itself reveals a number of serious limitations in its usefulness and explanatory power.[1] While this does not mean that those difficulties cannot be transcended by further refinement, I do want to stress that the general trajectory of the concept's development led to the increase in its popularity at the expense of its clarity and ability to provide interesting insights. Secondly, I will use the example of how the concept of social capital has been employed to account for the willingness (or to be more precise, lack of it) of the Polish people to participate in public life after the collapse of communism. This approach should help to highlight some of the difficulties with the concept invoked already in the first part of the paper.

[1] I will not address in the paper at hand another line of criticism, which boils down to the conclusion that social capital is just a fashionable contemporary word for processes and issues which had been described and analysed by the classical sociology from Marx, through Durkheim and Weber, to Simmel.

2 THE CHALLENGES OF THE CONCEPT

Let us begin by stressing the obvious, there is no single theory of social capital. In fact, we encounter a number of theoretical approaches which employ this concept. It is almost universally recognized that among the most influential theorists of social capital (and sometimes also popularizers of the concept) 4 figures stand above others: Pierre Bourdieu, James S. Coleman, Robert D. Putnam and Francis Fukuyama. The problem is not however that there is no single, unified definition at our disposal. That after all is the case with a whole range of concepts which are crucial for social sciences. For instance, there is no universally accepted definition of democracy and various theories of democracy deploy this concept in different ways. So, the difficulties with social capital do not simply originate from this theoretical multiplicity. It is rather that theories of the 4 abovementioned classics of the literature on social capital are not only different, but also largely incommensurable. While they all employ the same concept, the role that it fulfills in their individual accounts can only be understood when put in context of the larger theoretical wholes,[2] or even historically established schools of thought, which differ in their explicit and implicit assumptions. Therefore, it is also unsurprising that the abovementioned authors apply the concept for widely divergent purposes. For instance, Pierre Bourdieu's account of social capital is embedded in his poststructuralist, marxist analysis of the social stratification and the various ways in which the social hierarchy is reproduced over generations. There is very little that this has in common with Robert Putnam's approach who originally used the concept of social capital to explain the differences in the functioning of democratic self-government in Italy[3] and later invoked it in the context of the anxieties over the supposedly diminishing "civic virtue" of the citizens in the USA[4] and other Western democracies. What follows from this is that one cannot combine elements of different theories of social capital, as if they were pieces of the same puzzle, without running the risk of serious incoherence.

Secondly, different definitions of social capital can be placed somewhere on the scale between two extremes, neither of which is particularly attractive, although for very different reasons. On the one end of the spectrum the concept can hardly meet the explanatory burden that is being put onto it, while on the other end it becomes so loose that it is doubtful whether it can provide genuine explanation of social phenomena. This is not to say that no satisfactory middle-ground approach is possible. It should nevertheless be highlighted that the dangers of either setting the bar too high or sliding towards the vagueness are very real. And this can be illustrated by briefly reviewing the classical definitions of social capital. Let us note that the latter is quite often introduced as a functional concept. It means that, independent of whatever social capital is precisely taken to be, its function is to secure certain beneficial effects for individuals or groups.[5] Nevertheless, this claim can be developed into two alternative interpretations, a stronger and a weaker one. Pierre Bourdieu defined social capital as: "[T]he aggregate of the actual or potential resources which are linked to

[2] KLIMOWICZ M. Kapitał społeczny. Zagadnienia metodologiczne. In KLIMOWICZ, M., BOKAJŁO, W. (ed.): Kapitał społeczny – interpretacje, impresje, operacjonalizacja. Warszawa : CeDeWu, 2010, p. 44 – 46.

[3] PUTNAM R. D. et al. Making Democracy Work. Civic Traditions in Modern Italy. Princeton : Princeton University Press, 1993.

[4] PUTNAM R. D. Bowling Alone: the Collapse and Revival of the American Community. New York, London, Toronto, Sydney, Singapore : Simon & Schuster, 2000.

[5] However, not all the beneficial effects of some x can be taken to be the function of x. Some of those effects may arise unintentionally and accidently. See VORHAUS J. Function and Functional Explanation in Social Capital Theory: A Philosophical Appraisal. In Studies in Philosophy and Education. Vol. 33, No. 2 (2014), p. 188.

possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition".[6] Bourdieu is not only claiming that having a network of social relationships is functional for securing various resources (material or symbolic) which otherwise would be difficult to obtain for individuals. He is in fact attempting to present a functional explanation of the creation and maintenance of those social networks! In other words, according to him they exist because they provide such benefits: "The profits which accrue from membership in a group are the basis of the solidarity which makes them possible (…) the network of relationships is the product of investment strategies, individual or collective, consciously or unconsciously aimed at establishing or reproducing social relationships that are directly usable in the short or long term, i.e., at transforming contingent relations, such as those of neighborhood, the workplace, or even kinship, into relationships that are at once necessary and elective, implying durable obligations subjectively felt (feelings of gratitude, respect, friendship, etc.) or institutionally guaranteed (rights)".[7] This is certainly a very interesting claim, yet also a formidably stringent one.[8] Functional explanations in general are a contentious subject in the philosophy of science, as critics question their explanatory power.[9]

James S. Coleman approach is more modest as he does not try to provide a functional explanation, but merely a functional definition of social capital. Coleman claims that social capital is "[N]ot a single entity, but a variety of different entities, with two elements in common: they all consist of some aspect of social structure and they facilitate certain actions of actors – whether persons or corporate actors – within the structure. Like other forms of capital, social capital is productive, making possible the achievement of certain ends that in its absence would not be possible ".[10] To use one of the examples from the field of education that originally inspired Coleman's research, social capital of the children attending religious schools (and presumably therefore also raised in a tightly knit communities) leads to a much lower drop-out rate in comparison with their peers from non-religious public schools. Coleman's definition inspired a great number of similar attempts, although quite often less refined theoretically. However, as Alejandro Portes noted, already the original definition was somewhat blurry and did not clearly distinguish between sources of social capital, its consequences and the resources that it is supposed to allow to obtain.[11] One of the main problem with functional definitions in general is that the functions of a given x can be various, changeable and dependent on the socio-cultural context.[12] Hence the risk of subsuming under one concept a whole range of distinct phenomena. I want to argue that this lead to an increasing lack of clarity about the meaning of social capital, especially as the concept found new applications.

The conceptual stretch that the notion of social capital has undergone is apparent in the case of the other two classics. Both Francis Fukuyama and Robert D. Putnam initiated a turn from *hard* definitions of social capital which related it to elements of social structure, social roles etc. (i. e.

6 BOURDIEU P. The Forms of Capital. In RICHARDSON J. (ed.): Handbook of Theory and Research for the Sociology of Education. New York : Greenwood Press, 1986, p. 248.

7 BOURDIEU P. The Forms of Capital, op. cit., p. 249 – 250.

8 For a more thorough analysis of the demanding conditions that need to be met by a theorist to provide a successful functional explanations see: VORHAUS J. Function…, op. cit., p. 190 – 191.

9 KRAUZ-MOZER B. Teorie polityki. Warszawa : Wydawnictwo Naukowe PWN, 2005, p. 127.

10 COLEMAN J. S. Social Capital in the Creation of Human Capital. In The American Journal of Sociology. Vol. 94 (1988), p. 98.

11 PORTES A. Social Capital: Its Origins and Applications in Modern Sociology. In Annual Review of Sociology. Vol. 24 (1998), p. 5 – 6.

12 KWIATKOWSKI M. Aksjonormatywne aspekty kapitału społecznego. In Kapitał społeczny we wspólnotach. Zeszyty Naukowe – Akademia Ekonomiczna w Poznaniu. Vol. 58 (2005), p. 81.

Bourdieu and Coleman) towards *soft* definitions which emphasized the shared values and norms, trust and reciprocity.[13] According to Fukuyama social capital can be defined as: "[T]he ability of people to work together for common purposes in groups and organizations".[14] This is rather general and vague definition and social capital here begins to approach something akin to a shared culture of a given community. Fukuyama's use of the concept also emphasized the link between the common values and norms on the one hand and generalized trust which in turn reduces transactional costs on the other, a move which quickly became a staple of literature on social capital.

Putnam's starting point in *Making Democracy Work. Civic Traditions in Modern Italy* was not far removed from Coleman's, as he defined social capital in the following way: "[F]eatures of social organization, such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions".[15] Yet, it is worth pointing out that trust, norms and networks are not elements belonging to the same realm. For instance, trust is typically understood as a subjective attitude while the norms which are enforced by a given society are clearly independent of individual's will. Nor do norms and social networks, although certainly related, belong on the same level of social reality. Putnam was quite harshly criticized for looseness of his definition. But that did not detract him from arguably stretching the concept of social capital a bit further in *Bowling Alone: the Collapse and the Revival of American Community*. This time the concept refers to: "[C]onnections among individuals – social networks and the norms of reciprocity and trustworthiness that arise from them".[16] If all social relations involving reciprocity and trust are to be considered forms of social capital, the theoretical net has indeed been cast very widely.

Thirdly, the move from hard to soft definitions of social capital which was sketched above opened the way for the conclusion that the latter can be a kind of a collective asset, an attribute of large groups like nations or whole societies. For Bourdieu social capital was a *private good,*[17] it was an individual who could benefit in various ways from the possession of well placed acquaintances. Coleman already emphasized that it is a *public good*, but characteristically he attributed it to relatively small groups: families, local communities, parental associations etc.[18] Yet, with Putnam and Fukuyama it becomes possible to speak about the stock of social capital in the whole regions or even in the American, Japanese or Polish society. Alejandro Portes rightly pointed out that: "[T]he transition of the concept from an individual asset to a community or national resource was never explicitly theorized, giving rise to the present state of confusion about the meaning of the term. In one sentence, social capital is an asset of children in intact families; in the next, it is an attribute of networks of traders; and in the following, it becomes the explanation of why entire cities are well governed and economically flourishing while others are not. The heuristic value of the concept suffers accordingly as it risks becoming synonymous with each and all things that are positive in social life".[19] Moreover, the shift from small to large social grouping in application of the concept has an

[13] On the distinction between „hard" and „soft" groups of definitions of social capital as well as mixed approaches see: KAŹMIERCZAK T. Kapitał społeczny a rozwój społeczno-ekonomiczny – przegląd podejść. In KAŹMIERCZAK T., RYMSZA M. (ed.): Kapitał społeczny. Ekonomia społeczna. Warszawa : Fundacja Instytutu Spraw Publicznych, 2007, p. 44 – 45.

[14] FUKUYAMA F. Trust: The Social Virtues and the Creation of Prosperity. New York : Simon & Schuster, 1995, p. 10.

[15] PUTNAM R. D. et al. Making Democracy Work, op. cit., p. 167.

[16] PUTNAM R. D. Bowling Alone: the Collapse and Revival of the American Community, op. cit., p. 19.

[17] BOURDIEU P. The Forms of Capital, op. cit., p. 249

[18] COLEMAN J. S. Social Capital in the Creation of Human Capital, op. cit., p. 116 – 118.

[19] PORTES A. The Two Meanings of Social Capital. In Sociological Forum. Vol. 15, No. 1 (2000), p. 3.

unwelcome consequence of obscuring the ways in which group interests often collide with what is considered to be the good of general public. Smaller collectives are frequently very effective at securing various benefits for themselves at the exclusion of the outsiders. In that sense it can be said that criminal organizations like *mafia*, lobbyists or some ethnic minority groups are indeed very successful at accumulating and using social capital, although their actions are detrimental to the good of the whole society impartially conceived. Hence the importance of drawing attention not only to the "bright side" of social capital, but also to the *negative social capital.*[20] This was also recognized in a way by Putnam who distinguishes between *bridging* (*inclusive*) and *bonding* (*exclusive*) social capital. The former characterizes social networks which: "are outward looking and encompass people across diverse social cleavages", while the latter tends to "reinforce exclusive identities and homogeneous groups".[21] This distinction between bridging and bonding social capital will be revisited in the second part of the paper.

Fourthly, it is frequently the case, especially with the broad definitions of social capital, that it becomes very difficult to disentangle the causes or sources of social capitals from its effects and even from its forms. For instance, it is claimed that social capital facilitates collective action, yet at the same time the growth of social capital is supposed to be an outcome of collaborative efforts.[22] Needless to say, this is an example of circular reasoning. The other option is, unfortunately, that the explanation based on social capital ends up being trivial. If the latter simply means that ordinary citizens trust each other and deeply care about the public good, then indeed it is not hard to see that countries blessed with such citizens would be better governed than others. But that is a commonplace. As Portes noted in his scathing critique of Putnam attempts to account for the differences in the quality of governance and economic prosperity of Italian cities and regions in terms of the differences in their social capital resources: "More insidious, however, is the search for full explanation of all observed differences, because the quest for the prime determinant often ends up by relabeling the original problem be explained. This happens as the elimination of exceptions reduces the logical space between alleged cause and effect so that the final predicative statement is either truism or circular".[23]

Fifthly, there are considerable problems with operationalizing the concept of social capital for the purposes of empirical research. Partially the very choice of word "capital" can be potentially misleading here. Physical capital is tangible and easily measurable, but human capital which comprises the individual skills and competences is much less so. And social capital as a property of relations between the individuals (independent of how precisely we define it) is even more elusive and intangible. Therefore, the resources of social capital can typically be assessed indirectly, by using indicators which are observable. While some progress has been achieved in that regard, for instance in the operationalization of the concept in the research conducted by the World Bank, the problem of identifying indicators which would at the same time be adequate, universal and applicable in different social contexts remains. Furthermore, the aggregation of various components of social capital in order to create its indexes has proven to be controversial, similarly the issue of direction of causality in explaining for instance the relations between trust and cooperation.[24] In the field of

[20] PORTES A. Social Capital: Its Origins and Applications in Modern Sociology, op. cit., p. 16 – 18.

[21] PUTNAM R. D. Bowling Alone: the Collapse and Revival of the American Community, op. cit., p. 22 – 23.

[22] RYMSZA A. Klasyczne koncepcje kapitału społecznego. In KAŹMIERCZAK, RYMSZA(ed.): Kapitał społeczny. Ekonomia społeczna, op. cit., p. 38.

[23] PORTES A. Social Capital: Its Origins and Applications in Modern Sociology, op. cit., p. 20.

[24] THEISS M. Operacjonalizacja kapitału społecznego w badaniach empirycznych. In Kapitał społeczny we wspólnotach. Zeszyty Naukowe – Akademia Ekonomiczna w Poznaniu. Vol. 58 (2005), p. 67 – 68.

studies dedicated to the relations between social capital and economic inequalities among frequently reported problems are: the piecemeal character of conducted research which leads to ambiguous or contradictory conclusions, limited comparability of research results due to the use of different data sets (various countries and measures of social capital, different time frames etc.) and methods.[25] All those methodological difficulties are by no means fatal to social capital theories, yet they are also worth noting.

Final critical remark concerns the normative aspect of the concept as well as the political agenda underlying its uses in the public discourse. I already mentioned that there is a notable tendency to glance over the potential "dark side" of social capital and to treat it almost as a magical remedy for all ills of contemporary societies.[26] Naturally, scientists will not have much use of the concept which is so malleable as to fit whatever one finds good and valuable. But indeed that is perhaps precisely where one of the attractions of social capital lies for politicians and public figures.[27] It is a vague term, but at the same time associated with all the desirable qualities. What is truly remarkable is the political career of the concept over the last few decades. In a thought provoking article Emanuele Ferragina and Alessandro Arrigoni argue that the theory of social capital by merging individualism of rational choice theory with concerns about the communal ties became a crucial instrument of the neoliberal political project. This hypothesis can be even put more sharply – social capital theory became something akin to the ideology which masks the internal inconsistencies of the neoliberal policies. Ferragina and Arrigioni claim that: "[D]espite the significant increase in economic inequality generated by the aforementioned (neoliberal – K. A.) policies of the 1980 s and 1990 s, political rhetoric based on social capital theory helped to conceal the contradiction between the encouragement of civic engagement and the neoliberal political agenda".[28] I am not sure whether I would wholly embrace that interpretation, yet it is undeniable that social capital suits the rhetorical purposes of many incompatible political standpoints. It has been used by liberals, conservatives, social democrats, communitarians, contemporary republicans. And this raises suspicion that the concept itself is ready-made for ideological purposes, easily manipulated to justify policies and goals which are at odds with each other.

3 THE CASE OF POLAND

In the second part of this essay I want to argue that some of the criticism highlighted above is significant for understanding the role of social capital in the explanation of low level of participation in public life by the Polish people. By participating in public life I do not only mean regularly voting in the local and national elections, involvement in the political parties and other activities which are conventionally described as political participation. Of equal importance is membership in voluntary associations which are often said to form the backbone of the civil society: charities, trade unions, parents' organizations, ecological movements etc. Poland, similarly to other postcommunist coun-

[25] WOSIEK M.: Kapitał społeczny w kontekście nierówności ekonomicznych – wybrane aspekty teoretyczne. In Optimum-studia ekonomiczne. Vol. 80, No. 2 (2016), p. 42.

[26] KIERSZTYN M. Kapitał społeczny – ideologiczne konteksty pojęcia. In Kapitał społeczny we wspólnotach. Zeszyty Naukowe – Akademia Ekonomiczna w Poznaniu. Vol. 58 (2005), p. 50.

[27] PORTES A. The Two Meanings of Social Capital, op. cit., p. 4.

[28] FERRAGINA E., ARRIGIONI A. The Rise and Fall of Social Capital: Requiem for a Theory? In Political Studies Review. Vol. 15, No. 3 (2017), p. 361.

tries, has struggled in both regards. Since the breakthrough of 1989 the level of political participation has remained fairly low, despite occasional periods of greater mobilization and involvement. Similarly, Poles are also much less likely to be actively engaged in the voluntary organizations than the majority of the EU societies. Therefore, the lack of willingness to participate in public life is typically interpreted as clear evidence of the deficiencies of social capital in the Polish society. I want to argue that there are two main factors emphasized by the proponents of this popular interpretation: 1) absence of certain skills necessary for involvement in voluntary organizations and perhaps also in democratic politics 2) low level of trust towards public institutions and other people in general. But how convincing are those explanations?

Let us start with the involvement of the Polish people in voluntary associations. The level of the latter has been consistently low, especially in comparison with some European countries. For instance, in a survey from 2015 the average number of organizations to which respondents older than 16 belonged in Poland was 0,14. For comparison, in Sweden, which topped the *European Social Survey 2002* in that regard, the same number was 2,5.[29] Moreover, most of the Poles who declare active involvement in voluntary associations typically belong to religious organizations, sport clubs, hobby groups. Few are members of trade unions, professional associations, organizations created for the promotion of knowledge or protection of the environment and of political parties.[30] Furthermore, many of the officially registered non-governmental organizations are in fact inactive or are acting only sporadically. This brings us directly to the issue of social capital. There is a popular argument which appears in many variations, so for illustration I will use one example. Efficient and prosperous functioning, the argument goes, of a modern "developed, democratic and market society"[31] requires the possession of a certain set of skills by its members. Polish sociologist Piotr Sztompka describes them jointly as *civilizational competence* which is necessary for successful, authentic modernization. At least some ingredients of civilizational competence can be treated as forms of social capital. Sztompka mentions for instance: political activism, readiness to participate, concern with public issues.[32] Unsurprisingly the period of "real socialism" in Poland is identified as the one which not only thwarted the development of these valuable skills, but bred its own, peculiar kind of *civilizational incompetence.*[33] Firstly, this argument becomes progressively weaker in explaining the meagerness of voluntary associations as more time has passed since the collapse of socialism in Poland, although admittedly the cultural changes belong to the long term processes. There is however another difficulty I wanted to highlight. It seems that the skills listed above can typically be acquired only through successful collective agency, through acting *in concert* with others. So it turns out that Polish people are not good at cooperating, because they do not have the relevant competences. But do not have the relevant competences since they do not cooperate with one another.[34] The reasoning is obviously

[29] CZAPIŃSKI J., PANEK T. (ed.): Diagnoza społeczna 2015. Warunki i jakość życia Polaków. Warszawa : Rada Monitoringu Społecznego, 2015, p. 354.

[30] CZAPIŃSKI J., PANEK T. (ed.): Diagnoza społeczna 2015, op. cit., p. 340 – 341.

[31] SZTOMPKA P. Civilizational Incompetence: The Trap of Post-Communist Societies. In Zeitschrift für Soziologie. Vol. 22, Is. 2 (1993), p. 88.

[32] Ibid., p. 89.

[33] Ibid.

[34] This is a reiteration of the statement taken directly from the commentary on the results of social survey quoted above. The original passage goes as follows: "Polish people are not capable of organizing and acting effectively together unless it is about the strike or protest (…) They are not capable since they did not learn to do so from their meagre experience in that regard. They are not capable because they do not act together and they do not act together because they are not capable – this is the vicious circle of social engagement.". CZAPIŃSKI J., PANEK T. (ed.): Diagnoza społeczna 2015, op. cit., p. 348.

circular. Furthermore, there might be a good deal of truth about the mutually reinforcing lack of relevant skills and the lack of activity in organizations of the civil society. But we also do not learn from it how to break this vicious circle.[35]

Proceeding now to the issue of trust. There is indeed ample evidence that Polish people do not trust public institutions, especially the more directly involved these institutions are in political struggles and party interests. For instance, in a recent survey a majority of respondents declared that they trust local authorities, the President of Poland (the office symbolizes the country's splendor) and even public administration officials. At the same time most of them did not trust the government, both chambers of the Polish Parliament, courts, television and newspapers.[36] In the same survey 63% of respondents were distrustful towards political parties in general (not towards any particular party).[37] It is important to stress that although the results of the discussed survey might have been influenced by the events at the time when it was conducted, clear patterns of mistrust towards the political institutions have been confirmed time and again by other research as well.

Moreover, the problem is not limited to low level of trust towards public institutions. The results of research suggest that the same can be said about generalized (social) trust. In 2018 the number of Poles who agreed with a statement "Generally speaking, most people can be trusted" was 22%. Correspondingly, 76% of respondents declared that "It is better to be careful in relations with others".[38] For comparison, the number of those who agreed that "most people can be trusted" in all 3 countries (Denmark, Finland, Norway) which topped the European Social Survey 2014 in that regard was well over 60%.[39] As mentioned before, the low level of generalized social trust is characteristic for post-communist countries (with a notable exception of Estonia), although the results of European Social Survey 2014 suggest that both Czechs and Hungarians are a bit more trustful than Poles.[40] It is also worth mentioning that in 2018 the percentage of the Polish people who distrust strangers was the highest in the recorded history of the CBOS survey.[41]

It is a staple of sociological literature that the scarcity of trust in the Polish society is rooted in the period of communism and the habits of thought and action that it cultivated. Already in the 70s sociologist Stefan Nowak claimed that in Poland there was a sociological vacuum created by the lack of intermediary institutions between the level of primary groups and the level of national community.[42] As a result, individuals were socialized to act only for the benefit of family and close friends. Those outside this small circle were to be treated with suspicion as potential rivals in a competition for various scarce resources. It is not my goal here to contest that established interpretation, since I agree that it contains a lot of truth. Nevertheless, I wanted to argue that it overshadows

35 Sztompka's article is worth revisiting 25 years after its publication for various reasons, one of them being the authors suggestions how the civilizational incompetence could be (and arguably also will be) overcome. The desirable influence of processes such as globalization, technological progress and democratization in that regard is indeed hard to deny, but in hindsight also seems too optimistic. SZTOMPKA P. Civilizational Incompetence: The Trap of Post-Communist Societies, op. cit., p. 93 – 94.

36 CBOS. Komunikat z badań Nr 35/2018, O nieufności i zaufaniu, p. 7 – 8.

37 Ibid., p. 7.

38 Ibid., p. 1 – 2.

39 CZAPIŃSKI J., PANEK T. (ed.): Diagnoza społeczna 2015, op. cit., p. 352.

40 Ibid.

41 CBOS. Komunikat z badań Nr 35/2018, op. cit., p. 3.

42 DZWOŃCZYK J. Kapitał społeczny a rozwój społeczeństwa obywatelskiego w Polsce. In KRAUZ-MOZER B., BOROWIEC P. (ed.): Samotność idei? Społeczeństwo obywatelskie we współczesnym świecie. Kraków : Oficyna Wydawnicza AFM, 2007, p. 62.

other causes that could have contributed to the deficiencies of trust in the Polish society. Among the factors which are antithetical to the flourishing of trust in society one can list: anomie (normative disorder), instability of the social order, lack of transparency in the social organization (in the operations of institutions, associations, groups), strangeness and unfamiliarity of the social environment, lack of accountability and arbitrariness of individuals and institutions.[43] It is reasonable to assume that the social reality of Poland in the 90s, when the transformation of the political and economic system was most dramatic, could well have been characterized by at least some of these phenomena. Moreover, as Ferragina and Arrigioni argue: "[S]ocial capital does not seem to flourish when high inequalities persist in society".[44] In Poland, as a result of the economic reforms of the early 90 s the inequalities within society grew very quickly and exponentially. It is beyond the scope of this essay and beyond the competences of its author to establish how persistent those inequalities have proved to be. Yet, almost 30 years after the political and economic transformation was initiated it seems uncontroversial that while most social groups are materially much better off, certainly not all have benefited equally. Moreover, it is misleading to suggest that expectations of a substantial part of the Polish society that the state to promote a more substantial economic equality and welfare of citizens can be simply reduced to the pathological legacy of real socialism in Poland.[45] The caricature of *homo sovieticus* with a clientelist mentality, lack of resourcefulness and downward leveling tendencies becomes all too easily an ideological construct used in order to discredit perfectly legitimate expectations. There is nothing inherently contradictory in the notion that democracy should mean not only free elections, but also greater equality.

Moreover, the lamentable tone of many works on trust and social capital in Poland is perhaps somewhat unnecessary. Since it is possible to interpret the distrustfulness of the Polish society not as an evidence of the lack of social capital, but as a sign of its ample resources. It all turns on what kind of social capital is under consideration. Recall the Putnam's distinction between bridging (inclusive) and bonding (exclusive) social capital. The former encompasses relations between people from very different social backgrounds, while the latter is characteristic for relatively small, tight and homogenous groups. Sociological research confirms that Poles are most trustful towards family members and close friends. So it would seem perfectly reasonable to conclude that it is the bridging social capital that is scarce in the Polish society, while the bonding social capital is not at all lacking. One might obviously claim that the whole point of the argument right from the start was to stress that it is precisely the right, desirable kind of social capital that is missing in Poland. But is it really that obvious? Is bridging social capital indeed so indispensable? And if it is, are we really entitled to conclude, based on the quoted research on trust, that it is a scarce resource among Polish people? Firstly, the low level of trust might indeed adversely affect the quality of life and participation in public affairs, yet so far it does not seem to have hampered the economic development of the country. As sociologist Andrzej Rychard noted already some time ago, the relatively good performance of Polish economy over the years might falsify the hypothesis put forward by Fukuyama and Putnam that social capital in the form of trust is necessary for economic development and modernization. It might also be the case that sooner or later the lack of bridging social capital will "catch up" with

[43] SZTOMPKA P. Zaufanie: fundament społeczeństwa. Kraków : Wydawnictwo Znak, 2007, p. 276 – 281.

[44] FERRAGINA E., ARRIGIONI A. The Rise and Fall of Social Capital: Requiem for a Theory?, op. cit., p. 357 – 358. On the complex relations between social capital and economic inequalities described in the scientific literature see also: WOSIEK M.: Kapitał społeczny w kontekście nierówności ekonomicznych – wybrane aspekty teoretyczne, op. cit., p. 39 – 54.

[45] For an example of this see: DZWOŃCZYK J. Kapitał społeczny a rozwój społeczeństwa obywatelskiego w Polsce, op. cit., p. 72, 75 – 76.

Polish economy and limit the possibilities of further development. None of these possibilities is to be easily discarded. Yet, there is also a third option, that there are some hidden resources of social capital in the Polish society, or substitutes of it, which are not easily detectable in standard social research.[46] Rychard claims that those hidden resources can perhaps be located not only in pathological relations (like corruption), but also in informal, but not pathological, networks and procedures which contribute to the integration of the society.[47]

4 CONCLUSION

Over the course of this paper I tried to show that the concept of social capital is burdened with some considerable limitations. I do not claim that the difficulties I mentioned must prove fatal for the concept itself and for the theories employing it. Nor do I want to diminish the value of majority of research conducted by scholars worldwide which is related to social capital. My goal was simply to caution against the dangers underlying following the fashionable trend. In my view key among these are: the vagueness of the concept which invites circularity in reasoning and its propensity to serve the expression of normative and political convictions of its users. I used the example of how social capital frequently features in explanation of the unwillingness of the Poles to participate in the public life in order to highlight these points. While Polish people are indeed not very active in public matters, this does not in itself mean that social capital of the society is low (unless one makes it so by definition), nor is it obvious that its deficiencies are to be located in the remains of the socialist mentality. Insofar as other possible explanations are obscured by the ones including social capital, a particular caution is advised.

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[46] RYCHARD A. Kapitał społeczny a instytucje. Wstępne rozważania. In DOMAŃSKI H., OSTROWSKA A., SZTABIŃSKI P. B. (ed.): W środku Europy? Wyniki Europejskiego Sondażu Społecznego. Warszawa : Wydawnictwo IFiS PAN, 2006, p. 212 – 213.

[47] Ibid., p. 214.

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ARTICLES

IMPEDIMENTS TO PUBLIC CONSULTATIONS IN THE POLISH LOCAL SELF-GOVERNMENT

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Abstract: The aim of this paper is a comparative analysis of legislative solutions and practical application of the public consultations in the Polish local government after 1989. The legal changes that occurred during this period have guaranteed Polish citizens the tool to direct exercising the political power. Unfortunately, the lack of legislative precision in the use of mechanisms of civic participation in Poland is characteristic of public consultation. Despite the fact that this solution has been used by public administration since the political-system transformation and the passing of the Act on Gmina Self-Government of 1990, and that in 1997 the consultations as a form of the exercise of power by the citizens were also established in the Constitution, for the first two decades there was a fairly great freedom of interpretation in holding them, which the local self-government authorities widely used. Positive changes in the practice of using the mechanisms of public consultation in Poland, including the formulation of the widely accepted set of guidelines and practical advice concerning the manner of implementing these mechanisms, began to take place only in the last four to five years. Main thesis of the paper is the opinion that public consultations in the example of the Polish self-government despite nearly three decades of legislative and political experiences are still not an effective tool of direct democracy, but only a bureaucratic facade.

Key words: public consultations, self-government in Poland, direct democracy

1 INTRODUCTION

The purpose of this paper is to attempt to answer the question of the scope of legislative solutions and practical application of the public consultations in the Polish local self-government after 1989. The legal changes that occurred during last three decades have guaranteed Polish citizens an instrument to direct exercising the political power. Unfortunately, one of characteristics of Polish public consultation is the lack of legislative precision in the aspect of applying mechanisms of civic participation. Despite the fact that this legal solution has been used by public administration since the political-system transformation, there is a fairly great freedom of interpretation in applying them. This freedom is extensively used by local self-government authorities. Positive changes in the practice of using the mechanisms of public consultation in Poland, including the formulation of the widely accepted set of guidelines and practical advice concerning the manner of implementing these mechanisms, began to take place only in the last five years. Main thesis of the presentation is the opinion that public consultations in Polish self-government despite nearly three decades of legislative and political experiences are still not an effective tool of direct democracy rather a bureaucratic facade.

The concept of the public consultations is understood in the paper as an instrument of engaging citizens in decision-making and thus as a form of at least indirect governance in the state, both at the

government and local self-government level. It is important to remember that public consultation is a coordinated and rule-based procedure. The conviction that (1) consultations should be conducted in the spirit of civil dialogue and mutual understanding; (2) information about their purposes, rules or progression must be publicly available; and 3) anyone interested in the topic can express their own opinion and receive answers to their doubts within a reasonable time, are the standards of a democratic state of law. However, not every authority using this instrument attempts to remember that public consultations should be conducted both on the basis of clear rules, and that their organizers, though entitled to express their views, should organize the procedure for the public interest and general good in a broader sense[1].

2 LEGAL FOUNDATIONS FOR PUBLIC CONSULTATION IN POLISH LOCAL SELF-GOVERNMENT

One of the most visible features of the Polish legal system in the context of public consultation procedure is the lack of direct regulation of the latter. The procedure was not directly legislated in the current Constitution of Poland adopted on 2 April 1997. There is even no comprehensive act of law on this issue. This procedure indirectly derives from a number of general constitutional principles including: (a) rule of law principle that "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice" (article 2); (b) popular sovereignty principle that "Supreme power in the Republic of Poland shall be vested in the Nation" (article 4); (c) the principle of social dialogue as the foundation of various forms and methods of cooperation between administration and social partners (Preamble); and (d) the principle of subsidiarity as an element ensuring citizens' priority in solving social problems (Preamble), which is especially important from the local self-government point of view. The supporters of public consultations also refer to the fragments of the constitution defining elementary rules of access to information on the activity of public authorities, in particular to article 54 according to which "The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone" as well as to article 61 that "1. A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury. 2. The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings"[2].

Before accepting the constitution, the public consultation procedure was the subject of a law adopted by the communist authorities in 1987. The Act on public consultation and referendum was in force during the systemic transformation in Poland and was finally repealed in 1995. Pursuant to the provisions of the Act, public consultations were allowed to be organized in order to consult the

[1] MAKOWSKI, G. Konsultacje publiczne – uregulowania prawne a praktyka. In Infos. Zagadnienia społeczno-gospodarcze. Vol. 20 (2014), p. 1 – 4.

[2] The Constitution of the Republic of Poland of 2nd April 1997. Law No. 78, Item 483 (1997).

society on "matters of crucial importance for the development of a country, a specific area or interests and conditions" (article 1). The Act has been so far the only legal enactment in Polish legislation, which set out detailed rules for conducting public consultations, including: the form of initiating consultations, the scope of responsibility for their reliability or the principles of substantive supervision over consultations[3]. Therefore, many rules related to the practice of conducting consultations have remained in common use even after the Act was repealed.

The direct legal basis for conducting public consultations in Poland is included in three local self-government laws: (1) The Act on Commune Self-Government (2) The Act on County Self-Government (3) The Act on Voivodship Self-Government. In each of the laws there are almost identical provisions on public consultations, referring to particular levels of the Polish self-government: *gmina* (commune), *powiat* (county), *województwo* (voivodship). Under these legal acts, public consultations can be carried out in two cases: (a) in matters provided by law (obligatory); and (b) in other matters important to the local self-government (facultative). In the case of principles and detailed procedure of conducting consultations, the legislator secured freedom for local authorities, making self-government legislative bodies responsible for determining these bases. They have to specify, among others: formal requirements that public consultation projects should fulfill; the rules for the assessment of notified projects in terms of compliance with law, technical feasibility or formal requirements; the rules on voting and determination of results; as well as the rules for making the results public, taking into account that the voting principles must ensure equality and directness of the vote[4].

In the case of the Lubelskie Voivodship, the fundamental document defining the framework for conducting public consultations is the annual *Local Self-Government Program of Cooperation with Non-Governmental Organizations and Other Entities Carrying Out Public Benefit Activities*. Chapter 12 of the programme details the scope of consultative competences available to non-governmental organizations. Public benefit entities may, inter alia:

1. express opinions on matters concerning the functioning of non-governmental organizations;
2. apply to local authorities with proposals for legal solutions regarding the participation of the non-governmental sector in the processes of consulting local self-government tasks;
3. apply to local self-government authorities with proposals for legal solutions regarding the procedures for implementing commissioned local self-government tasks;
4. create and consult strategic programmes;
5. express opinions on draft local law acts;
6. notify any planned activities to each other;
7. participate in the development of the project of the Local Self-Government Cooperation Programme[5].

Usually, local self-government is the party which initiates such public consultations, however this can be done on the request of the either side. The consultative procedure is most often carried

[3] The Act on Public Consultation and Referendum of 6th May 1987. Law No. 14, Item 83 (1987).

[4] The Act on Commune Self-Government of 8th March 1990. Law No. 16, Item 95 (1990), article 5a. The Act on County Self-Government of 5th June 1998. Law No. 91, Item 578 (1998), article 3d. The Act on Voivodship Self-Government of 5th June 1998. Law No. 91, Item 576 (1998), article 10a.

[5] Resolution on 'Lubelskie Voivodship Local Self-Government Program of Cooperation with Non-Governmental Organizations and Other Entities Carrying Out Public Benefit Activities in 2018' of 7th December 2017. Law Item 4906 (2017), article 14.

out in very specific situations specified by law. Polish legislation allows public consultations on the following issues:

1. Creation of annual as well as long-term cooperation programmes with public benefit organizations by self-government authorities[6].
2. Formulation of spatial layout plans as well as studies of conditions and directions for development planning[7].
3. Creation of projects for the development strategy of Local Self-Government Units[8].
4. Implementation of investments affecting the environment[9].
5. Making changes in the boundaries of local self-government units[10].
6. Formulation of strategies for solving social problems[11].

In the Polish legislative and political practice the citizens may take part in public consultations in two ways: directly or by the medium of their representative bodies. It is worth noting here that it is quite common practice for the Polish local self-government to carry out simultaneous public consultations in both ways. The first way is understood as a general consultation. The procedure for conducting such consultation begins with the publication of the draft regulations as well as the summary of their impact assessment on official local self-government website. Residents of the local self-government unit have the right to submit comments to the regulation. Such a notification can be made via e-mail, post or directly at the office within a specified period of time, which is usually 14 or 21 days. The department accountable for proposed regulation is required to consider any comments and corrections. A final report is prepared from the consultation. The document contains information on the following: time and place of the procedure; number of submitted comments; characteristics of the proposed changes; as well as the justification for accepting or rejecting such changes by the applicant of new regulations. The final report is submitted to the authorities of the local self-government unit by the accountable department, and after its approval it is made public via the official website.

The basis for the second method of conducting public consultations in the Polish local self-government is the idea of creating joint official bodies in which representatives of non-governmental organizations and representatives of local self-government administration cooperate with each other. Such bodies operate with local self-government permanently or for the duration of a specific task, and their main task is to give opinions on new regulations for the needs of the local self-government administration. The inclusion of the so-called 'social factor' – representatives of non-governmental organizations in the official structure has to ensure the permanent presence of a citizens voice in the activities of local self-government authorities. From the perspective of the voivodship self-government the most important representative bodies are The Voivodship Social Dialogue Council (*Wojewódzka Rada Dialogu Społecznego*) and The Voivodship Council for Public Benefit Work (*Wojewódzka Rada Działalności Pożytku Publicznego*).

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6 The Act on Public Benefit and Volunteer Work of 24th April 2003. Law No. 96, Item 873 (2003), article 5a.

7 The Act on Spatial Planning and Land Development of 27th March 2003. Law No. 80, Item 717 (2003), article 49f.

8 The Act on the Principles of Conducting Development Policy of 6th December 2006. Law No. 227, Item 1658 (2006), article 6.

9 The Act on Sharing Information about the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments of 3rd October 2008. Law No.199, Item 1227 (2008), articles 110, 115.

10 The Act on Commune Self-Government of 8th March 1990. Law No. 16, Item 95 (1990), article 4a. The Act on County Self-Government of 5th June 1998. Law No. 91, Item 578 (1998), article 3a.

11 The Act on Social Assistance of 12th March 2004. Law No. 64, Item 593 (2004), articles 19, 21.

The Voivodship Social Dialogue Councils are institutions intended for cooperation between employees, employers, local self-government and government representatives appointed on the basis of the Act on the Social Dialogue Council and other institutions of social dialogue of 24 July 2015. The most important tasks of such Councils are: (1) negotiating social and economic issues causing conflicts between employees and employers; (2) expressing opinions and positions on matters within the scope of tasks of trade unions or employers' organizations; (3) expressing opinions on voivodship development strategy projects and other programmes within the scope of tasks of trade unions and employers' organizations. In the case of the Voivodship Social Dialogue Council operating in the Lublin Voivodship, the institution was established by the Marshal (the Head of the Local Self-Government Executive) in December 2015. It consists of 30 people. The chairmanship of the Council has a rotational nature. In the first term of office (2016), the employee's representative was the Chairman; in the second (2017) – a representative of local self-government. In the current third term of office (2018), the function of the Chairman is represented by employers, and in 2019 a representative of the Polish government will take it over[12].

The Voivodship Councils for Public Benefit Work are consultative, advisory and auxiliary institutions of self-government authorities. They are created on the basis of the Act on Public Benefit and Volunteer Work of 24 April 2003. On the joint request of at least 50 non-governmental organizations the Marshal of the Voivodship may establish the institution. The Council is composed of: a representative of the Voivode (Province Governor, representative of the Polish government), representatives of the local self-government executive (The Management Board of the Lubelskie Region) and legislative (The Voivodship Council), as well as the representatives of non-governmental organizations. At the same time, the representatives of non-governmental organizations that operate locally, form at least one half of the Council. The non-governmental organizations included in the Council must also have the status of a 'public benefit organization', so they do not run a business and have been active in legally defined 'public benefit work areas' for at least two years. The tasks of the Council should include in particular "(1) issuing opinion on matters pertaining to the activity of non-governmental organizations, including cooperation programmes with non-governmental organizations; (2) issuing opinion on draft resolutions and draft acts of local law on public tasks; (3) offering assistance and issuing opinions in case of any dispute between public administration authorities and non-governmental organizations; (4) issuing opinion on matters concerning public tasks, on the process of commissioning such tasks to be performed by non-governmental organizations and on recommended public task performance standards; (5) issuing opinion on the projects of the development strategy for the voivodship." Debates of the Voivodship Council take place during meetings and the term of office of a Voivodship Council is three years[13].

3 PRACTICAL ASPECTS OF PUBLIC CONSULTATION IN POLISH LOCAL SELF-GOVERNMENT

The lack of legislative precision in the application of mechanisms of civic participation in Poland was expressed by the authors of the report as part of the *Study on the Effectiveness of Mechanisms*

[12] The Act on the Social Dialogue Council and other institutions of social dialogue of 24th July 2015. Law Item 1240 (2015).
[13] The Act on Public Benefit and Volunteer Work of 24th April 2003. Law No. 96, Item 873 (2003), articles 41a, 41 b, 41c.

for Public Consultation. The document was commissioned in 2010 by the Ministry of Labor and Social Policy and analyzed the practices carried out at the central (government) and local (voivodship, county, commune) levels. The authors have formulated several dozen remarks pertaining to the quality of public consultations conducted in Poland. The conclusions regarding the quality of public consultations at the voivodship level were as follows:

1. Public consultations at the regional level are carried out mainly by Marshal Offices, much less frequently by Province Governor's Offices
2. There is no uniform mechanism for conducting public consultations in the offices.
3. Public consultations are usually treated as an obligation resulting from legal regulations rather than as a form of building permanent structures of cooperation with citizens. The effect of such an approach may be façade management that has no impact on the decision-making process.
4. The consultations are usually conducted in cases in which directly required by law. Cases of 'spontaneous' consultations are rare.
5. There is relatively high awareness of the role of civil dialogue in making decisions about public matters, often accompanied by positive attitude towards social consultations, which does not reflect into specific actions.
6. There are preferences for passive ways of seeking opinions, consisting in the placing of information on consultations exclusively on the websites of the Bulletin of Public Information and on the notice boards in the offices, and in waiting for comments[14].

The chairman of the Voivodship Councils for Public Benefit Work of the Lubelskie Voivodship Ms. Małgorzata Gromadzka agrees with the above remarks. According to her opinion, the fundamental problem of public consultations in the local self-government is the lack of mutual will to carry them out. The little innovative nature of the procedure discourages citizens from becoming involved in it. Basing consultations only on questionnaires without the opportunity to meet face-to-face bores citizens and strengthens them in the belief that their opinion has no real impact on the legislative process. On the other hand, self-government administration is equally skeptical about consultations, treating them as a necessity extending the legislative process. Therefore, information about public consultations is popularized in an insufficient manner only through the website or bulletin board at the office[15].

Furthermore, the analysis of the quality of public consultations conducted at the county and commune levels (*powiat* and *gmina*) showed that citizens are interested in consultations, especially regarding regulations affecting their own lives, but they cannot refer these procedures to the overly technical language of various types of documents or strategies. Moreover, the vast majority of offices at these levels do not have a dedicated organizational unit that conducts public consultations. Such entity is only present in 6% of counties and 8% of communes. Consultations are more often organized in urban communes than in rural ones. Dedicated organizational units that conducts public consultations exist in 43% of the former and 7% of the latter[16]. The distinctive popularity of public consultations in urban communes is most likely the result of growing interest in the participatory budget, which according to Polish law is treated as a 'special form of public consultation'[17].

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[14] CELIŃSKI, A. et al. Wyimki z raportu końcowego badania efektywności mechanizmów konsultacji społecznych. Warszawa: Pracownia Badań i Innowacji Społecznych Stocznia, 2011, p. 10 – 11 [hereafter as CELIŃSKI (2011a)].

[15] The interview with Ms. Małgorzata Gromadzka held in Lublin on May 18, 2018. Author's own archive.

[16] CELIŃSKI (2011a) ibid., p. 11.

[17] The Act on County Self-Government of 5th June 1998. Law No. 91, Item 578 (1998), article 3d, The Act on Voivodship Self-Government of 5th June 1998. Law No. 91, Item 576 (1998), article 10a.

On the basis of questionnaire surveys conducted in commune and county offices, the authors of the report also concluded that in the case of over one third of local self-governments the practice of the use of public consultation was considered only as a troublesome necessity. When asked about the number of consultation procedures carried out by a given unit during the last two years, 37% of local self-government units admitted that the number was from one to three procedures. A comparable percent (34%) said the number of conducted consultations ranged between four and ten procedures. Only 15% of local self-governments admitted that they had conducted eleven or more public consultations in the last 24 months while at the same time almost the same percent of the offices surveyed (14%) were entirely unable to give the number of conducted consultations. A detailed analysis of the results showed as well that the most popular forms of inquiry in public consultations are 'the most traditional ones' as submitting written applications by post, reporting verbally to the official during the office's working hours and submitting written applications directly to the office[18].

	Never	**Rarely**	**Half of the cases**	**Often**	**Always**	**I do not know**
Submitting written applications by traditional mail or by fax	4%	5%	9%	14%	65%	3%
Submitting applications by e-mail	13%	10%	11%	12%	50%	4%
Submitting applications via internet forums, chats and other forms of electronic communication	59%	8%	6%	8%	16%	4%
Individual meetings with interested persons and institutions	13%	11%	15%	21%	35%	5%
Reporting verbally to the official during the office's working hours	10%	9%	10%	12%	53%	6%
Submitting written applications directly to the office	3%	5%	8%	11%	70%	4%
Submitting phone applications directly to the official	27%	12%	10%	12%	34%	5%
Filing the application by phone via the hotline	75%	5%	4%	4%	9%	3%

[18] CELIŃSKI, A. et al. Raport końcowy z badań efektywności mechanizmów konsultacji społecznych. Warszawa: Pracownia Badań i Innowacji Społecznych Stocznia, 2011, p. 117 – 118, 128 [hereafter as CELIŃSKI (2011 b)].

	Never	Rarely	Half of the cases	Often	Always	I do not know
Open meetings and conferences	12%	11%	21%	22%	30%	3%
Meetings of working groups	13%	12%	19%	21%	30%	4%
Gathering information in informal everyday contacts with representatives of interested institutions	27%	13%	15%	14%	24%	7%
Consultation through a permanent consultative / advisory body	48%	10%	9%	10%	15%	8%
Other forms	83%	3%	1%	1%	1%	11%

Chart 1: The use of various forms of inquiry in public consultations in Poland[19]

Positive changes in the practice of applying the mechanisms of public consultation in Poland began to take place only in the last years. A few main directions of these changes can be indicated. The first one is the efforts carried out jointly by scientists and local government officials to improve the quality of social consultations through their more careful and detailed preparation. An example of such activities is the scientific project *New Perspectives for Dialogue: A Model of Deliberation and ICT Tools for Social Inclusion in Decision-making Processes* conducted between the years 2014–2017 by the University of Warsaw; the Warsaw University of Technology; the Association of Polish Cities; the Foundation of Free and Open Software and the Polish Forum of Disabled People. The aim of the project was to develop a model of social dialogue and innovative IT tools that will enable its implementation. However, the practical effect of the actions was to propose specific services and develop procedures related to the public consultation process, as well as the creation of new products, including an online platform enabling social dialogue and consultations via internet. So-called 'the inDialogue application' has been used successfully in 2017 in pilot studies in ten municipalities in different regions of Poland, including: Olsztyn, Brwinów, Mińsk Mazowiecki, Krosno, Słupsk and Toruń[20]. The proposed application has gathered a number of positive opinions both among representatives of non-governmental organizations and the international scientific community. Reviewing the project Stephen Coleman, Professor of Political communication at the University of Leeds called inDialogue "a tool that can be used by local administrations in Poland and beyond"[21].

The second positive change is an effort undertaken by the Polish government focused on the formulation of the widely accepted set of guidelines and practical advice concerning the manner of

[19] CELIŃSKI (2011 b) ibid., p. 128.

[20] PRZYBYLSKA, A. inDialogue software for the good quality of public consultations. The model for action. In The project inDialogue website, 2017, p. 1 – 2 [online]. Available at <http://wdialogu.uw.edu.pl>. [q. 2018-09-20].

[21] COLEMAN, S. In Dialogue – Some observations on a new platform for local government online consultations. In The project inDialogue website, 2015 [online]. Available at <http://wdialogu.uw.edu.pl>. [q. 2018-09-20].

implementing the mechanisms of public consultation. One of the most significant actions improved the quality of public consultations in the Polish local self-government was taken by The Chancellery of the President of Poland. The office prepared in late 2013 so-called *Canon of Local Public Consultations*. Although the canon has not been laid down in the legislation, it is a commonly accepted practice, defining inter alia seven cardinal principles of public consultation, which would be a guideline for the offices in the use of the procedure. The document embraces the requirement of planning public consultations in the spirit of:

1. Good faith i.e. agreement, the will to accept different arguments, and dialogue between the parties.
2. Universality, according to which every citizen should be provided with information about consultations and have an opportunity to express his/her opinion in them.
3. Transparency consisting in universal access to the goals, rules, course and results of consultations.
4. Responsiveness, under which local self-government offices are obliged to give a factual answer to everyone submitting an opinion.
5. Coordination, which specifies the administratively empowered 'host'-manager responsible for consultations in organizational and political terms.
6. Predictability, according to which local self-government offices are under the obligation to conduct consultations in a planned way from the beginning of the legislative process.
7. Respect for general interest, which obliges both officials and consultation participants to act in the spirit of public interest[22].

The last but not least positive change in the practice of applying the mechanisms of public consultation is the spread of the idea of establishing permanent consultative and advisory bodies in the public administration units. A good example of such are the Councils for Public Benefit Work, mentioned above. They have been established with all sixteen Marshal Offices in Poland as well as at the central level as a consultative-advisory agency of the Minister of Family, Labor, and Social Policy. The role of these bodies in local self-government increases gradually. In 2017, the Voivodship Council for Public Benefit Work of the Lubelskie Voivodship issued binding opinions in the case of 17 acts of local law. In 2018, a similar number of cases (16) were already approved by the Council in the first half-year, which allows us to observe the growing importance of this body In the cases of counties and communes it is only in recent years that there has been an observable heightened interest in this form of public consultation. The leading role is still played by urban units, which, already in 2011, set up local Councils of Public Benefit Work three times as often as rural ones. The structures of urban counties and communes also more often contained other consultative bodies. In the foregoing year, two thirds of urban counties had such a solution in their structure, twice as often as rural counties and three times as often as communes did[23].

[22] Siedem zasad konsultacji społecznych. In Kanon Lokalnych Konsultacji Społecznych [online]. Available at <http://www.kanonkonsultacji.pl>. [q. 2018-09-21].

[23] CELIŃSKI (2011 b) ibid., p. 81 – 82.

4 CONCLUSION

Undoubtedly, the fundamental sign of positive changes in the practice of using the mechanisms of public consultation in Polish local self-government is the growing popularity of the participatory budgeting as well. In 2011 this procedure was conducted for the first time in Poland by city authorities of Sopot, which allowed residents to distribute the amount of 7 million PLN. Five years later, similar solution was adopted by 58 local self-governments and the total value of funds which had to be distributed within amounted to 318.5 million PLN[24]. The numerical data shows exquisitely that public consultations are still a socially desirable instrument in local self-government, because citizens want to have a real impact on political decisions that shape their lives. They only need effective solutions for this. Examples of the inDialogue application, the Council for Public Benefit Work as well as the participatory budgeting show the necessity of constant work on new forms of citizens' involvement in public sphere. Therefore, the potential for such 'public consultation' requires not only the involvement of citizens, but also the support of the government, local self-governments as well as the political elite, because the social enthusiasm can only be absorbed within a clearly and precisely defined legal and political framework.

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[24] KRASZEWSKI, D., MOJKOWSKI, K. Budżet obywatelski w Polsce. Warszawa: Fundacja im. Stefana Batorego, 2014, p. 4 – 5. Budżety 2016. In Fundacja Instytut Myśli Innowacyjnej [online] <http://budzetyobywatelskie.pl/>. [q. 2018-09-21].

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SEPARATION OF POWERS ACCORDING TO THE NEW AMENDMENTS TO THE CONSTITUTION OF GEORGIA – PROBLEMS AND PROSPECTS

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Abstract: The article looks at the last amendments to the Constitution of Georgia. By this amendments Georgia moves into parliamentary system. However, there are some questions: Does this system comply with European standards of parliamentary system? How will this system work in Georgia? Is a parliamentary system ideal model for Post-Soviet countries and particularly for Georgia? The article is divided into two parts: The first part looks at the new redaction of the Constitution of Georgia and the new system of governance which will be established by this constitutional changes. By analysis the author comes to the conclusion that new amendments to the constitution will serve as a guarantee of a long-standing stay in the government for the ruling political party; In the second part of the article the author discusses the negative aspects of a parliamentary system in general. Here main question is "how will the Parliament control the executive branch and its leader who is the head of the ruling party and the parliamentary majority, as well? It may be vice versa." In The author' opinion one of the ways for a parliamentary system is to elect a non-party president through a universal suffrage.

Key words: Constitution of Georgia, amendments, elections, parliamentary system, parliament, government, Prime Minister, Vote of No Confidence.

1 INTRODUCTION

In 2017 and 2018 Parliament of Georgia made substantial amendments to the constitution of Georgia. As a result, the Constitution has changed both in terms of technique and content. The government of Georgia often mentions that providing these Constitutional amendments helps the country to move to the European Parliamentary State System – considered to be the most democratic model.

In this paper Iwill be discussed the veracity of these words concerning the Separation of Powers. First, we should find out the essence of the amendments to the Georgian Constitution and the compliance of it with European standards. Then we will turn to a broader discussion of merits and perils of the Parliamentary System and whether it represents an ideal model.

2 ELECTIONS WITH REGARD TO CONSTITUTIONAL AMENDMENTS

It is not arguable that the basis for any republican and democratic state is elections. "Regular and genuine elections remain the primary institutional mechanism through which rulers are made ac-

countable to those in whose name they exercise political power… It is difficult to envision modern democracy without meaningful elections."[1]

In this paper, I will mainly discuss the changes in electoral rules and the alleged consequences of them in respect to the principles of Separation of Powers.

First it should be emphasized that after constitutional amendments enter into force there will be some transitional period until 2024; however, the Parliamentary System will be fully enacted from 2024 onwards, as announced by the government.

Let's see what the transitional changes include. According to the new redaction[2] of the constitution:[3]

1. In 2018 the president was elected by universal suffrage. A new rule of the presidential election will be enacted from 2024, when the powers of the President elected by universal suffrage will expire.[4]
2. As before, the political parties and the unities of political parties – electoral blocks will be able to participate in a proportional voting system election.[5]
3. For 2020 the election threshold will be reduced one-time-only from 5% down to 3%.[6]
4. Finally and most importantly, the current electoral model will remain in force for the 2020 parliamentary elections. According to the model 77 members of parliament will be elected by the proportional voting system and 73 members – by the majoritarian voting system.[7]

It is worth mentioning that the majoritarian voting system in Georgia has always benefited the ruling party. An illustrative example of which is the current Parliament of Georgia:

In the 2016 parliamentary elections the ruling party received 856 638 votes out oftotal 3 513 884 registered voters that is 24.37% of the total number of electorate. Accordingly, by the proportional voting system the ruling party received 44 seats in the Parliament, but by the majoritarian voting system the party received additional 71 seats from 73.[8] Moreover, although the governing party did not win the other 2 seats, these seats were taken by the satellite subjects of the elections.

It is a proven fact that one of these two "independent" majoritarians – Salome Zourabichvili (current President of Georgia) has put herself as presidential candidate in the presidential elections in 2018 and the ruling party decided to support her. Therefore, the ruling party has refused to have a presidential candidate from its members and fully supported (including financial) to this "independent" candidate. Moreover, even the legislative amendments were made to the Election Code of Georgia for Salome Zurabishvili. It is clear that in the conditions of the given electoral system, talking about independent majoritarians is unnecessary.

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1 ROSENFELD, M., SAJO, A. (ed.): The Oxford Handbook of Comparative Constitutional Law. Oxford : Oxford University Press, 2012, p. 529.

2 In this paper "new redaction" means current text of the Constitution of Georgia (1995) including constitutional amendments of 23 March 2018, but "old redaction" means the text of the Constitution including constitutional amendments of 04 October 2013.

3 The official text of the Constitution of Georgia you can found here: https://matsne.gov.ge/en/document/view/30346?publication=35

4 Constitution of Georgia, article 50, para. 3.

5 Constitutional Law of Georgia "About Amendment to the Constitution of Georgia" of 23 March 2018. Article 1, para. 2, available at: https://matsne.gov.ge/ka/document/view/4110673?publication=0.

6 Ibid., article 1, para. 2.

7 Ibid., article 1, para. 2.

8 Summary Protocol of the Central Election Commission of Georgia on the Final Results of 8 October 2016 Parliamentary Elections of Georgia. Tbilisi, 16 November 2016, available at: http://cesko.ge/res/docs/shemajamebelieng.pdf.

Here may appear a simple question: Why is it happening that, in all majoritarian electoral districts the candidates of the ruling party are always winning the elections? To some extent, this question includes the answer: because they are the favorites of the ruling party, which means that they use the ruling party's resources. In particular, during their election campaign they are supported by local municipalities, representatives of law enforcement agencies and party assets. There are also big financial resources that the existing ruling party has. It is also important for the election administration in which the ruling party always has the majority.

Thus, the fact is that the ruling party, which in the parliamentary elections in 2016 collected 24.37% of electorate, obtained more than 76% of mandates in the parliament, which means that it received constitutional majority.[9]

Despite the demands of Venice Commission, the political spectrum of Georgia, the society and the promise of the ruling party of Georgia, that the majoritarian voting system will be abolished for the 2020 parliamentary elections, the government doesn't make concessions.

From this perspective it is clear that lowering of the threshold from 5% to 3% does not have any meaning. At first glance, it may be considered as a positive phenomenon, as it provides a broad spectrum of political parties in the legislative body of Georgia, but if you look at it well, it is more contrary. The point is that, as already noted above, by 2020, the majoritarian electoral system will remain, which ensures the preservation of the parliamentary majority for ruling party. That is, the ruling party is supposedly guaranteed by the parliamentary majority for 2020. In this case, the threshold of the election threshold will only increase between 5 to 3 percent between the opposition parties. Thus, it is only favorable for the ruling party.

Therefore, by keeping the majoritarian voting system, the Georgian governing party has guaranteed the parliamentary majority up to 2024.

As it has been announced, from 2024 onwards the country should fully adopt the parliamentary model. Let us now consider Constitution changes in this regard:

1. The majoritarian electoral system will be abolished in the parliamentary elections and the Parliament will be composed only of the members elected by the proportional voting system;[10]

2. However, it seems that, as a counterweight, the unities of political parties – electoral blocks will not be able to participate in the parliamentary elections,[11] and the election threshold will again rise up to 5%.[12] That is, when the country passes on a parliamentary model, which should be based on political parties and coalitions of the parties, instead of strengthening political parties, the changes serve to weaken them.

In addition, it once again confirms the above-mentioned opinion on the reduction of the electoral threshold from 5% to 3% by 2020. If the changeswere aimed at increasing the political pluralism in the Parliament of Georgia, then the threshold would remain within 3% for the next elections, but it is not so. From 2024 by the moving to the full proportional electoral system, when the ruling party will no longer have bonus at the expense of majoritarian electoral system, the reduced election threshold will have a negative impact for the party. That is why the election threshold will be increased up to 5% since 2024.

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9 Summary Protocol of the Central Election Commission of Georgia on the Final Results of 8 October 2016 Parliamentary Elections of Georgia. Tbilisi, 16 November 2016, available at: http://cesko.ge/res/docs/shemajamebelieng.pdf.

10 Constitution of Georgia, article 37, para. 2.

11 Ibid., article 37, para. 5.

12 Ibid., article 37, para. 6.

So even the given changes also serve the ruling party in power after 2024.

3. From 2024 onwards the President of Georgia will not be elected through universal and equal elections, but will be elected by the Board of Elections consisting of 300 electors. The rule for the board composition raises the doubt that the board will be overrepresented by the members of the ruling party.[13]

According to the paragraph 3 of article 50 (Procedures for electing the President of Georgia) "The Electoral College shall consist of 300 members, and shall include all members of the Parliament of Georgia and of the supreme representative bodies of the Autonomous Republics of Abkhazia and Ajara. Other members of the Electoral College shall be nominated by the respective political parties from among the representative bodies of local self-governments on the basis of quotas defined by the Central Election Commission of Georgia in accordance with the organic law. The quotas are defined in compliance with the principle of proportional geographical representation and in accordance with the results of the elections of local self-governments held under the proportional system. The composition of the Electoral College shall be approved by the Central Election Commission of Georgia."

Here the main issue is that the Electoral College, which should elect the President of Georgia, will consist of the representatives of the Parliament of Georgia, supreme representative bodies of Autonomous Republics of Abkhazia and Ajara and local self-government bodies. Same time, the Parliament of Georgia and the supreme representative bodies of the Autonomous Republics of Abkhazia and Ajara will be represented in the Electoral College.

The latest history of Georgia shows us that, with a rare exception, everywhere in the local self-governing representative bodies (Sakrebulo) majority belongs to the government party. An example of this is the current situation: After local self-government election on October 2017 from 64 local self-governing representative bodies – Sakrebulo (including Sakrebulo of capital Tbilisi) the ruling party do not have majority only in Borjomi Sakrebulo.

The same applies to the Supreme Council of the Autonomous Republic of Ajara, where the majority always belongs to the ruling party. As for the representative body of the Autonomous Republic of Abkhazia, the legitimate authority was expulsed of from this territory in early 1990-ss. From this time, the representative body of the Autonomous Republic of Abkhazia elections have not been held yet and have not been renewed. As recent history and current situation show, existing members of the representative body of the Autonomous Republic of Abkhazia, as a rule, are not distinguished with any government confrontation.

The submitted statistics show us that the Electoral College, which should elect the President of Georgia from 2024, will be consist of the majority of the ruling party.

Therefore, the President of Georgia will be elected by the ruling party

Note that the main reason why the rule of presidential elections should be changed in Georgia is that the previous president often created some discomfort to the governing party. Although in 2013 he was nominated as a presidential candidate by the ruling party, he took a relatively neutral position after being elected: disagreeing on some issues with the ruling majority and vetoing several bills. Thus, in my opinion, when the President realized that he would not be elected by people OR by any particular party, he started to act as an independent government branch – as the Head of the

[13] Ibid., article 50, para. 3.

State. Thanks to the recent constitutional amendments, the ruling party will no longer experience a trouble from the President starting from 2024.

4. Parliament will continue to elect the government under the leadership of the Prime Minister, but this will be done by the reduction of the controlling function of the Parliament of Georgia and, in general, the background of strengthening the government, especially of the prime minister's figure:

a) Article 811 paragraph one of the old redaction of the Constitution of Georgia set out: "After Parliament gives a vote of confidence in the Government and the Government Programme, if the initial composition of the Government is renewed by one third but not less than 5 members of the Government, the President of Georgia shall present a composition of the Government to Parliament for giving a vote of confidence within one week."[14] According to the new redaction of the Constitution similar obligation does not exist, which means that the Prime Minister can totally change the composition of the Government practically on the next day after receiving a confidence from Parliament. In such a case, it is unclear what is the reason of a Parliament's vote of confidence in the Government if the Prime Minister can totally change its composition without Parliament? It degrades status of the supreme legislative body;
b) In accordance with article 93, paragraph 41 of the old redaction of the Constitution of Georgia, "If Parliament fails to adopt State Budget within two months after the beginning of a new budget year, this shall be regarded as raising a question of giving a vote of no confidence." By the last amendments of the Constitution, this rule is abolished and the government is no longer responsible for failure State Budget draft;
c) Regarding the State Budget, it is important to know that Parliament will not have the right to make any amendment to the budget draft without the consent of the government. Article 66, Paragraph 3 of the new redaction of the Constitution of Georgia enounces, that "Amending a draft law on the State Budget shall be inadmissible without the consent of the Government." It is true that same rule was acted before, but the transition to the parliamentary system logically had to cause its abolition and increase of parliament's power in budget issues, though this did not happen. It should be noted that the European Commission for Democracy Through Law (Venice Commission) expressed the same remarks regarding the issue. It stated: "The fact that any amendment to the Draft State budget needs governmental approval is an excessive restriction of the Parliament's powers in budget matters…The Commission thus reiterates its previous recommendation in the 2010 Final Opinion that the Parliament should be more significantly involved in budget matters."[15] Despite the recommendation of such an authoritative organization, Georgian Parliament did not consider it;
d) The terms of holding a vote of no confidence in the Government have been reduced. In Georgia operates so-called Constructive Vote of No Confidence. The term the Constructive Vote of No Confidence means that the initiators shall nominate a candidate of Prime Minister together with a no confidence motion.[16] According to old redaction of the Constitution of Georgia, the Parliament has to elect a new Prime Minister and Government during 25 days from proposing no confidence.

[14] The official text of the old redaction of the Constitution of Georgia you can found here: https://matsne.gov.ge/en/document/view/30346?publication=33.

[15] European Commission for Democracy Through Law (Venice Commission), Opinion on the Draft Revised Constitution, Venice, 16-17 June 2017, p. 10, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)013-e.

[16] ROSENFELD, M., SAJO, A. (ed.): The Oxford Handbook of Comparative Constitutional Law. Oxford : Oxford University Press, 2012, p. 655.

The new redaction of the constitution has reduced this deadline to 14 days, which is very short term. For example, different dates are set by the constitutions of European countries where the institute of Constructive Vote of No Confidence acts. For example, in the same case, the Basic Law of Federal Republic of Germany does not establish the term at all. The main thing is that 48 hours have to pass since the announcement of the new chancellor.[17] The same is required by the Constitution of the Republic of Slovenia,[18] but the Constitution of Republic of Poland states: "A motion to pass a resolution… may be put to a vote no sooner than 7 days after it has been submitted."[19]

e) By the recent amendments to the Constitution, "The Prime Minister shall have the right to present to Parliament an issue of confidence in the Government,"[20] but the deadlines are too limited in this case. In particular, according to the article 58, paragraph two of the new redaction of the constitution, "An issue of confidence shall be put to vote no earlier than the 7th day and no later than the 14th day after it has been presented. If the Government fails to achieve a vote of confidence from Parliament, the President of Georgia shall, no earlier than the 8th day and no later than the 14th day after the vote, dissolve Parliament and call extraordinary parliamentary elections."[21] In addition, paragraph 3 of the same article states: "The President of Georgia shall not dissolve Parliament if, within 7 days after voting against a vote of confidence in the Government, Parliament passes by a majority of the total number of its members a vote of confidence in the Government proposed by a candidate for the office of Prime Minister nominated by more than one third of the total number of the Members of Parliament."[22] So paragraphs 2 and 3 of Article 58 of new redaction of the Constitution say that if Parliament does not declare confidence in the period of 7 to 14 days, it remains only 7 days to elect a new Prime Minister. Otherwise, the President will dissolve the Parliament.

If we again draw parallels to the Basic Law of Federal Republic of Germany and the Constitution of the Republic of Slovenia, we will see that these terms are too small. For example, in accordance with Article 68, paragraph one of the Basic Law of the Federal Republic of Germany, "If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another Federal Chancellor by the vote of a majority of its Members."[23] In such a way, after voting against a vote of confidence initiated by the Chancellor, Bundestag has 21 days to elect a new Chancellor. In accordance with Article 117 of the Constitution of the Republic of Slovenia, the National Assembly has 30 days to vote against confidence and elect a new leader.[24] The Constitution of the Republic of Poland does not state any date in the same case.[25]

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17 Basic Law for the Federal Republic of Germany, 1949, last amended of 23 December 2014, article 67. Available at: https://www.gesetze-im-internet.de/englisch_gg/.

18 Constitution of the Republic of Slovenia, 1991, last amended of 24 May 2013, article 116. Available at: http://www.us-rs.si/media/constitution.pdf.

19 The Constitution of the Republic of Poland, 1997, article 158, para. 2. Available at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

20 Constitution of Georgia. Article 58, para. 1.

21 Ibid., Article 58, para. 2.

22 Ibid., Article 58, para. 3.

23 Basic Law for the Federal Republic of Germany, 1949, last amended of 23 December 2014, Art. 68. Available at: https://www.gesetze-im-internet.de/englisch_gg/.

24 Constitution of the Republic of Slovenia, 1991, last amended of 24 May 2013, art. 117. Available at: http://www.us-rs.si/media/constitution.pdf.

25 The Constitution of the Republic of Poland, 1997, art. 160. Available at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

Thus, the new redaction of the Constitution of Georgia has a very short term for the Parliament to declare no confidence. If by the initiative of Prime Minister the Parliament declares no confidence in the Government, but fails to elect a new Prime Minister in the time of 7 days, the President will dismiss the Parliament. Consequently, in the present case, the voting against vote of confidence in the Government is associated with a very high risk and may result in dismissal of the Parliament.

f) The Prime Minister's power has also increased in the field of defence: Until now, the President of Georgia could make a decision about using military forces during the peace and martial law, but he had top resent the decision to Parliament for approval within 48 hours after it was made.[26] According to the Article 70, paragraph 6 of the new edition of the Constitution, "The Defence Forces shall act by the orders of the Minister of Defence in accordance with the procedures established by law and, during a state of emergency or martial law, by the orders of the Prime Minister."[27] Moreover, article 72 paragraph one states that "Decisions on the use of the Defence Forces during martial law shall be made by the Prime Minister and shall not require Parliament's approval." Like this, according to the third sentence of the paragraph 2 of same article the Prime Minister's decisions on the use of Defence Forces during natural or technogenic disasters or epidemics do not require Parliament's approval,[28] as well. Consequently, the Prime Minister's power has increased so much in the field of defense that he exceeded even the powers of President in the so-called half-presidential system how Georgia was before.

5. Actually the Chairperson and judges of the Supreme Court should be elected by the "one-party" Parliament; (It was the case in the old redaction as well)

6. The Constitutional Court of Georgia consists of 9 members who shall be appointed/elected by the President, the Parliament and the Supreme Court in the amount of 3-3 members on parity basis. (It was the case in the old redaction as well)

Let us summarize the above-mentioned changes:

The ruling party which has the majority in the Parliament and local self-government level, guaranteed by the electoral system, elects the President, the Government, the Supreme Court members, and the Constitutional Court together with the elected President and the Supreme Court. Thus, the head of the state and the three branches of the government will be composed by one party. Since in Georgia the existing parties are mainly focused on a particular leader and are managed by them, the Georgian model of Separation of Powers provides the way to establish informal governance in the country.

The analysis above reveals that it is difficult to evaluate these changes as a transition to the European-type of the parliamentary republic. As shown, above the head of the state, legislative, executive and judicial branches may be composed by one political party. All this runs against the principle of Separation of Powers, which means that all government powers should not be concentrated in the hands of one person or one body. In Georgia situation may be even worse – power may fall in the hands of the governing party leader, who may not hold any official post. Apart from this, what is the difference between the Soviet totalitarian state and the democratic republic, if in both cases one particular party will be the main ruler and will control all three governmental branches?

[26] Constitution of Georgia, old redaction. Article 100, par. 1.
[27] Constitution of Georgia, article 70, par. 6.
[28] Ibid., article 70, par. 2.

3 PERILS OF THE PARLIAMENTARY SYSTEM

Now let us turn to the second issue: Is the parliamentary republican model so ideal? Is the principle of Separation of Powers secured in the parliamentary model and does the leading role belong to the parliament in the given system?

At the end of the twentieth century, about this issue András Sajó in his famous paper "Limiting Government: An Introduction to Constitutionalism" – wrote: In parliamentary systems "the executive has made its operations considerably independent and has become dominant without parliamentary direction. In addition, it is able to influence the legislation and the parliament's other activities that are in theory aimed at directing the executive. In other words, the executive operates by using the parliament as the formal director of its actions."[29] Furthermore, the author adds that "British parliamentarism has evolved into a democratic cabinet dictatorship, and most of the nonpresidential democracies in Eastern Europe… are moving rapidly in this direction."[30] These words of Sajó are especially remarkable for those post-soviet states which have chosen Parliamentarian model as a form of governance.

Sajó ironical criticized modern parliamentary system. He says: "In parliamentary systems, the relationship between the legislative and executive branches is more fluid, including the worrying situation when it is the tail that wags the dog, that is, the executive, or the government (as the core of the executive is called on the Continent), dictates to the parliament. In some states there is no dog, only its tail, in which case the government does not even bother to ask the parliament what kind of policy it should follow."[31]

In the same paper, the author expresses his opinion that "British parliamentarism has evolved into a democratic cabinet dictatorship, and most of the nonpresidential democracies in Eastern Europe are moving rapidly in this direction."[32] These words of Sajó are especially remarkable for the post-Soviet states who have chosen a parliamentary model as the form of governance.

Not only Sajó talks about the abovementioned tendencies of parliamentary system. Gustavo de Andrade also draws attention to this issue. He warnS against the actual merge of legislative and executive branches in parliamentary models.[33] He says, "Many countries in Europe adopted the parliamentary system of government as an outcome of legislative supremacy. In these systems, a considerable and important part of the executive powers is placed into the hands of a prime minister, who is usually a member of the legislative branch. Therefore, in the parliamentary systems of Europe there is no strict separation of powers since some of the executive and legislative powers merge in the hands of a prime minister."[34]

Georgian scientist Karlo Godoladze speaks about primate of government's competence in budget issues. He says, "If we make a practical review, we conclude that the so essential function, as a budg-

[29] SAJO, A. Limiting Government : An Introduction to Constitutionalism. Budapest : Central European University Press, 1999, p. 91.
[30] Ibid, p. 4
[31] Ibid, p. 173.
[32] Ibid, p. 4.
[33] De ANDRADE G. F. Comparative Constitutional Law: Judicial Review. In Journal of Constitutional Law. Vol. 3, Iss. 3 (2001), p. 977-984. Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1436 & context=jcl.
[34] Ibid., p. 984.

etary competence is, realize the executive branch, but the legislation branch retains only formal competence."[35]

Entin thinks, "Now governments are not just a parliamentary policy executors, but they made as a main source of policy determination for parliament. That is why governments are already called not "executive" but "governor branch."[36]

What is the reason of this?

I believe that the primary reason of this danger is the political party's influence and role in parliamentary systems. The need for party politics and discipline tradition has brought the new government-parliament relations to the new frame.[37]

It is well known that, in the parliamentary system a political party which has won in the parliamentary elections composes the government, whose head, Primer-Minister, is a leader of the party. A simple question arises: How will the Parliament control the executive branch and its leader who is the head of the ruling party and the parliamentary majority, as well? It may be vice versa.

In the countries with a long democratic tradition this matter may be less problematic because of the internal party democracy and frequent practices of coalition governments. However, in Georgia, as in general in the post-Soviet states, the affairs are different. First of all, as it was mentioned above, each political party is associated with a particular leader, united around one particular person and governed by him/her. Secondly, in most cases the single party has the parliamentary majority and practically, it seldom has a coalition government. In contrast to Western European democracies, the threats coming from one-party Parliament and government in the case of Georgia is appear extremely dangerous.

However, it should be noted that the existence of the single-party parliament and the single-party government is the problem not only for the countries of new democracy. As modern American scholar Mark Tushnet remarks: "Representatives of the executive power and legislators, who are members of one political party, as a rule, will support each other except for special cases."[38] Tushnet argues that such support may include covering a crime connected with corruption or even hindering the investigation.[39]

If Tushnet sees the problem in the presidential system where a hard model of Separation of Powers operates, then the parliamentary system seems much more problematic.The above-mentioned defects may not be revealed where a single party cannot win a majority in the Parliament, thus a coalition government is formed; the head of the coalition government is not a party leader of the parliamentary majority and thus, such parliament is more likely to exercise control over the government.

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35 GODOLADZE, K. Constitutional amendments in Georgia. Political and legal aspects. De-Parliamentaryization: Myth or Reality. Tbilisi : Ilia State University, 2013, p. 63.

36 ENTIN, L. Separation of Powers: The experience of modern states (in Russian), 1995, p. 91. From: JIBGASHVILI, Z. President's Institution in Georgia and in Former Socialist Countries of Europe (Comparative Analysis). Doctoral Dissertation (in Georgian), Tbilisi State University, 2017, p. 62. Available at: http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/zurab_jibgashvili.pdf

37 JIBGASHVILI, Z. President's Institution in Georgia and in Former Socialist Countries of Europe (Comparative Analysis). Doctoral Dissertation (in Georgian), Tbilisi State University, 2017, p. 62. Available at: http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/zurab_jibgashvili.pdf.

38 TUSHNET, M. Advanced Introduction to Comparative Constitutional Law (in Georgian). Tbilisi: Edward Elgar Publishing, 2016, p.142 – 143.

39 Ibid., p. 143.

4 CONCLUSION

To summarize the argumetns made in the paper I would like to note that:

1. The analysis reveals that new amendments to the constitution of Georgia will not provide the condition for the country transition to the European parliamentary system; it will serve as a guarantee of a long-standing stay in the government for the ruling political party;

2. As for the second issue, I think one of the ways for a parliamentary system is to elect a non-party president through a universal suffrage. In the republic there must be a post elected through a universal suffrage. In such a case, the president will indeed play the role of an objective arbiter. In addition, such a president may be entitled to recruit a special body or appoint a special prosecutor who will investigate the crimes committed by high-ranking officials.

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RENASCENCE OF THE ADMINISTRATIVE JURISDICTION IN HUNGARY

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Abstract: The administrative jurisdiction is one of the guarantees of the civil legal security. However, a state has to „grow up" to this as to every legal guaranties. Administrative jurisdiction, and within it the creation of an independent administrative procedural order has been cause for much excitement in the law-making community basically from the early 1990 s, when control over administrative rulings became genuinely possible again. It was thus unsurprising that the codification of the Act on the procedural code of public administration was followed with interest, and the professional and scientific community gave regular updates on the status of the codification. Therefore, the fact that the president did not sign the Act passed by the National Assembly, but sent it to the Constitutional Court for evaluation instead caused a major stir. Based on the decision 1/2017. (I. 17.) of the Constitutional Court, the National Assembly eventually modified a number of provisions in the Act on the administrative procedural code and passed the Act again, which was then promulgated on March 1, 2017 as Act I/2017 on the administrative procedural code, and became effective, as per initial plans, on January 1, 2018. The article is not an ode to the Hungarian administrative jurisdiction or to the new independent administrative procedural code, but a historical and mainly legal analysis.

Key words: administrative jurisdiction, administrative procedural code, administrative courts, history of the administrative jurisdiction, Hungary

1 ABOUT THE ADMINISTRATIVE JURISDICTION IN GENERAL

Throughout our life we meet offices and authorities, which establish rights and obligations for us. These offices and authorities are parts of the administrative system and exercise the executive power.

Against the administration there is a general need for municipal administration and for the protection of the legality of the administration. As one of the preconditions of the realization of this last one we can regard the judicial control on the administration. This works in various countries as independent administrative court and on other countries it is realized as part of the civil jurisdiction. In Hungary there is no administrative jurisdiction de lege lata,[1] the judicial review of the administrative decisions is a part of the civil justice.

The administrative authorities (by their nature) in most of the cases establish rights and obligations for themselves. There is no such a perfect state which could eliminate the bias of every action by means of internal control. It cannot be left to the interested parties to bring the infringements to an end, the elimination of the violation of law in the law enforcement must be ensured with external control. This organ can only be an outsider, independent judicial organ.[2]

[1] PATYI, A. Közigazgatási bíráskodásunk modelljei. Tanulmány a magyar közigazgatási bíráskodásról. Budapest: Logod Bt., 2002, p. 228.

[2] KOZMA, GY. – PETRIK, F. Közigazgatási perek a gyakorlatban. Budapest: A Deák Ferenc Jogakadémia könyvei – KOTK Kft., 1994, p. 10.

This control can be realized in the most effective way, if the revision of the administrative actions is achieved by independent courts. Moreover, it is also very important, that the judicial control of the administrative decisions would cover not only certain cases but most of the cases, especially those cases which are important for the citizens.[3]

It is a measure of the constitutionality whether a state allows or not – and if yes to what extent – to submit itself under the control of an independent court mentioned above. Whereas there are three criteria of a constitutional state:

– distribution of the state powers
– unconditional regime of laws, and deriving from these two criteria:
– self-restraint of the state.[4]

The realization of the third criterion premises the existence of the administrative jurisdiction. The importance of this is at least so much as the importance of the constitutional court and its effect on the everyday life of the citizens is much more. This cannot be regarded as a simple resolution of the state organization, it is much more, a new opinion of the civil society about the acts, the law and the authorities, because today there is no greater offense to say about an act that it is unconstitutional and about an administrative decision that it is breaking the law and that is why they must be annulled.[5]

Accordingly, the administrative jurisdiction is one of the guarantees of the civil legal security. However, a state has to „grow up" to this as to every legal guaranties. István Stipta identified three preconditions which should be granted to develop the judicial control of the public administration:

– the administration and the jurisdiction should be isolated from each other in the sense of the constitution
– the customary character of the administrative rules should be stopped: the ranges of the state's actions should be regulated by acts and their activity should be determined at least by decrees
– there should be a social expectation to save the civil rights: the opinion which stresses the primacy of the state interest should be pushed into background.[6]

These preconditions were realized in the individual states in different times and in different forms. Thus, we can say that every state has its own administrative jurisdiction with specific structure and operation.

In the legal history of Hungary these preconditions came into being very slowly and shakily: this is what will be discussed in this study.

2 ADMINISTRATIVE JURISDICTION IN HUNGARY BEFORE THE COMPROMISE

The three preconditions of development of the judicial control on the administration mentioned above had to come into being also in Hungary to raise the idea of the administrative jurisdiction at all.

[3] Ibid.
[4] Ibid., p. 9.
[5] Ibid.
[6] STIPTA, I. A magyar bírósági rendszer története. Debrecen: Multiplex Media – Debrecen University Press, 1997, p. 136.

Because of the lack of these three preconditions, before 1848, real administrative jurisdiction did not exist in Hungary.

The changes in 1848 built up a very important condition of the legal defence against the administrative actions, because with the declaration of the equality before the law, the non-feudal persons of past times could also put up for judicial protection against the actions taken on behalf of the state. The other requirement, namely the distribution of state powers could be realized just in part, so the relationship between the administration and the jurisdiction was not exonerated, the structural sharing of this two state power was not tried. Of course, it could also not amount to constitutional regulation of the implementation.[7]

However, because of the tragic end of the revolution and war of independence the laws from April 1848 did not have real impact to this area. Thus, in the case of the administrative jurisdiction they could lay down only the outlines and the principal demand.

3 PURSUITS OF ESTABLISHMENT OF ADMINISTRATIVE JURISDICTION AFTER THE COMPROMISE

After the compromise between Hungary and Austria in 1867 it was possible to implement the acts from 1848 and the concretisation of the ideas about state organization. The contemporary governing party did not plan the establishment of the administrative jurisdiction at that time. Namely, they were afraid, that the administrative court would weaken the state will, it would control the ministerial self-sufficiency, as well as it would enhance the separative process in that time, when the country is shared in nationality and political aspects. The opposition, which defined itself as public law, did also not demanded the establishment of an institute which limits the power of the government, it concentrated on serious believed questions.[8] There was a large theoretical uncertainty about this question, the clarifying academic debates was missing as well. The example of Austria[9] did also not incite to the establishment of this legal institution.[10] Of course, it did also not encourage the establishment of the administrative jurisdiction that several constitutional structures[11] missed.

The political and legal milieu changed slowly. In 1880 it was decided at a consultation on the administrative reforms in the Ministry for Home Affairs, that the general administrative jurisdiction must exist in Hungary. This was the first time, when the governmental agents were concerned seriously about the details of a future solution. Beyond that, a parliamentary decision ordered the government that '… if an administrative court could not be regulated soon, for financial jurisdiction should be presented a proposal.'[12]

In the opening speech of the diet in 1881 there appeared the case of the administrative jurisdiction. After the expectation of the monarch '… the establishment of the administrative courts has

7 Ibid., p. 137.

8 E.g. the criticism of the compromise, the autonomy of the counties and the principle of election.

9 In Austria was established the Imperial Court in 1869, which acted in cases of breach of constitutional fundamental rights of citizens, but it had not competence on the revision of the non-legal decisions of the administration.

10 STIPTA, I. A magyar bírósági rendszer története, op. cit. p. 139.

11 E.g. court system, which comply with the requirements of the era; clarification of the relationship between the central and the lower level administration; declaration of civil rights in acts.

12 STIPTA, I. A magyar bírósági rendszer története, op. cit. p. 141.

to be effected as soon as possible'. From the opinion of the head of the state it turns out, that the legislature got to pre-sanctify for the establishment of more with each other in hierarchical relationship organ.[13]

The government made still in 1881 two drafts. According to the version published on 31th January 1881, the future special court would have consisted of administrative officers, judges of the high courts and laymen. This proposal faced great resistance from the public opinion. Pursuant the other idea from 24 September 1881, the government wanted to organize a full-time, independent court for the decision of disputes on financial questions. This proposal came to the chamber of deputies.[14]

Act XLIII of 1883 on Financial Administrative Court was sanctified on the 13th of July 1883 and published on the 21th of July 1883. This disposed to establish an independent financial court with seat in Budapest, which has the same grade and character as the Hungarian Royal Curia. The main achievement of the Act is that it was the first to allow in certain cases the revision of administrative decisions, namely it adopted the principle of judicial control of executive power. According to the modern approach, it guaranteed the citizens' individual right to claim against the administration and the effective legal defence of a part of the finances (typically in the field of fiscal and fee affairs).[15]

The procedure of the Financial Administrative Court was written,[16] it had not only power for cassation, but it could decide the merits.[17]

After the establishment of the Financial Administrative Court in 1883 was the preparatory work on realization of general administrative jurisdiction in progress. As a result of this, with Act XXVI of 1896 the Hungarian Royal Administrative Court was born, in which the Financial Administrative Court was blended.

4 FUNCTION OF THE HUNGARIAN ROYAL ADMINISTRATIVE COURT (1896 – 1949)

The Hungarian Royal Administrative Court was a supreme court which had two departments: the general administrative department and the financial department.

The president of this court was equal with the president of the Curia and the judges of this court had to comply with highly professional requirements.

The court had a written procedure with only one instance but with authority of reformation.[18]

The competence of the court was laid down in an itemized list. However, this list was modified more than a hundred times. In general, it can be said, that about 80 percent of administrative decisions could be reviewed by the Hungarian Royal Administrative Court.[19] In practice, most of the

13 Ibid., p. 142.
14 Ibid.
15 Ibid., p. 148.
16 Ibid., p. 149.
17 GÁSPÁRDY, L., WOPERA, Z., KORMOS, E., CSERBA, L., NAGY, A., HARSÁGI, V. Polgári perjog különös rész. Budapest: KJK-Kerszöv, 2004. p. 167.
18 See more on the procedure: CSIBA, T. A közigazgatási bíráskodás alapvető kérdései. In IMRE, M. (ed.): Közigazgatási bíráskodás. Budapest: HVG-ORAC, 2007, p. 24 – 25.
19 KISS, D. A közigazgatási perek. In NÉMETH, J. (ed.): A polgári perrendtartás magyarázata. Budapest: Közgazdasági és Jogi Könyvkiadó, 1999, p. 1356.

cases were tax and duty related, over and above cases in connection with the entitlement of representatives to duties and pension.[20]

During the more than 50-year-long existence of the Hungarian Royal Administrative Court there was a lot of intention and attempts to give the procedure more instances or to connect the court to the general court system, but nothing had a real result in practice.

5 ADMINISTRATIVE JURISDICTION BETWEEN 1949 AND 1989

Between 1949 and 1989 the administrative jurisdiction did not exist in Hungary aside from some cases. Thus, in cases related to legal basis and amount of state tax, as well as to certain duties, the financial and duty arbitration committees of the Ministry of Finance acted. Although in some cases, the appeal against the administrative decisions was allowed before the civil courts, but in the 1950's the state and political power became so concentrated that the judicial control on the activity of the executive organs became practically impossible.[21]

6 ADMINISTRATIVE JURISDICTION AFTER THE POLITICAL TRANSFORMATION (1989) BUT BEFORE 2018

In 1989 the legislators created the constitutional basis of the administrative jurisdiction with the amendment of the Constitution. Thus, the administrative jurisdiction exists again since 1991, when the Hungarian Constitutional Court provided the making of the new rules on judicial review of the administrative decisions.

Act XXVI of 1991 was not an autonomous act, but a modification of three acts (Act on Administrative Proceedings, Act on Code of Civil Procedure and Act on Court Organization). Thus, the main rules of the administrative jurisdiction were in the Code of Civil Procedure.

Chapter XX of the Code of Civil Procedure was applied to actions for the review of administrative decisions.

Administrative actions were brought by the client or by any other party to the proceeding concerning provisions expressly pertaining to him. The action were brought against the administrative body that has adopted the decision to be reviewed. (327.§ Par. (2))

The court procedure had a lot of own rules (this means: they were different from the general rules) and if we read these rules, we could feel that these rules are to some extent a foreign body in the Code of Civil Procedure. This statement is supported by the fact that these rules were amended several times and from time to time the idea of creating an independent administrative jurisdiction appeared.

[20] KENGYEL, M. Magyar polgári eljárásjog. Budapest: Osiris Kiadó, 2014, p. 424.
[21] Ibid., p. 424 – 425.

7 ANTECEDENTS OF THE ACT ON THE PROCEDURAL CODE OF PUBLIC ADMINISTRATION

7.1 Direct antecedents of the Act on the Procedural Code of Public Administration

The government legislated on the procedural code of public administration with Government resolution 1011/2015. (I.22.), followed by resolution 1352/2015. (VI.2.) on certain tasks connected with the preparation of the act on the procedural code of public administration and the act on general administrative regulations. It was along the principles laid down in these two resolutions that further acts were prepared: Act T/12233 concerning general administrative regulations and the Act concerning proposals on the restructuring of the court system, and Act T/12234 on administrative regulation. The acts on administrative regulation and on the procedural code of public administration were sent for debate to the National Assembly together, and were both passed with a simple majority on December 6, 2016 (the Act on the procedural code of public administration was passed with 115 yes votes, 36 no votes and 21 abstentions). The Act concerning the restructuring of the court system was finally not sent to the Assembly, as when the above mentioned two acts were passed, the Ministry of Justice was still conducting political negotatiations with the representatives of the parliamentary parties.

7.2 Presidential motion to the Constitutional Court

János Áder, the president of the republic – based on Art. 6 par. (4) of the Constitution – has requested the Constitutional Court to rule on the constitutionality and compatibility with public law of Art. 7 par. (4) and Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration passed by the National Assembly on December 7, 2016, but not yet promulgated. The president of the republic furthermore advised the Court to evaluate the constitutionality of the promulgation of the above questioned legislative proposals. The legislation evaluated by the Constitutional Court is the following:

"Art. 7. [Courts acting in administrative proceedings]

[…]

(4) The Budapest-Capital Regional Court acts as the supreme court in administrative proceedings".

Art. 12. (2) Except trials related to the legal relationships of public servants, the court acting as supreme court in administrative proceedings handles trials relating to the administrative activities of the following:

"a) an independent regulatory agency, an independent state administration agency or a government office, as per the act on central state administration agencies

[…]

c) the electoral commission."

The presidential motion dated December 16, 2016 cites Art. 25 par. (8) of the Constitution, as per which the detailed instructions regulating the organization and administration of courts, as well as the supervision of the central administration of courts in Hungary is laid down in a fundamental law, which fundamental law is presently Act CLXI of 2011 (henceforth Act CLXI) on the organization and administration of courts. As per Art. 16 of Act CLXI, justice can be exercised on the territory

of Hungary by the following types of courts: the Curia (the Supreme Court of Justice), the Court of Appeals, the tribunal, the district court and the administrative and labour court.

The presidential motion points out that Art 7. par. (4) of the Act on the procedural code of public administration mentions a court which is not included in Act CLXI, the so called administrative supreme court, the attributes of which are held by the Budapest Capital Regional Court. Thus, while the Act on the procedural code of public administration does not formally modify Act CLXI, it does however widen its content by adding a new court, furthermore, this legislative change is the result of a law passed by the National Assembly with a simple majority.

Therefore, the presidential motion specifies that although the role of the newly 'created' administrative supreme court is fulfilled by the Budapest-Capital Regional Court this does not change the fact that the court system laid down by Act CLXI is enlarged with a new type of court. This is further underlined by the provisions which outline the functions and authority of the administrative supreme court [Art. 7 par. (1) pt. b), Art. 7 par. (2) pt. b), Art. 12 par. (2)-(3), Art. 15 par (3) pt. a), Art. 36. par. (2) pt. a)], define its structure [Art. 8 par. (6)] and specify regulations which differ from the 'general procedural order' of the Budapest-Capital Regional Court [for example regarding representation and compulsory legal representation in Art. 27 par. (1)].

Following the motion of the president, as per Art. 57 par. (1b) of Act CLI of 2011 on the Constitutional court, the minister of justice forwarded his resolution on the matter, dated December 20, 2016, to the Constitutional Court. The minister of justice debated the nullity under public law and the constitutional incompatibility of the provisions highlighted by the president. In his argumentation the minister points out that the presidential motion is untimely, furthermore, that the possible future incompatibility with the Constitution would not be caused by the act itself, but by eventual insufficiences of subsequent legislation.

The Constitutional Court, in line with Art. 57 par. (2) of Act CLI, requested the declaration of the Speaker of the National Assembly. In his resolution dated January 5, 2015, the Speaker of the National Assembly informed the Constitutional Court that, as per the National Assembly diary, the acting speaker requested the house to vote according to the rules of simple majority voting, and the closing voting likewise happened along the same guidelines.

7.3 Decision of the Constitutional Court

The Constitutional Court, through Constitutional Court decision 1/2017. (I.17.) found Art. 7 par. (4) and Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration, passed by the National Assembly on December 6, 2016, to contravene the Constitution, and as such, unfit for promulgation.

The Constitutional Court made the decision public on January 13, 2017. The judge rapporteur of the case was Tamás Sulyok, parallel argumentations were provided by constitutional court judges Imre Juhász, Béla Pokol, István Stumpf and András Zs. Varga, and a diverging opinion was provided by constitutional court judge Egon Dienes-Oehm.

7.4 Argumentation of the Decision – The majority point of view

Prior to evaluating the motion, the Constitutional Court conducted a brief review of the historical precedents of administrative jurisdiction in Hungarian lawmaking, as well as the legislative purpose

of creating the Act on the procedural code of public administration, then proceeded to analyse the sections of the motion which state the nullity under public law of the Act.

Based on the motion, the analysis of the Constitutional Court extended to the following: 1. reviewing the legislative scope impacted by the law amendment, 2. analysing whether the law amendment is directed at modifying the content of the provisions of Act CLXI and, if so, 3). whether amending this fundamental law occurred as per the required procedural order.

Upon reviewing the relevant regulations contained in Act CLXI, the Constitutional Court ascertains that, by mentioning an administrative supreme court, furthermore defining its scope of tasks and authority and defining procedural rules connected to the new denomination, and through this new denomination empowering the Budapest-Capital Regional Court to act as such, the Act on the procedural code of public administration legislates in matters which, as per Act CLXI, are considered subject to fundamental legislation.

The Constitutional Court points out that at this stage it does not bear relevance under public law that the new denomination is to be assumed, temporarily or indefinitely, by a court which already exists as per Act CLXI, however, it does bear relevance that the Act on the procedural code of public administration, passed under the procedural order of laws requiring a simple majority cannot create a new type of court, which is not specified in Art. 16 of Act CLXI.

The Constitutional Court points out that the Act on the procedural code of public administration – passed under the procedural order of laws requiring a simple majority does not change the denomination of the Budapest-Capital Regional Court, instead it invests it with the powers of an administrative supreme court, a type of court which is not explicitly specified or nominated in Art. 16 of Act CLXI.

During its investigation, the Constitutional Court also touched upon the question of general jurisdiction and special courts. With regards to this, the Court found that Art. 7 par.(4) of the Act on the procedural code of public administration invests the Budapest Capital Regional Court, a court regulated by fundamental law, with the judicial powers of an administrative supreme court, thus making it a court which has both general jurisdiction, and additionally acts as a special court.

In the context of analysing the Act's nullity under public law, the Constitutional Court subsequently touched upon the matter of fundamental legislation. Here the court invokes Constitutional Court decisions 16/2015. (VI.5.) and 1/1999. (II.24.) (already cited above), which were also quoted by the presidential motion. Based on these, the court finds that Art. 7 par. (4) of the Act on the procedural code of public administration, passed along the procedural order of a simple majority, is content-wise directed at amending a fundamental law, and thus should have been passed according to the procedural order of legislation requiring a qualified majority.

In the second part of the decision, the Constitutional Court analyses the incompatibility with the Constitution of Art. 12 par (2) of the Act.

Regarding Art. 12 par. (2) point a), the Court has found that it invests that Budapest Capital Region Court with a jurisdiction which had previously been assigned, through the fundamental legislation of the Media act, to the exclusive scope and authority of another type of court (administrative and labour court), more specifically to the Budapest-Capital Administrative and Labour Court. The exclusive scope of jurisdiction and authority which had been assigned through fundamental legislation cannot be changed or amended through legislation passed along the procedural order of a simple majority. It is thus concluded that the currently discussed provision is unconstitutional.

With regards to Art. 12 par. (2) point c), the Constitutional Court invoked the argumentation presented in the presidential motion, and concluded that, along the same line of reasoning as Art. 12 par. (2) point a), this point is unconstitutional as well.

In the recapitulative section of the decision, the Constitutional Court emphasized – evidently in response to the stance of the minister of justice – that the subject case of our present study was subjected to a prior review of constitutionality, along the lines of the presidential motion, that is, the analysis concerns a law which has been accepted, but not yet promulgated. As such, the Constitutional Court pointed out that the Act on the procedural code of public administration, like any other piece of legislation, could not have materialized before being promulgated, independently of the content of the Court's decision. Therefore, the Court sees its own role in the present case solely as meant to point out that fact that, should the Act be promulgated, it would become null under public law due to it having been passed according to an incorrect procedural order. Consequently, at this point in time the Court exercised a prior review of constitutionality, the purpose of which is to prevent that a piece of unconstitutional (and as such, null under public law) legislation become a part of the legal system.

7.5 Consequence of the Decision of the Constitutional Court

Based on here discussed decision 1/2017. (I. 17.) of the Constitutional Court, the National Assembly eventually modified a number of provisions in the Act on the procedural code of public administration and passed the law again, which was then promulgated on March 1, 2017 as Act I/2017 on the procedural code of public administration, and will become effective, as per initial plans, on January 1, 2018. The provisions analysed by the Constitutional Court have been amended in the new Act as follows:

"Art. 7. [Courts acting in administrative proceedings]

(1) First instance decisions taken by

a. the administrative and labour court

b in cases defined by law, the tribunal or the Curia

(2) Appeal decisions taken by

a. for cases handled by the administrative and labour court the tribunal and

b. for cases handled by the tribunal, the Curia

(3) Re-examinations are handled by the Curia.

12. § [Jurisdiction]

[…]

(2) Except trials related to the legal relationships of public servants, the tribunal handles trials relating to the administrative activities of the following:

a. in the absence of other legal provisions, an independent regulatory agency, an independent state administration agency or a government office, as per the act on central state administration agencies

b. the railroad administration agency and the aviation authority

c. public agencies

d. the Hungarian national bank."

We can thus see that the legislator, in conformity with the Constitutional Court decision, does not mention neither an administrative supreme court, nor a court acting as such: Art. 7 par (4) has

been removed from the Act. As Art. 12 par. (2) pts. a) and c) had also been found to be unconstitutional by the court, pt. a) was modified by the legislator, using the suggestion made by András Zs. Varga in his parallel argumentation, by adding the phrase 'in the absence of other legal provisions', while the electoral commission previously included in pt. c) was removed altogether from the enumeration.

8 CONCLUSION

Administrative jurisdiction, and within it the creation of an independent administrative procedural order has been cause for much excitement in the lawmaking community basically from the early 1990 s, when control over administrative rulings became genuinely possible again. It is thus unsurprising that the codification of the Act on the procedural code of public administration was followed with interest, and the professional and scientific community gave regular updates on the status of the codification. Therefore, the fact that the president did not sign the Act passed by the National Assembly, but sent it to the Constitutional Court for evaluation instead caused a major stir.

However, the Act on the procedural code of public administration has been promulgated in its new form, and seemingly does not contain any unconstitutional provisions. We apply its provisions since the 1st January 2018: we shall find out how it fares in practice.

The development or the renascence of the administration jurisdiction does not stop: the latest news from the government are talking about a new, from the civil courts separated administrative court system. We can conclude that the idea of the independent administrative jurisdiction is more than a dream today and in a few years we can talk about a new system of courts because of the existence of independent administrative jurisdiction in Hungary. We shall see!

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ATTEMPT OF CLASSIFICATION OF THE PUBLICISATION OF CIVIL MATTERS BASED ON RECENT EXAMPLES FROM POLAND[1]

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Abstract: The purpose of this paper is to assess the phenomenon of the publicisation of civil matters in Poland against the background of the current legislation and the practice observed by the Author, as well as, based on the conducted analysis, to offer a classification of the publicisation. The analysis is based on the following main elements. First, it attempts to provide an overview of what may be considered the most significant features for each of the examples of this phenomenon. Third, it looks at what the publicisation is driven by and whether there is a fiscal function provided for in its case. Fourth, it analyses available data to verify whether there are growing numbers of decisions taken in each category of the publicisation outlined in the paper.

Keywords: civil matters, private law, public law, privatisation, publicisation, *de iure* publicisation, *de facto* publicisation, de-privatisation

1 INTRODUCTION

The main focus of this paper is on a phenomenon that appeared in Poland with regard to some civil matters and could be called the publicisation of civil (private) matters. The publicisation of civil matters does not seem a unique phenomenon that does not exist in the other EU countries; to the contrary, from time to time various national legislatures decide to "publicise" a given category of civil matters for various reasons. However, in Poland it happened to a few categories of civil matters within a quite short period of time and, as such, made me reflect on whether perhaps it is already a tendency (trend) regarding the relationship between private and public enforcement of law. The division of law enforcement into private enforcement and public enforcement should be a point of departure for further considerations. This division follows the Ulpian's (who was a jurist in ancient Rome) division of law into two fundamental branches: private law (relating to the interest of individuals) and public law.[2] The border between them does not seem as clear as it used to be, since contemporary commentators identify phenomena such as privatisation of public law and publicisation of private law.[3] Private enforcement of law is carried out under private (civil) law and one

[1] This paper is to large extent a re-print of the Author's paper on "Publicisation as the Transfer of Competences from Civil Justice to Public Administration: An Attempt of Classification and Recent Examples from Poland" (publ. University of Szeged). The paper was presented, first, at the Pázmány Péter Catholic University on 01. 06. 2018 and, second, at the University of Szeged on 25. 09. 2018.

[2] For example, see: WATSON, A. The State, Law, and Religion. Pagan Rome. Athens and London: University of Georgia Press, 1992, pp. 21 – 29.

[3] Among others, MICHELON, C. The Public, the Private, and the Law. In MAC AMHLAIGH, C., MICHELON, C. & WALKER, N. (eds). After Public Law. Oxford: Oxford University Press, 2013, pp. 83 – 100; HELIOS, J. Publicyzacja prawa prywatnego – prywatyzacja prawa publicznego w kontekście rozważań nad prawem europejskim [Publicisation of private law – privatisation of public law in the context of considerations on European law]. In Acta Universitatis Wratislaviensis Przegląd Prawa i Administracji. Vol. 92 (2013), pp. 11 – 36.

can realise the crucial role of civil courts therein. Public enforcement of law is carried out by other authorities. For a given category of legal provisions it may be decided by national laws that they are enforced both privately and publicly (**dual system**) or only in one way (**non-dual system**). Dual systems seem particularly challenging. On one hand, they may bring more efficiency into the law enforcement but, on the other hand, there are particular needs inherent in them, such as the need for effective interaction of private enforcement and public enforcement as well as for their coordination in a coherent manner.[4]

For the purposes of this paper the publicisation shall be understood as the introduction of public enforcement for matters that so far have been enforced (or have been able to be enforced) privately. At the end of this paper a classification of the publicisation will be offered.

Each of the three main parts of the paper shall present one example of each category of the publicisation. They are also going to elaborate, in particular, on what their introduction is driven by, whether there is a fiscal function provided for in their case and whether there are growing numbers of decisions taken in each category outlined in the paper. The point of the analysis is both normative and descriptive. Not coincidentally, each example is related to the Polish competition authority, that is the President of the Office of Competition and Consumer Protection.[5] It was the development of the UOKiK President's competences that inspired the contents and title for this paper.

2 EXAMPLE REGARDING THE PROHIBITION OF UNFAIR TRADING BUSINESS-TO-BUSINESS PRACTICES

A key example of the publicisation of civil matters in Poland in recent years at which one may look for the purposes of this analysis is related to the prohibition of the unfair abuse of bargaining power (unfair trading practices, UTPs) between entrepreneurs in business-to-business food supply chains. Previously this prohibition could have been enforced only before civil courts (but in fact it hardly was, so this paper does not discuss the issue of the practical application of its private enforcement) and from 12th July 2017 it may be combatted – in addition or alternatively – in administrative proceedings conducted on the basis of a new statute, i.e. 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products.[6] Pretty coincidentally, the adoption of the Polish statute was followed by the EU development in the field, i.e. the draft Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain[7] that was published on 12th April 2018.[8]

4 For example, see: Directive 2014/104/EU of the European Parliament and of the Council of 26. 11. 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 05. 12. 2014, pp. 1 – 19.

5 In Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów*; hereinafter, UOKiK President.

6 Act of 15. 12. 2016 on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products (Journal of Laws of the Republic of Poland 2017, item 67).

7 COM(2018) 173 final, 2018/0082 (COD).

8 In the "Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain" of 29. 01. 2016, the Commission concluded that at this stage there was no need for EU legislative measures in the field of unfair trading practices (as if there was a possibility the markets would "sort itself out" naturally through the normal market forces) and, consequently, regulatory initiatives in the discussed field were left to Member States. However, within one year from the publication of the Commission's report, the European

The public enforcement of the UTPs' prohibition is currently tested by the Polish enforcement authority. It is now nearly October 2018, and not much has been heard: the latest update is that only one "pilot" case has been concluded with a decision that was adopted on 5th March 2018[9] and over twenty new proceedings are pending.[10] In order to probe on reasons of the adoption of the Act, it is necessary to analyse the explanatory notes[11] accompanying the draft Act and performing a largely justificatory function. Judging from this document, inefficiency of private enforcement was one of the main reasons for the publicisation. Provisions of the 1993 Act on Combating Unfair Competition,[12] to the extent that they cover the unfair use of superior bargaining power, have been, *de facto*, considered difficult to enforce and ultimately ineffective. Weaker parties to commercial transactions have often been afraid of retaliation and/or compromising an existing commercial relationship with the stronger party (the so-called "fear factor").[13] Owing to this, they have not been willing to seek redress before a court of civil law even till the end of the relationship. This has not translated into a lack of such civil cases, since from time to time, after the termination of the relationship, the weaker party has indeed pursued a so-called "divorce case" and sought redress (even though in practice civil proceedings might have been long-lasting and expensive).[14]

Under the 2016 Act administrative proceedings are initiated by the enforcement authority *ex officio*.[15] In fact, it means that, due to limited resources of the enforcement authority, less troublesome practices have to be sifted out and the other practices have to be selected for more detailed investigation from the entire cross-section of practices. Injured parties are not parties to the administrative proceedings. What the authority can also do in investigated cases is the imposition of fines of up to 3% of annual turnover of the infringer.[16] The provisions providing for the high statutory maximum of fines offer an opportunity to reflect upon whether or not under the new status quo a fiscal function is performed by public law provisions. There are not sufficient sources, however, to effectively examine a phenomenon from this perspective, since – as it has been mentioned – there has been only one decision of the enforcement authority so far and it has not imposed any fine on the alleged infringer (commitment decision). It is difficult (if not impossible) to figure this challenging conundrum out due to a general lack of experience of the enforcement authority.

The example described above may be classified as the publicisation *largo sensu*. In brief, publicisation *largo sensu* may be understood as **adding** legal bases for public enforcement of given provi-

Parliament (resolution of 07. 06. 2016 on unfair trading practices in the food supply chain, No. P8_TA(2016)0250), the European Economic and Social Committee (opinion of 30. 09. 2016 on report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, No. NAT/680) and the Council all called for actions to be taken at the EU level (conclusions of 12. 12. 2016 on strengthening the position of farmers in the food supply chain and tackling unfair trading practices, No. 15508/16).

9 Decision of 05. 03. 2018, No. RBG-3/2018. In Polish available at: <https://decyzje.uokik.gov.pl/bp/dec_prez.nsf> (all Internet references in this paper were accessed: 27. 09. 2018).

10 In Polish available at: <https://uokik.gov.pl/aktualnosci.php?news_id=14634 & news_page=2>.

11 In Polish available at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=790>.

12 Act of 16. 04. 1993 on Combating Unfair Competition (consolidated text Journal of Laws of the Republic of Poland 2018, item 419).

13 Explanatory Memorandum to the draft Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (note 7), p. 2, 5 – 6, 10.

14 PISZCZ, A. The EU 2018 Draft Directive on UTPs in B2b Food Supply Chains and the Polish 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. In Yearbook of Antitrust and Regulatory Studies. Vol. 11(17) (2018).

15 Article 10 of the 2016 Act.

16 Article 33 of the 2016 Act.

sions by the legislature **to already existing** legal bases for their private enforcement. This puts the **dual model** of enforcement into force. The assumption which has to be made here is that there have been no legal bases for public enforcement of these provisions directly prior to the introduction of these new legal bases, so such publicisation equals to **regulation** or **re-regulation** (after a period of the lack of regulation) of a given category of matters.

3 EXAMPLE REGARDING THE ABSTRACT CONTROL OF STANDARD FORMS OF AGREEMENTS CONCLUDED WITH CONSUMERS

In this section, the abstract control of standard forms of agreements concluded with consumers – that used to be a competence of a civil court, i.e. the Regional Court of Warsaw XVII Division called Court of Competition and Consumer Protection – will be reviewed concisely as an example of the publicisation.[17] One of the assumptions which have to be made here is that there have been legal bases (in Civil Procedure Code[18]) for private enforcement of given provisions beforehand, regardless of the range and quality of their application. Then, in place of them the legal bases for public enforcement have been introduced. This new model shows features of the **non-dual model**.

The new provisions were added to 2007 Act on Competition and Consumer Protection on 17 April 2016[19] and have not been further refined. With the new legislation, the administrative proceedings initiated *ex officio* by the UOKiK President have been introduced instead of private enforcement.[20] The fact that the new legislation does not give the right to initiate abstract control proceedings (and to be the party to those proceedings) to any other entity constitutes a major change – raising concerns related to the right to a fair trial – in comparison to the previous court proceedings model, where a lawsuit brought by an authorized entity initiated the civil proceedings.[21]

As for decisions adopted under the new provisions there must be emphasised that in the quite short period of their application there have not been plenty of decisions issued. The number of them is only nine for around 2.5 years.[22] And, characteristically, the first decision was adopted by the authority on 5 June 2017, that is more than one year after the entry of the new provisions into force.

The main reason behind the new legislation was the flood of actions that the only competent Polish court suffered from. Those civil cases were free of court registration fees. On the other hand, a winning party represented by a professional lawyer (an advocate or an attorney-at-law) could have

17 The introduction into domestic legal systems of rules that enable control of terms used in contracts concluded with consumers by sellers or suppliers is required by Council Directive 93/13/EEC of 05. 04. 1993 on unfair terms in consumer contracts, OJ L 95, 21. 04. 1993, pp. 29 – 34.

18 Act of 17. 11. 1964 – the Civil Procedure Code (consolidated text: Journal of Laws of the Republic of Poland 2018, item 1360 as amended).

19 Act of 16. 02. 2007 on Competition and Consumer Protection (consolidated text Journal of Laws of the Republic of Poland 2017, item 229 as amended).

20 Article 49 sec 1 of the 2007 Act.

21 See also KORYCIŃSKA-RZĄDCA, P. Review of the New Polish Model of Abstract Control of Standard Forms of Agreements Concluded with Consumers. In Yearbook of Antitrust and Regulatory Studies. Vol. 9(14) (2016), p. 253.

22 In Polish available at: <https://decyzje.uokik.gov.pl/bp/dec_prez.nsf>.

received the costs of legal aid resulting from the tariffs provided for by law[23] and not from the actual expenditure. This resulted in cost pathologies. The consumer organisations being in fact "factories" of such actions appeared in Poland; they used to copy the same template of an action regarding the same clauses from the same standard form of agreements concluded with different, numerous consumers in order to win as much lawyers' fees "reimbursement" from the infringer as possible at a very low "price". The information announced by the Ministry of Justice every year[24] (based on data available from the court) makes it clear that from 2008 to 2013 the number of filed actions was growing very fast; the information shows its increase in 2008 – 2010 from 325 to as many as 3,909 actions and the further growth to 41,016 actions in 2013. It was reduced for the first time in 2014 to 3,109 actions, thanks to a reduction in lawyers' fees in those proceedings, which took place in 2013[25] and, in figures released recently, the number of actions amounted to 1,859 in 2016. One can realise, first, so much of civil justice for so little money (no court registration fee!) and, second, making money on the reimbursement of lawyers' fees at which actions from the "factories" were aimed. So, the main reason behind the change was inefficiency too, like in the first example shown in the part 2 of this paper. The details on how that inefficiency looked like were, however, different. The most basic difference was that in the first example private actions had been quite rare and here, to the contrary, the right to trial before the civil court had been significantly abused.

Under the new legislation, the enforcement authority has the possibility to impose fines of up to 10% of the infringer's annual turnover on the infringer. Again, a look at whether this provision performs or is to perform a fiscal function can be taken. Interestingly, fines for the usage of prohibited clauses in standard forms of agreements have been imposed on entrepreneurs in four out of nine cases. They amounted to around thousand Euro,[26] over 40 thousand Euro[27] and over 1,300 thousand Eur.[28] It must be explained that their amounts were dependant on a given entrepreneur (its turnover) and the gravity of practices in question. The legal bases for public enforcement have been in force with regard to the discussed type of practices for only around 2.5 years now and, so far, the system has not shown any sign of considerable severity of fines confirming their fiscal function.

This example of the publicisation of civil matters shows their **de-privatisation**, i.e. **moving them by the legislature from civil proceedings to administrative proceedings**. This is the publicisation *stricto sensu*.

4 EXAMPLE REGARDING THE PROHIBITION OF ANTI-CONSUMER PRACTICES

The last example is related to the phenomenon that appeared in Poland in consumer matters. Anti-consumer practices may be combatted both before civil courts and in administrative proceedings

[23] The Ordinance of the Minister of Justice of 22. 10. 2015 on legal advisors' fees (consolidated text Journal of Laws of the Republic of Poland 2018, item 265) and the Ordinance of the Minister of Justice of 22. 10. 2015 on advocates' fees (Journal of Laws of the Republic of Poland 2015, item 1800).

[24] Available at <http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2016/download,3369,4.html>, <http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2014/download,2834,10.html>, <http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2577,5.html>.

[25] KORYCIŃSKA-RZĄDCA, P. (note 21), p. 263.

[26] Decision of 22. 12. 2017, No. RBG-8/2017 and decision of 22. 12. 2017, No. RBG-9/2017.

[27] Decision of 28. 12. 2017, No. RŁO-9/2017.

[28] Decision of 12. 12. 2017, No. RWR-10/2017.

(in this last case – anti-consumer collective practices regulated by the 2007 Act on Competition and Consumer Protection). The existing **dual** system is a concoction of private enforcement and public enforcement. In fact, however, when those two elements provided for in the legal provisions come together, it does not result in an efficient system of enforcement. There are not many civil cases regarding unfair B2C practices; empowered persons are usually passive even though it results in that consumers remain uncompensated (or at least undercompensated). However, during some administrative proceedings (initiated *ex officio*[29]) the UOKiK President as a competent enforcement authority tends to oblige an entrepreneur to offer to individual consumers the so-called **public compensation** (within a broader and quite imprecise competence to impose obligations on entrepreneurs[30]). By this, in fact the administrative authority is a "mixed bag" of regulatory competences and adjudicative function in its private (civil) sense.

The notion of the public compensation and the new practice of the Polish competition and consumer protection authority appeared in 2015.[31] Again, one of the reasons for this new decision-making practice has been inefficiency of private enforcement that could be seen in particular in the passivity of consumers. Another prominent reason openly discussed in the UOKiK has been the repeated relaxation of imposed fines by the Court of Competition and Consumer Protection as a specialized court of the first instance dealing with appeals from the UOKiK President's decisions and the Court of Appeals of Warsaw as a court of the second instance.[32] Whatever the reasons of those reductions were, they have been an important incentive for the UOKiK President, on the one hand, to modify the fining policy, and on the other hand, to look for other instruments aimed at the sustained elimination of anti-consumer practices. The public compensation has been employed by the UOKiK President as such an instrument used in commitment decisions and/or in infringement decisions without fines or combined with lower fines. If the public compensation implies a lower fine (or no fine at all), then it is unlikely to perform a fiscal function. However, it is believed by the UOKiK President that the public compensation, either alone or in combination with a fine, fulfils a repressive function (as it requires the infringer to bear financial burden of practices), but also makes consumers benefit directly from the UOKiK President's proceedings.[33]

From 2015 until the end of September 2018 there have been at least 38 decisions of the UOKiK President providing for public compensation (including 31 commitment decisions, three infringement decisions without fines and four decisions with fines of various amounts[34]). To consumers such decisions mean they will be compensated and will not need to go – for this purpose – to civil courts,

29 Article 49 sec 1 of the 2007 Act.

30 Article 26 sec 2 and Article 27 sec 4 of the 2007 Act. In the case of commitment decisions see Article 28 of the 2007 Act.

31 See UOKiK, Public compensation in UOKiK's decisions, available at <https://uokik.gov.pl/news.php?news_id=12159>.

32 In Polish available at <https://www.uokik.gov.pl/aktualnosci.php?news_id=12156>. On reductions see e.g. BERNATT, M. Czy Polska oferuje więcej niż wymaga Konwencja? O konwencyjnym wymogu pełnej jurysdykcji i polskim modelu sądowej kontroli kar nakładanych przez Prezesa UOKiK [Does Poland offer more than the Convention requires? On the conventional requirement of full jurisdiction and the Polish model of judicial control of fines imposed by the UOKiK President]. In JASIŃSKI, W. (ed). Między prawem administracyjnym a prawem karnym. Standardy rzetelności postępowania w sprawach ochrony konkurencji i konsumentów [Between administrative law and criminal law. Standards of fairness of proceedings in cases of competition and consumer protection]. Warszawa: Wolters Kluwer, 2016, pp. 131 – 153.

33 See note 31.

34 Decision of 30. 12. 2015, No. DDK-28/2015, *T-Mobile*, over 1 million Euro; decision of 30. 12. 2015, No. DDK-30/2015, *Multimedia Polska*, over 1.1 million Euro; decision of 29. 07. 2016, No. RBG-5/2016, *UPC Polska*, over 190 thousand Euro; decision of 30. 12. 2016, No. DDK-26/2016, *Orange Polska*, over 6.6 million Euro. Due to public compensation those fines were reduced by 25 to even 90 per cent.

either individually or in group proceedings.[35] In the UOKiK President's view, a decision providing for public compensation not only has an effect for the future (consumers will not be exposed to an anti-consumer practice and will no longer suffer harm), but also acts "retroactively", thereby leading to direct compensation of the consumers' harm suffered so far.[36] The UOKiK Vice-President said to media that public compensation made consumers benefit directly from administrative decisions.[37] There is something to it, though, as e.g. subscribers to T-Mobile network will readily agree, as one of the UOKiK President's decisions required T-Mobile to pay customers PLN 65 (EUR 14,5) for informing them unduly that it was raising monthly subscription charges for cellphones by PLN 5 (EUR 1,1).[38] In the absence of this decision, if the service provider did not agree for consensual means of the dispute resolution (settlements), for many of those subscribers the pursuit of actions claiming from the service provider to pay PLN 65 would not have any chance to happen because of many various reasons including the small amount of claim, the time and knowledge needed to conduct the case on their own and costs that would need to be paid to a lawyer in case of professional representation. Thus, the public compensation may be viewed as the gateway to compensation in the case of small dispersed claims of consumers.

Polish commentators' concerns related to the public compensation are all about its nature.[39] This remedy as a new additional element of administrative decisions is considered to be getting closer to fines, whereas civil (and not administrative) proceedings have always been the right means to obtain compensation by consumers.[40] That is why in mid-2018 the Polish government criticised[41] Article 6(1) of a draft directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC[42] providing for a redress order issued also by administrative authorities. It is believed by the government that the proposed procedure cannot replace group proceedings. Furthermore, in their opinion draft provisions providing for the combination of injunctions and collective redress in respect of civil claims are doubtful, since such combination is unacceptable under the Polish legal system where civil claims can be resolved only by courts. The government did not manage to see that this system already operates quite efficiently in the case of decisions issued by the UOKiK President (the central governmental authority). Some UOKiK President's decisions providing for public compensation have been appealed to the Court of Competition and Consumer Protection. It remains to look

35 On Polish group proceedings see e.g. PISZCZ, A. Has class-action culture already hit Poland? In: ETEL M., KRAŚNICKA, I. & PISZCZ, A. (eds). Court Culture – Conciliation Culture or Litigation Culture? Białystok: Temida2, 2014, pp. 137 – 147.

36 See: Informacja Prezesa UOKiK o działaniach służących wzmocnieniu ochrony konsumentów, jednocześnie wpisujących się w realizację „Polityki ochrony konkurencji i konsumentów" ["Information from the UOKiK President on measures to strengthen consumer protection, at the same time entering into the enforcement of the "Competition and consumer protection policy"], p. 9, in Polish available at: <http://orka2.sejm.gov.pl/INT8.nsf/klucz/283B8401/ % 24FILE / z03345-o1.pdf>.

37 Available at <https://www.uokik.gov.pl/news.php?news_id=12159>.

38 See decision of 30. 12. 2015, No. DDK-28/2015; in Polish available at: <https://decyzje.uokik.gov.pl/bp/dec_prez.nsf>. The decision is being proceeded by the Court of Competition and Consumer Protection to which it was appealed by the party. The service provider's misstep came at a price also in the other way, as the authority also fined the provider PLN 4,5 million (EUR 1,01 million).

39 See SIERADZKA, M. Rekompensata publiczna a inne środki usunięcia trwających skutków naruszenia zbiorowych interesów konsumentów [Public compensation against the background of other means of the elimination of lasting effects of the infringement of collective consumer interests]. In Internetowy Kwartalnik Antymonopolowy i Regulacyjny. Vol. 6(7) (2018), pp. 77 – 87.

40 Ibid.

41 On this criticism see in Polish <orka.sejm.gov.pl/SUE8.nsf/Pliki-zal/1124-18.rtf/%24File/1124-18.rtf>.

42 COM/2018/0184 final – 2018/089 (COD).

ahead to what approach to the UOKiK President's new decision-making practice will be taken by the courts of the first and second instance (and eventually the Supreme Court).

This last example proves that categories of the publicisation range from the statutory publicisation – either *largo sensu* (the first example) or *stricto sensu* (the second example) – to the *de facto* **publicisation**.

5 CONCLUSION

It follows from the above considerations that in practice the following categories of the publicisation can be observed in Poland:

1. de iure **publicisation (statutory publicisation)**, that is the introduction of legal bases for public enforcement by legislature for matters that so far have been enforced privately or have been able to be enforced privately (legal bases for private enforcement have already existed) – as such it can be divided into:
   a) **publicisation** *largo sensu*,
   b) **publicisation** *stricto sensu* **(de-privatisation)**, and
2. *de facto* **publicisation**.

On the one hand, the three above examples of the publicisation show that this phenomenon has been driven by efficiency reasons in all of them, and even though the effect is nevertheless small now, it can reasonably be expected that the publicisation will lead to a better law enforcement. The first and third examples are direct instances of the "helpful hand" addressed to weaker injured parties. In the third example the context of the administration of justice plays an important role. Additionally, in this case the de-privatization allows for being fair in procedures even vis-à-vis those (allegedly) unfair. Not only does this mean the de-privatization can offer the elimination of case backlogs, but it is also able to block the previously existing cost pathologies. Moreover, no real signs of fiscal functions of the publicisation have been seen so far (in particular in the first example where there have been no fining decisions yet and in the third example where the public compensation has been combined with lower fines or there have been no fines at all) but it must be remembered that more practice is needed to gain complete information in this regard and draw conclusions.

On the other hand, the publicisation continues to raise concerns. The second example may lead to the question of whether the right to a fair trial is or not unduly restricted in the case of the de-privatization understood as the elimination of legal bases for private enforcement and replacing them with legal bases for public enforcement in administrative proceedings which are initiated only *ex officio*. The third example conveys the exciting potential of the innovative approach for including the public compensation in administrative decisions; however, it is accompanied by concerns around whether the resolution of civil claims can be deployed to private or public enforcement, wherever decision-makers consider it more seamless and cost-effective.

It may be that we will see even more successful examples of the publicisation of civil matters. There should be, however, not only a growing emphasis on regulatory impact assessments essential to the policy-making in particular from the perspective of cost-effectiveness, but also on the compatibility of new solutions with fundamental rights and principles.

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CHANGING CONSTITUTIONAL IDENTITY: CONSTITUTIONAL REFORM AND NEW CONCEPT OF HUMAN RIGHTS IN GEORGIA

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Abstract: Constitutional reform of 2017 – 2018 amended the whole text of Georgian basic law, including the 2nd chapter – Basic Human Rights. Many articles and human rights were displaced to other chapters as general principles, some new and postmodern rights were added to the text. These changes are not only ordinary amendments; they make constitutional court and other state organs to realize their duties, and individuals to find new ways of protection of their rights. New constitutional regulation raises new forms and meanings, but this novation includes risks and perils, that should be discussed and analysed not only in the light of national constitutional law, but also in comparative and international context. This article describes main directions of amendments in the chapter on human rights and analyses perspectives, positive and negative aspects of them.

Keywords: Constitution, Georgia, Constitutional Reform, Human Rights, Constitutional Identity

1 INTRODUCTION

Every constitutional amendment is a challenge for new democracies. Unstable political regime and unfinished constitutional order, so characterising these countries, needs great patience and energy to be sustainable and face them. This is impossible without collaboration of all political actors.

Constitution of Georgia was adopted in 1995.[1]Despite numerous constitutional amendments during past 22 years,[2] articles in the 2nd chapter, which includes provisions on human rights, were amended only several times. Constitutional reform of 2017 – 2018 amended the whole text of Georgian basic law,[3] including the 2nd chapter. Many articles and human rights were displaced to other chapters as general principles, some new and postmodern rights were added to the text.

These changes are not only ordinary amendments; they make constitutional court and other state organs to realize their duties, and individuals to find new ways of protection of their rights. New constitutional regulation raises new forms and meanings, but this novation includes risks and perils, that should be discussed and analysed not only in the light of national constitutional law, but also in comparative and international context.

1 See BABECK, W. Elaboration and Adoption of the Constitution in Georgia (1993 – 1995). Tbilisi: Iris, 2013.

2 GEGENAVA, D. Retrospection of the Constitutional Reforms of Georgia: In Search of the Holy Grail, In South Caucasus Law Journal, No. 8 (2017), p. 238.

3 See Constitutional Law on "Amending Constitution of Georgia", 13 October 2017; Constitutional Law on "Amending Constitutional Law on Amending Constitution of Georgia", 23 March 2018.

2 GEORGIAN CONSTITUTIONAL IDENTITY, HUMAN RIGHTS AND NEW CHALLENGES OF DEMOCRACY

Protection of human rights is not a result, but the on-going process. Constitutional concept of human rights is critical for the society, state and individuals. This concept should be sustainable but the same time flexible for better implementation and realization of human rights in practice. Core of each nation's constitutional identity is made with concept of its state construction and human rights,[4] especially with the rights, binding public power and creating basic frames for state actions. Therefore changing constitutional regulation on human rights can override the whole system of constitutional thought, develop or ruin it.

Georgia developed European, German model of human rights and declared human dignity as the basis of the whole system.[5] Constitutional court defined it as the main idea of the state and linked all other rights to that.[6] The Court made many famous and revolutionary decisions interpreting Article 17 of the constitution of Georgia. It seems, that human dignity is the basic part of Georgian constitutional identity and this is not only for academic purposes but also inspired with the spirit of nation.

Constitutional reform of 2017 – 2018 renewed even structure of the basic law, so it automatically changed human rights chapter too. 2nd chapter of the constitution begun with citizenship, equality and right to life.[7] This order was illogic, these norm were just regular progression of rights and norms. Now new redaction of the Georgian Constitution starts with the article 9 that guarantees inviolability of human dignity. New place[8] in the constitution is adequate and emphasizes attitude of our legal system concerning the human rights. Beginning of the chapter declares priority and the meaning of human dignity as the legal basis of all human rights.

3 SUBJECTIVE AND OBJECTIVE RIGHTS

Constitutional reform of 2017 – 2018 aimed to modify whole concept of regulation of human rights in the basic law. Constitutional Commission differed subjective and objective understanding of human rights and decided to remove declarative norms to the chapter on general principles.[9] Subjective rights are connected to individuals or legal entities and basing on them it is possible to file the case to constitutional court[10] remained in the 2nd chapter. Such kind of rights are very useful, because they are practical and everyone can refer to them, they are concrete and don't declare abstract ideas.

4 JACOBSOHN, G. J. Constitutional Identity. Harvard University Press, 2010, p. 153.

5 Commentary to the Constitution of Georgia, Chapter 2, Citizenship, Basic Rights and Freedoms. Edited by P. Turava, Tbilisi, 2013, p. 107.

6 See TUGHUSHI, T., BURJANADZE, G., MSHVENIERADZE, G., GOTSIRIDZE, G., MENABDE, V., Human Rights and Case-Law of the Constitutional Court of Georgia. Tbilisi, 2013.

7 Articles 12, 13, 14 of the Constitution of Georgia (24. 08. 1995 Redaction).

8 Starting with human dignity was receipted from Germany but unlike it, where the basic law starts from this right, in the constitution of Georgia it got place in the beginning of the human rights' chapters, which is structurally better. See: Basic Law of the Federal Republic of Germany, 23 May 1949, Art.1(1).

9 Institute for Development of Freedom of Information, Assessment of the Proposed Constitutional Amendments, 27 April 2017; available at: <https://idfi.ge/en/evaluation_of_proposed_actions_as_part_of_georgias_constitution_project> [10/08/2018]

10 e.g. Right to Property, Right to Fair Trial and etc.

Objective rights have declarative meaning and are abstract, in this point of view, they are more general norms and principles, and they can't be implemented directly.[11] Beside this, objective rights are very important, they help judges or other officials to understand real meaning of rights, interpret true idea of norms by teleological or system interpretations.

Constitutional commission decided to structure new chapter using only subjective rights and take any other to the general principles or remove from the constitution.[12] And this was principally right position, because it is very important to have "useful" provisions in the chapter, which is the basis of protection of your rights;[13] these norms are the legal ground to submit your case to the court and demand from the state to act according its responsibility.[14] It would work in ideal world, but in practice constitutional court needs objective rights to refer them when there is a difficult case, or when judges need basics according positive law for argumentation. Beside commission's logic some of objective rights are still in the 2nd chapter and its illogic. There are two explanations: 1. Commission couldn't differ these two types of rights; 2. Removing some rights, even they have objective meaning, would be unpopular,[15] so parliament and politicians decided to forget about principal position and remain some of those rights in the chapter.

Some abstract rights that moved in the first chapter and set in socio-economical goals and principles of Article 4 became privilege for citizens, while subjective rights in the 2nd chapter of the constitution are applicable for everyone.[16]

Article 28 (Right to Healthcare), Article 29 (Rights to Protect the Environment), or Article 30 (Right to Marry) still cannot be the legal basis for constitutional claim and they are still abstract and hypothetic. But they are very popular and no one wanted to rescue their authority and popularity removing them from the text. Unfortunately, their formulations are not useful. They are more like principles than real basic rights. It would be better to achieve the primary goals of constitutional commission and make 2nd chapter with subjective rights, which have not only declarative meaning, but can be implemented in the process of realization of human and civil rights.

4 SOME MODERN AND POST MODERN RIGHTS

Modernity and development always get new ideas and concept of human rights and freedoms. Some of them are just concretized versions of existing rights, but there is a need to emphasize something for the higher level of guarantee.

New article 17 of Georgian Constitution provides freedom of access and use the internet – of course it is a part of freedom of thought and freedom expression. But for new generation and mod-

11 JOWELL, J. Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters. March 2017, p. 5.

12 Institute for Development of Freedom of Information, Assessment of the Proposed Constitutional Amendments, 27 April 2017; available at: <https://idfi.ge/en/evaluation_of_proposed_actions_as_part_of_georgias_constitution_project> [10/08/2018]

13 Ibid.

14 Ibid.

15 Differing these rights and what to leave in the chapters was political question. See JOWELL, J. Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters. March 2017, p. 5.

16 Ibid, p. 6.

ern society internet became not only an important thing but irreplaceable part of everyday life, many people express their ideas in social media, blogs and use internet sources to implement their freedom. Legal experts and international organizations positively marked such novation.[17]

Civil Law system differs from Anglo-American Law and all of these differences firstly come from dividing law as private and public.[18] European system recognizes this division and includes administrative law. In practice it is a law of executive branch of government, strictly connected to the public governance.[19] Any individual or legal entity needs to be secured and protected from the interruption of administrative organs. Beside the litigation we have case hearings by administrative organs and they can make their own decisions.[20] These decisions can be appealed at courts, but it is very important to have constitutionally guaranteed right for fair hearing on the administrative level too. Amendments created special norm, which provides the right to give a fair hearing of case by an administrative body within a reasonable period of time.[21] This article automatically made possibility for protection rights by constitutional litigation.

Right to education was in the basic law but amendment changed it formulation and added a new concept for institutional independence, which is vital for academic entities.[22] New article 27 gives individual and collective understanding of right to education. It guarantees freedom to choose education for any person and autonomy of a higher educational institution for organizations.

Unfortunately, amendments changed standard of the access public information and widened the scope of restriction and "substantially worsened the opportunities for accessing such information".[23] "Protecting interests of legal proceedings" is very wide legitimate aim and it will be very problematic to define whether it is necessary in the democratic society. This provision gives public authority opportunity to interpret some situations on behalf their position and they can restrict access to the public information, which may be dangerous for the government.

New redaction of the constitution guaranteed independence of the public broadcaster and declared its independence from public of commercial influence.[24] The constitution also provides special status, "institutional and financial independence of the national regulatory body – established to protect media pluralism and the exercise of freedom of expression in mass media, prevent the monopolisation of mass media or means of dissemination of information, and protect the rights of consumers and entrepreneurs in the field of broadcasting and electronic communications".[25]

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17 Ibid.

18 See FERNANDO, O. Conceptual Differences between the Civil Law System and the Common Law System. In Southwestern University Law Review. Vol.19, 1990, p. 1164.

19 KÜNNECKE, M. Tradition and Change in Administrative Law. An Anglo-German Comparison. Berlin: Springer, 2007, p. 3 – 4.

20 See General Administrative Code of Georgia, 25 June 1999.

21 Constitution of Georgia, 24 August 1995, Art.18. (*Shall become effective upon taking of the oath of office by the President of Georgia to be elected in the next Presidential Elections*)

22 Ibid., Art.27.

23 Opinion on the Draft Constitutional Amendments Adopted on 15 December 2017 at the Second Reading by Parliament of Georgia, Adopted by the Venice Commission, CDL-AD(2018)005, Venice, 16 – 17 March 2018, Par.33.

24 Constitution of Georgia, 24 August 1995, Art.17 (6). (*Shall become effective upon taking of the oath of office by the President of Georgia to be elected in the next Presidential Elections*)

25 Ibid., Art.17 (7).

5 PROPERTY AND OWNERSHIP – SPECIAL PROTECTION OF AGRICULTURAL LAND

In June 2012 Constitutional Court of Georgia declared some provisions of regulations on agricultural land unconstitutional. Law on Agricultural Lands prohibited to own such kinds of lands to foreigners and legal entities registered outside of Georgia. The constitutional court annulled this regulation. The decision evoked heterogeneous reactions in population. New parliament and government that were elected after a few months from the judgment were against of it. Parliament adopted new law and declared moratorium on selling agricultural lands to foreigners, but the court annulled this moratorium too.

According the constitutional parliament has no right to adopt any law with the concept that was declared unconstitutional by the constitutional court. The only way is to incorporate this rule in the basic law. So the parliament decided to act this way. New article 19 on right to ownership includes provision regarding property right on agricultural land. Basic Law recognized agricultural land as a resource of special significance and provided that it may only be in the ownership of the State, a self-government unit, a citizen of Georgia, or an association of the citizens of Georgia. Exceptional cases may be determined by the organic law, which shall be adopted by a majority of no less than two thirds of the total number of members of Parliament. The mandatory quorum is unusual for organic laws, but because of significance and the will of Georgian population, parliament decided to make more guarantees for stability.

Stability is very important, but it should not be in controversy to investment climate and country's financial sustainability. "Such a provision of course has a political as well as legal dimension. It is well known that foreign investment is often deterred by countries which do not permit land ownership to non-nationals."[26] Results will be shown only after implementation of new rules.

Some constitutions contain intellectual property provisions with general norms of property, but new redaction of Georgian basic law chose another way: freedom of artistic and intellectual creativity is set in new article 18.[27] Such norm was also in the former redaction too and this underlines the position of the country regarding intellectual property and copyright, which is very important and popular problem of XXI century.

6 FREEDOM OF BELIEF, RELIGION AND CONSCIENCE

Freedom of belief and religion is one of the most sensitive rights in law. Current redaction of Georgian constitution guarantees freedom of belief and religion and explicitly gives only one possibility to interrupt in it. This freedom can be restricted unless expression thereof infringes on the rights of others.

After constitutional amendments ways of restriction increased. After enforcing the amendments, restriction of such rights shall be admissible in accordance with law for the purposes of ensuring

[26] JOWELL, J. Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters. March 2017, p. 13.

[27] Ibid.

public safety, or for the protection of health or the rights of others, insofar as is necessary in a democratic society. These reasons were receipted from the European Convention on Human Rights, which was adopted more about 60 years ago and has broader mechanisms of interruption in the secured sphere of freedom of belief and religion. Step by step European Court of Human Rights narrowed it and restricted the ways of interruption of right. In 21st century it's unbelievable to use the old regulation and implement it, when you have much higher level of protection.

Following recommendation of the Venice Commission, parliament of Georgia changed formulation of restriction of these rights and "national security", "preventing crime" and "administering justice", "which are not legitimate aims in the sense of the second paragraph of Article 9 ECHR have been deleted".[28] Now legitimate grounds for restriction are "public safety" and "protection of health or the rights of others", this formulation is much better. Restoring the old norm, which guarantied more protection and more stability in the multi religious society, should amend this provision in the constitution.

7 MARRIAGE

Definition of marriage in the constitution was changed and narrowed. Constitution of 1995 declared that marriage is based on equality of rights and the free will of spouses. This provision was taken from the first Georgian constitution of 1921. In the twenties of last century Social Democrats, ruling party at that time, made extraordinary and unusual concept of marriage for the first quarter of the XX century – Equal rights and free will of spouses.[29]

Last constitutional reform changes this declaration and added terms in the provision. Now it sounds: Marriage, as a union of a man and a woman for the purposes of building a family, shall be based on equality of rights and the free will of spouses. Now it is a classic definition from the civil code[30] and it is not clear why it is included in the basic law of Georgia. Unfortunately some political parties used this topic for political purposes, anti European rhetoric and provided the whole parliamentary campaign to make such amendments to the constitution.[31]

New constitutional norm is in compliance with ECHR provision[32] – "Men and women of marriageable age have the right to marry and found a family, according to the national law governing the exercise of that right".[33] New case law of the European Court of Human Rights doesn't obligate states to make possibility for marriage of homosexuals, but if there is an alternative for of partnership for heterosexual couples, it recommends granting equivalent to same-sex couples too.[34]

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28 Opinion on the Draft Constitutional Amendments Adopted on 15 December 2017 at the Second Reading by Parliament of Georgia, Adopted by the Venice Commission, CDL-AD(2018)005, Venice, 16 – 17 March 2018, Par.30.

29 Constitution of the Democratic Republic of Georgia, 21 February 1921, Art. 40 (1).

30 See Civil Code of Georgia, 26 June 1997, Art. 1106.

31 Institute for Development of Freedom of Information, Assessment of the Proposed Constitutional Amendments, 27 April 2017; available at: <https://idfi.ge/en/evaluation_of_proposed_actions_as_part_of_georgias_constitution_project> [10/08/2018]

32 JOWELL, J. Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters. March 2017, p. 17.

33 ECHR, Art. 12.

34 See Vallianatos and Others v. Greece. [ECtHR], App. nos. 29381/09 and 32684/09, 7 November 2013; JOWELL, J. Review of Amendments to the Constitution of Georgia in Respect of Human Rights and Judiciary Matters. March 2017, p. 13.

Venice Commission gave recommendation to the Georgian parliament and underlined in the opinion, that Article 30 "should in no case be interpreted as prohibiting same-sex partnerships".[35]

New definition of marriage was incorporated in the constitution for political goals and it doesn't have any connection to the protection of human rights.[36] This definition was already in the legislation of Georgia. Adding such provisions reduces the meaning of Constitution and it becomes just ordinary law that regulates everyday questions. These provisions should be excluded from the basic law; there is no place for narrow legal definitions and ordinary law questions in the most important document of the state.

8 ARTICLE 39 – DISPLACED NORM

Before the constitutional reform, Article 39 provided: "The Constitution of Georgia shall not deny other universally recognized rights, freedoms and guarantees of an individual and a citizen that are not expressly referred to herein but stem inherently from the principles of the Constitution". This norm came from the first constitution of the Democratic Republic of Georgia.[37] But this was receipted from the ninth amendment of the US constitution.[38] Real goal of existing such norms in the constitutions is to secure human rights, because it's impossible to enumerate all of them in the basic law.[39]

The ninth amendment of the US constitution is some kind of "penumbral" norm[40] and gives a wide opportunity for judicial interpretation.[41] Some constitutional commentators think, this amendment includes the idea of limitation of government by natural rights to secure possibility of protection other rights in first eight amendments.[42] Article 39 has the same function and its place in the 2nd chapter of the Georgian constitution is not accidental, it is directly linked to the material and procedural mechanisms of protection of human rights, set in the legislation.

Constitutional Court of Georgia defines, that Article 39 includes rights, which indirectly, but still comes from the constitutional principles and this can be interpreted as some kind of regulation.[43] The only standard of interpretation of this article is the constitution and constitutional principles.

35 Opinion on the Draft Revised Constitution Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, Adopted by the Venice Commission, CDL-AD (2017) 023, Venice, 6 – 7 October 2017, Par. 38.

36 Institute for Development of Freedom of Information, Assessment of the Proposed Constitutional Amendments, 27 April 2017; available at: <https://idfi.ge/en/evaluation_of_proposed_actions_as_part_of_georgias_constitution_project> [10/08/2018]

37 Constitution of the Democratic Republic of Georgia, 21 February 1921, Art. 45.

38 PUTKARADZE, N. Human Rights in the Constitution of 21 February of 1921. In Beginnings of Georgian Constitutionalism – 90 Years of the Constitution of 1921. Batumi, 2011, p. 58.

39 See GEGENAVA, D., JAVAKHISHVILI, P. Article 39 of the Constitution of Georgia: Internally Displaced Norm Pending the Shelter and the Phenomenon of Fear of the Unknown in Georgian Constitutionalism. In Academic Herald, Special Edition, 2017.

40 See: HART, H.L.A. Concept of Law. Clarendon Law Series, 1997.

41 LENY, L.W. Origins of the Bill of Rights. New Haven, London : Yale University Press, 2001, p. 242.

42 MCAFFEE, T.B., BYBEE, J.S., BRYANT, A.C. Powers Reserved for the People and the States: A History of the Ninth and Tenth Amendments. A Reference Guide to the United States Constitution. Westport, Connecticut, London : Praeger Publishers 2006, p. 38; LENY, L.W. Origins of the Bill of Rights. New Haven, London : Yale University Press, 2001, p. 254.

43 Recording Notice #2/2/416 of the Constitutional Court of Georgia on "Public Defender of Georgia v. Parliament of Georgia", 29 May 2007, III, 1.

Interpreting Article 39, the constitutional court constituted many important and relevant standards and principles,[44] and this norm became one of the last chances for the claimants, on which they could file cases to the court.

Explanatory note from the parliament of Georgia interprets this "movement" of norm as ordinary case and suggests constitutional court to interpret general principles widely.[45] Its quiet unusual, first of all, parliament has no right to suggest any way of interpretation and implementation to the constitutional court, secondly, the court declared many times, that claimant can only use provisions of the second chapter for the legal ground of claims.[46] So currently Article 39 becomes non useful for protection of rights and will be general principle, just sounding perfect.

9 CONCLUSION

These changes are not only ordinary amendments; they make constitutional court and other state organs to realize their duties, and individuals to find new ways of protection of their rights. New constitutional regulation raises new forms and meanings, but this novation includes risks and perils, that should be discussed and analysed not only in the light of national constitutional law, but also in comparative and international context.

Dynamic development of human rights is the basic for democracy and the rule of law. Constitutional experience of developed countries shows that formation of constitutional identity is strictly linked to the concept of basic rights, its scopes and the limitation of government, which is essential for every nation. Qualified system of human rights doesn't mean there is no place or necessity for future development, concretization or even creation of new ideas, new rights. Constitutional basis for rights is the signal from the system of values, constitutional understanding helps the whole system to reanalyse main concepts.

Georgian constitutional identity is still in the process of formation and we even can't see the final destination. Ongoing constitutional reform has made many interesting amendments, re-establish classic institutions in the new form. Definitely there are problems too, its irreplaceable pars of reform. In any case every reform must be necessary for nation and national development, good direction can reinforce margins and understanding of Georgia's mission in the world, or opposite, it can ruin even those thin fundaments, which is so tricky and overrule destinations that has already been passed.

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[44] ZOIDZE, B. Constitutional Control and Order of Values in Georgia. Tbilisi, 2007, p. 157.

[45] Explanatory Note on the Draft Constitutional Law on "Amendment to the Constitution of Georgia"; available at: <http://constitution.parliament.ge/uploads/masalebi/2. 05. konstitucia-barati.pdf> [06. 07. 2018]

[46] See e.g. Judgment #1/7/727 of the Constitutional Court of Georgia on "Citizen of Georgia Giorgi Sekhniashvili v. Parliament of Georgia", 21 April 2017, II, 2; Judgment #1/9/664 of the Constitutional Court of Georgia on "Non-Profitmaking Organization "Open Circle of Georgia" v. Parliament of Georgia", 25 November 2016, II, 8.

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NEW TRENDS OF THE CIVIL JUSTICE IN HUNGARY

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Abstract: The article provides an overview on the most important innovations of the new Hungarian Code of Civil Procedure. It presents a renewed system of allocation of cases, the split structure of the procedural phases, the modifications in connection of the representation, the new regulation on the illegaly obtained evidence, the solutions for incapacity to prove, the remedies and collective redress. Finally, the manuscript goes on with the question of electronization and try to evaluate the modest practical experience of these innovations so far.

Key words: civil procedure, new Code of Civil Procedure, litigious proceedings, Hungary.

1 INTRODUCTION

The old Hungarian Code of Civil Procedure (Act III of 1952), which has been modified many times since its entry into force, did not follow a uniform concept. After the political transformation, the Hungarian Code of Civil Procedure struggled with the problem of "belonging" and "finding its proper place". In this period of its development one may experience some kind of return to German-Austrian roots as well as some independence. One part of the modifications was triggered off by international conventions and European Union law. The main regulatory objectives defined by the Draft Bill on the new Code of Civil Procedure included the systemic realization of the effectiveness of court proceedings, diverting claims away from court proceedings (mainly to mediation), establishing procedural rules promoting agreement between the parties, the introduction of a split system of procedural phases, the creation of procedural rules ensuring the concentration of proceedings, the prescription of mandatory legal representation in proceedings commenced before the courts of justice as a guarantee of the professional conduct of proceedings, the creation of domestic rules of collective redress and enhancing the role of reasonable electronization. The new HCCP has introduced significant modifications concerning the rules relating to legal representation, it has afforded an enhanced role to statements made during the preparatory phase, and it has laid down stricter requirements concerning the parties' legal statements. The court has been granted extensive powers to clarify the legal dispute, and the demonstration of expert evidence has been provided with a new basis. There have been significant changes in the rules of the appeals process, while with regard to review a system based on a value limit has been introduced.

2 CASE ALLOCATION

The new Code of Civil Procedure (new HCCP – Act CXXX of 2016 entered into force on 1 January 2018) has not changed the system of two levels of first instance courts. Cases are tried at first instance

by the district courts and the courts of justice. In civil cases local courts had general first-instance jurisdiction before the new Act. From 2018 the new regulation defines courts of justice as the courts having general jurisdiction and also prescribes mandatory representation by counsel before them. By doing so, the regulation basically returns to the traditions of 1911. It introduces uniform procedural rules[1] (it no longer contains the rules of the former HCCP pertaining to small claims, or the rules relating to matters of special importance, which classified cases based on the value of the claim. The uniform system of procedural rules introduced by the new HCCP is modelled for courts of justice and even in cases initiated before the district courts deviation from these rules is permitted only if the party involved is not legally represented.

Cases falling within the first-instance jurisdiction of the courts of justice can be appealed to the courts of appeal. Review petitions are heard by the Curia. Moreover, it ensures the uniformity of judicial practice.

The purpose of effective case management is intended to be served by the distribution of cases between the two first instance courts (courts of justice and district courts), which takes place so that cases of a more specialized character or of greater complexity and cases involving substantial claims start at a higher level (before the courts of justice). The jurisdiction of district courts extends to *a)* property cases where the value of the claim does not exceed thirty million forints or where the value of the claim based on property rights cannot be determined (except for actions relating to copyright, neighbouring rights and industrial property rights, actions for general damages or compensation for pain and suffering related to the exercise of official authority, actions launched in the public interest, actions concerning the formation and lawful operation of a legal person, disputes between legal persons and their current or former members, and disputes between current or former members arising from their membership relations), *b)* actions related to personal status, *c)* enforcement actions. [Section 20 new HCCP].

The new Code of Civil Procedure has not essentially changed the rules relating to jurisdiction, but contains some novelties with regard to consumers (it has introduced rules of exclusive jurisdiction that serve the interests of the weaker party).

3 PREPARATION

The new HCCP reintroduced the split system of procedural phases (which used to be applied in the Code of Civil Procedure of Plósz of 1911). According to the explanatory memorandum attached to the Draft Bill, the draft proposal aims to set up a procedural order that will render the course of the proceedings more predictable for the parties, because the split system of procedural phases makes clear the function and duration of the specific procedural phases, thereby establishing unambiguous frames for the performance, restriction or preclusion of specific procedural acts, which will promote not only the effectiveness of proceedings, but also their predictability. First instance proceedings are divided into two stages: the preparatory phase and the merits phase. This model places great emphasis on the preparatory phase. This system provides possibility to concentrate the definition

[1] VARGA, I. Identification of Civil Procedure Regulatory Needs with a Comparative View. In ELTE Law Journal, No. 6 (2014), p. 139 – 140.; VARGA, I. Perrendi szabályozási igények azonosítása jogösszehasonlító kitekintéssel. In VARGA, I. (ed.): Codificatio processualis civilis. Studia in Honorem Németh János II. Budapest : ELTE Eötvös Kiadó, 2013, p. 492., 496 – 498.

of the content and frames of the legal dispute in the preparatory phase (motions for evidence and means of evidence become fixed). However – according to the explanatory memorandum – the preparatory phase does not lack flexibility: the specific steps involved in this phase are decided by the court, which enables the court to decide on the method and course of preparation in line with the particular characteristics of the specific case.[2]

The new Act applies a wide range of preclusions. For example, after the closing of the preparatory phase, as a general rule, it is not possible to modify the claim or defence, and the submission of further evidence and motions is precluded. The aim of the restriction – besides preventing the protraction of proceedings – is to also enable both the court and the opposing party at some point to regard the frames and content of the legal dispute finally fixed and to ensure that following this nothing but the evidence taking procedure and the decision on the merits should take place based on the fixed allegations. The modification of the claim may be permitted following the dividing line only if such modification is related to a cause that cannot be attributed to the fault of the party concerned.

Concerning the new regulation it is not yet possible to account of the practical experiences as not even three months have passed since the entry into force of the code, but a change may also be expected in the role of the hearing on the merits phase: the aim is to conduct the evidence taking concerning the legal dispute defined in the preparatory phase, which – as a result of the preparation – will become a lot more expedient and therefore one may expect an earlier decision on the merits of the case.

4 FIRST INSTANCE LEVEL

The new Code of Civil Procedure models uniform rules of procedure as a system of professional procedural rules, in relation to which it precisely determines the statutory situations – always along the lines of groups of persons or interests requiring protection – where deviation in the direction of more simple procedure is necessary and possible.[3] The new HCCP introduced a split system of procedural phases, which renders the course of the proceedings more plannable and predictable.

According to the expectations of the legislator, the professionalism of the parties' procedural acts may significantly contribute to effective claim enforcement and legal protection as well as defence against them, moreover, the resolution of lawsuits within a reasonable time. The detailed and elaborated content of the most important submissions, e.g. that of the statement of claim and the defence, which are to be submitted in written form obligatorily, serves both the proper and expedient preparation of the lawsuit and the conversion of submissions into standard forms, which provides help for the party acting without a legal representative and also facilitates electronic communication. Unfortunately, the first experiences do not corroborate these expectations. In the first months of the application of the new Code, an extreme number of statements of claims have been dismissed, which according to the accounts of lawyers has perceivably reduced the willingness of potential claimants to commence litigation.

[2] Cpr. KÖBLÖS, A. Hungary – Towards More Efficient Preparatory Proceeding. In ERVO, L., NYLUND, A. Current Trends in Preparatory Proceedings. Cham: Springer, 2016, p. 185 – 205.

[3] KARCZUB, E. al. Általános rendelkezések és alapelvek. In VARGA, I., ÉLESS, T. Szakértői Javaslat az új polgári perrendtartás kodifikációjára. Budapest: HVG-Orac – Magyar Közlöny Lap- és Könyvkiadó Kft., 2016, p. 798 – 800.

At the level of district courts (if the party is not legally represented) numerous rules have been introduced to facilitate the enforcement of rights, e.g. the use of standard forms, lesser requirements regarding submissions, and the party is also supported by the judge's substantive measures of conduct a case. According to the explanatory memorandum attached to the Draft Bill, this means a flexible alternative solution in cases of lesser complexity and in cases presupposing the involvement of a weaker party.

Apart from the exigency of providing evidence and the admissibility of illegally obtained means of proof, the most important innovation in the regulation relating to the demonstration of evidence is the reform of expert evidence: private expert opinions are also properly incorporated into the system. The party may supply expert evidence in three ways: by way of a private expert engaged by him, through an expert appointed for him in another proceeding, or via an expert appointed for him in the lawsuit. Private expert evidence – according to the explanatory memorandum attached to the Draft Bill – is expected to put an end to the current practice leading to the protraction of proceedings under which private expert opinions are used not for the main taking of evidence, but with the aim of contesting or challenging the professional competence of the expert appointed by the court.

The appearance of the parties' obligation to assist the court in administering justice as a basic principle is also a novelty in the new HCCP. The definition of the content of obligation to assist the court in administering justice – at least with regard to its limits – may pose a problem at first sight. The obligation to assist the court in administering justice involves the party's enhanced procedural responsibility, which means a supportive and active role. One might suppose that this active role is problematic in respect of the defendant, since active role on the side of the defendant would mean defence, moreover, defence against the relief sought by the claimant. It is important to emphasize that it is not so, the defendant is not obliged to put up a defence: he has self-autonomy, in other words, he is free to decide.[4]

The court's obligation to carry out contributive actions is also a new element, in the centre of which are the change in and the enhanced role of tools for the conduct of the case. In the range of the court's contributive actions, the new code has strengthened the court's powers relating to the conduct of the case.[5]

5 EXIGENCY OF PROVIDING EVIDENCE (INCAPACITY TO PROVE) – UNLAWFUL EVIDENCE

The old HCCP (before 2018) contained only a few provisions the violation of which would result in the unlawfulness of evidence. With regard to the *use of unlawfully obtained evidence*, the HCCP did not formulate generally applicable clauses of the type contained in the Act on Criminal Procedure. Prohibitions were concentrated around the witness statement and expert opinion, but in other areas the lack of general and special prohibitions results in uncertainty concerning such illegalities

[4] MOLNÁR, T. Az új polgári perrendtartás alapelveinek értékelése, a perjogi kodifikáció hatása a polgári eljárás sajátos alapelveire. In Közjegyzők Közlönye, No. 6 (2017), p. 20.

[5] Ibid., p. 23.

arising out of litigation[6] as e.g. the stealing of documents or obtaining an electronic letter through unauthorised access to the e-mail system.

The new HCCP regulates as a new legal institution the exigency of providing evidence, the admissibility of illicit means of evidence in the lawsuit, and the probative value of evidence from other procedures used in civil proceedings. According to the explanatory memorandum to the Draft Bill, the exigency of providing evidence (incapacity to prove) means a regulatory solution to strikingly information-asymmetric situations, where the adversary of the party having the burden of proof has the relevant evidence in his possession and therefore he is able to make it difficult or impossible to prove the case successfully. The legal consequence of the exigency of providing evidence is: the court establishes the existence of the fact, if the judge has no doubt in this regard. The new HCCP regulates the frames of admissibility of unlawfully obtained means of evidence, but does not lay down an absolute prohibition concerning them. Pursuant to Section 265, the facts in a case shall be proven by the party having an interest in the fact being accepted by the court as the truth (hereinafter "interest to prove"), and the consequences of not proving or unsuccessfully proving such fact shall also be borne by said party. The party is in a situation of exigency of providing evidence, if he substantiates that *a)* the data indispensable for his motion to present evidence are in the exclusive possession of the party with opposing interests, and he verifies that he took the necessary measures to obtain such data, *b) it is not possible for him to prove the facts alleged, but the opposing party can be expected to supply evidence to disprove his allegations of fact, or c)* the success of taking evidence was hindered by the party with opposing interests in a culpable manner, and the other party does not substantiate the opposite of those specified in points *a)* to *c)*. If the party is under the exigency of providing evidence, the fact to be proven by the party affected by such exigency may be accepted by the court as the truth, if it does not have any doubt regarding its veracity.

Pursuant to Section 269 of the CCP, a means of proof, or any separable part of it, is unlawful and cannot be used in the action, if *(i)* it was obtained or produced by violating or threatening a person's right to life and physical integrity, *(ii)* it was produced by any other unlawful method, *(iii)* it was obtained in an unlawful manner, or *(iv)* its submission to the court would violate personality rights. A means of proof shall be considered evidently unlawful if that can be clearly established as a fact on the basis of evidence and data available. The evidently unlawful nature of a means of proof is to be taken into account by the court *ex officio*, and the parties are to be informed accordingly. If a means of proof is not evidently unlawful, its unlawful nature shall be notified without delay by the party opposing the party submitting the means of proof. A party may only rely on the unlawfulness of a means of proof following the order closing the preparatory phase, if through no fault of his own he became aware of it only later, and he notifies it to the court within fifteen days after having become aware of it. With the exception of the case described in point *(i)* above, the unlawful means of proof may be taken into account by the court exceptionally and with due regard to the particular nature and extent of the violation, the legal interests affected by the violation, the impact of the unlawful piece of evidence on establishing the facts, the weight of other available pieces of evidence and all other circumstances of the case. If an unlawful means of proof cannot be used and the proving party cannot prove a significant fact in the case in any other way, the court may apply the rules pertaining to the exigency of providing evidence.

[6] KENGYEL, M.A. bizonyítás. In PETRIK, F. (ed.): Polgári eljárásjog. Kommentár a gyakorlat számára. Budapest: HVG–ORAC, 2017, p. A/373.

6 REMEDIES

The HCCP of 1952 transformed the earlier two instance appellate system into a one level system. In its original form, the above-mentioned Act maintained a kind of second instance proceedings characterizing Plósz' Code of Civil Procedure of 1911. After the democratic transformation in 1989 – 90 the first great impetus to the transformation of the Hungarian remedy system was given by a decision of the Constitutional Court, thus the reform really started in 1992 with the re-introduction of the review procedure. In the past decades, most modifications have been concerned with the institution of review and they have been generated by the decisions of the Constitutional Court in several cases.

It is universally valid that one of the main causes of the delay of civil lawsuits is the excessive caseload on courts. One of the means frequently used to resolve this problem is the restriction of legal remedy (filtering the cases). Restricting techniques may vary:[7] a limit of amount defined by law or, a specific group of cases that constitute the limit and exclude the possibility of resorting to legal remedy.

The Fundamental Law requires a regular appellate procedure. Conceptual questions arise mostly with respect to the permissibility of extraordinary appeals. Within the question of permissibility, it has to be clarified as to what roles the legislature envisages for the higher courts, especially the Curia, in the area of extraordinary appeals, in other words, what weight it wishes to assign to each of them when developing the dual task-totality of individual legal protection and legal uniformity. Within the scope of permissibility, the separation of permissibility from the disputed amount as the only entry condition also requires a fundamental decision in itself. The amount in controversy and the disputed amount do not determine the significance of the case.[8]

The new HCCP endeavoured to render the rules of appeal more effective. In this respect it aims to achieve a double goal: to ensure due prevalence of the right to legal remedy, and at the same time to prevent the regulation from providing opportunity for the protraction of proceedings during the appellate procedures. Therefore, the Code defines the scope of the second instance court's powers of revision, and determines the obligatory content of appeals accordingly, while at the same time it lays it down as a general rule that the second instance court shall adjudicate the appeal without a hearing. The Code also reregulates the circumstances serving as a ground for setting aside a judgment and therefore resulting in the protraction of proceedings. The essence of the new regulation lies in the fact that violations of procedural rules that do not constitute grounds warranting the mandatory setting aside of judgments are to be taken into account by the second instance court only at the request of the appellant and not ex officio.

The new HCCP deals with the effects of the judgments of the European Court of Human Rights in such a way that it leaves the earlier form of reopening cases for revision as well as the main rules almost entirely intact.

According to the explanatory memorandum attached to the Draft Bill, a so-called mixed system has been introduced concerning the rules of review as an extraordinary remedy, under which the right to review has been preserved within the frames of objective conditions excluding its possibility,

7 Cp. KENGYEL, M. Zivilprozessrecht um die Jahrtausendwende. In Zeitschrift für vergleichende Rechtswissen-schaft. Vol. 101, No. 3 (2002), p. 270 – 271.

8 Cpr. VARGA, I. Perrendi szabályozási igények azonosítása jogösszehasonlító kitekintéssel, op. cit., p. 505.

but in the case of judgments affected by specific grounds for excluding review the Curia may still allow review having regard to law uniformity considerations. In certain property cases the Curia may exceptionally allow review with regard to law uniformity considerations, or where it is justified by the special significance or social importance of the question of law raised.

7 COLLECTIVE REDRESS

The experiences of recent years (more serious cases of environmental pollution, consumer protection problems) have urged experts to reconsider the adequacy of current legal regulations concerning collective redress.[9] The chapter of the new HCCP on collective redress lays down common procedural rules concerning the rules of public interest actions (actio popularis) already existing in Hungary, but so far typically uncoordinated and contained scattered in various separate laws, thereby consolidating them into one bunch of laws. On the other hand, it contains the rules of coordinated actions to be newly introduced, which may serve as a means to enforce aggregated private interests.

The coordinated action intended to be introduced by the new Code of Civil Procedure is of an opt-in system, also having regard to Commission Recommendation 213/396/EU (of 11 June 2013). In a coordinated action the members of the group may be easily identified individually (their identities are known). However, individual claim enforcement does not use the resources of the justice system with proper effectiveness; therefore it is expedient to deal with them in one proceeding. Thereby, e.g. the costs of evidence may be reduced.

Opt-in system – based on foreign experiences – would be suitable for enforcing claims for damages in product liability cases (e.g. actions against pharmaceutical companies), or claims resulting from railway and air accidents, environmental pollution, and industrial disasters. The scope of the regulation introduced by the new HCCP only covers a small part of these actions (enforcement of claims arising from consumer contracts, claims for damages resulting from health injuries in employment actions based on human action or inaction, and directly caused by invisible environmental impacts or property claims for damages).[10] If it is justified by the extreme complexity or utmost social significance of the coordinated action coming under the jurisdiction of the courts of justice, the single judge may exceptionally order prior to the order concluding the preparatory phase that a panel of three judges shall proceed in the case. Once a case has been referred to a panel of judges, later it is not possible for a single judge to act concerning the case. As opposed to coordinated actions, public interest actions have been referred to the competence of courts of justice by the new HCCP. If it is justified by the special complexity of the public interest action, the single judge may

[9] Cpr. HARSÁGI, V. The Need for Further Development of Collective Redress in Hungary. In HARSÁGI, V., RHEE C.H. (ed.): Multi-party Redress Mechanisms in Europe: Squeaking Mice? Cambridge: Intersentia, 2014. p. 171 – 185.; HARSÁGI, V. Deficiencies of collective redress in Hungary and recomendations for codification. In FANKHAUSER, R. et al. (ed.): Das Zivilrecht und seine Durchsetzung. Zürich: Schulthess Juristische Medien AG, 2016, p. 201 – 215.; HARSÁGI, V. Quo Vadis Collective Redress? Hungarian Aspects. In Festschrift für Professor Nikolaos K. Klamaris – Essays in Honour of Professor Nikolaos K. Klamaris. Athens; Thessaloniki: Sakkoulas Publications, 2016, p. 343 – 355.; HARSÁGI, V. Combining opt-in and opt-out systems? – Expert Proposal for the Hungarian Regulation of Collective Redress. In ELTE Law journal, 2017, available at: http://eltelawjournal.hu/ [q. 20-01-2019].

[10] HARSÁGI, V. Kollektív igényérvényesítés – Általános indokolás a kollektív igényérvényesítéshez. In VARGA, I., ÉLESS, T. (ed.): Szakértői Javaslat az új polgári perrendtartás kodifikációjára. Budapest: HVG-Orac – Magyar Közlöny Lap- és Könyvkiadó Kft., 2016, p. 751 – 754.

exceptionally order prior to the order concluding the preparatory phase that a panel comprising three professional judges shall proceed in the case. Cases that have been referred to a panel cannot subsequently be decided by a single judge.

8 E-JUSTICE

Information technology offers possibilities by which access to justice may definitely be improved and proceedings without a legal representative may become better available. Let us think of e.g. the introduction of electronic forms and their publication on the internet. Through them a higher level of automatism may be achieved, especially if their actual filling in online is alleviated by supporting programmes. The rationalizing and accelerating potential resulting from the application of modern IT in court proceedings is dependent on the structure of the given proceeding to some extent. It offers more possibilities for proceedings with a simple structure and a rather routine-like course, where the decision-making process is schematic and more standardizable.[11] It is no accident that in numerous countries – amoung them in Hungary, too – order for payment proceedings and the company registration procedures have been considered to fall within this category. In these fields e-justice functions effectively and adequately. Moreover, in the case of automated proceedings, the geographic location of the processing court is insignificant, as communication takes place through the internet anyway.

Litigious proceedings – in international comparison – are still rather resistant to the effects of e-justice. The eIDAS Directive, reforming the foundations of electronic identification, was adopted by the European Parliament and the Council in the summer of 2014; following this in May 2015 the Hungarian Government adopted Decision No. 1295/2015. (V. 7.) Korm., in which it took the position that with regard to certain tasks of the court and prosecution service connected with the codes of administrative and civil procedure the delay observable concerning the establishing of electronic communication should be eliminated.

9 CONCLUSION

There is still relatively modest practical experience relating to the reform discussed in this article. Considering the information gathered during the codification process, the parallel experiences abroad and the internal inconsistencies of the new Code of Civil Procedure, as well as the not always progressing solutions, it is feared that it will not in all respects adequately meets the expectations of the 21st century. The first sign of this has already been manifested in the mass rejection of claims. However, hopefully, based on the experience of the first years, the shortcomings of the law can be corrected and it can be transformed into a well-functioning system. In the next years this may be the task to be done. This could also increase the value of forward-looking development experiments presented in this article.

[11] KODEK, G. Der Zivilprozeβ und neue Formen der Informationstechnik. In Zeitschrift für Zivilprozeß, No. 4, 2002, p. 481.

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RELIGION AND CONSTITUTION. SOME HUNGARIAN PERSPECTIVES

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Abstract: Freedom of religion shall be a universally recognized human right. States have developed highly different models with regard to their relations to religious communities. Some kind of neutrality of the state has to be preserved in order to provide due respect to all faiths. Derived from a religious heritage and beyond religious beliefs the cultural identity of peoples gains a rising significance. The historically determined identity of nations is expressed various ways including the public endorsement of the legacy shaped by religious communities. Beyond the national level and within their boundaries local communities express identities in various ways. The Basic Law of Hungary (2011) is characterized by an open commitment to the religious roots of the national culture but maintains the respect for religious freedom and consequently also remains in the framework of religious neutrality.

Key words: religious freedom, church and state, religious neutrality, cultural identity, Basic Law of Hungary

1 INTRODUCTION

Emperor Augustus has placed a Milliarium Aureum at the Forum Romanum. All roads lead to Rome – milestones were calculated from this place.

The milestones of national roads in Hungary are calculated from a Zero kilometer stone in central Budapest, from the square at the Buda side of the first permanent bridge of the city, the Chain Bridge. The Hungarian Automobile Association has inaugurated a Madonna statue (Patrona Hungariae – Our Lady of Hungary) to mark the place in 1932. The area was severely damaged in the war early 1945 and the statute has been replaced after the communist takeover by a schematic one depicting a worker with a wheel. The craftsman rendered his place to a 0 kilometer stone by Miklós Boros in 1975. The present statute is simple and elegant: a three meter tall 0 carved from white limestone, as neutral as a 0 can be. Subsequent changes within a few decades tell us a story. Whereas previous statues with a strong ideological message did not survive changes, the neutral statute has been in the place for more time than its predecessors together. Communist statues of Budapest were removed from the public square to a statute park but of course the Zero has not been offensive to anyone – it is a well-designed landmark generally accepted by the public.

Is this the model of the coexistence of identities? Should we neutralize the public space in order to avoid offensiveness? Is this the path to mutual respect or rather to emptiness that leads us to loose understanding for religious expression? Is there a difference between religious expression and the cultural identity rooted in religion?

2 RELIGIOUS FREEDOM AS A CONSTITUTIONAL MINIMUM

Many constitutions have only one reference to religion as such, and this is the acknowledgement of religious freedom as a fundamental right. Constitutional formula may be slightly different, providing for additional elements to human rights, like the previous Hungarian Constitution[1] as well as the new Basic Law explicitly refer to the negative aspect of religious freedom, the right not to manifest ones religion.[2] Constitutions show more differences when it comes to the status of religious communities: provisions vary from non-establishment clauses[3] to the constitutional endorsement of a religion or a state church.[4] None of these solutions shall curtail the free exercise of any religion, established or non-established.

Beyond constitutional arrangements of church-state relations, expressions of cultural identity may carry the heritage of religious convictions. Whereas certain aspects of affiliations are rather issues of policies (like customs of a given country or local community), other aspects do have legal relevance (like official symbols).

3 NEUTRALITY EMPHASIZED

The Constitution did not provide for neutrality with regard to religion in an explicit way. The doctrine on neutrality was elaborated by the Hungarian Constitutional Court,[5] in a similar way than in Germany, where it was the Federal Constitutional Court that stated the neutrality of the state.[6] Neutrality seemed to become the most important principle governing the State in its relationship with religious communities as well as with other ideologies. According to this doctrine, the State should remain neutral in matters concerning ideology: there should be no official ideology, be it religious or secular. Neutrality means that the State should not identify with any ideology (or religion); consequently it must not be institutionally attached to churches or to any one single church, nor to any organization based on an ideology. This shows that the doctrine underlying the principle of separation (as explicitly stated in the Constitution) is the neutrality of the State. It is to be noted that neutrality must be distinguished from indifference, which is not what the Constitution implies – as

1 Article 60.

2 Article VI.

3 e.g.: GG Art 140 iVm Art 137 (1) WRV „Es besteht keine Staatskirche" (There shall be no established church.)

4 Malta: "The religion of Malta is the Roman Catholic Apostolic Religion.") Section 2, Greece ("The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and syn- odal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.") Article 3, Denmark "The Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State." (Art. 4)

5 Decision 4/1993. (II. 12.) AB Commentary and text in English: SÓLYOM, L., BRUNNER, G. (eds.), Constitutional Jurisdiction in a New Democracy. The Hungarian Constitutional Court, The University of Michigan Press 2000, pp. 246 – 266.

6 BVerfGE 19, 206 (216), Campenhausen, Axel Frhr.v., Der heutige Verfassungsstaat und die Religion. LISTL, J.,ON, DIETRICH (eds.), Handbuch des Staatskirchenrechts der Bundesrepublik Deutschlands, 2nd edition, Duncker & Humblot, Berlin, p. 47, p. 77.

follows from the concept of neutrality elaborated by the Constitutional Court. Neither is neutrality "laicism": the State may have an active role in providing an institutional legal framework as well as funds for the churches to ensure the free exercise of religion in practice.[7] The State should not enter into institutional entanglement with any organization that is based on an ideology, either religious or secular. The freedom of religion and the freedom from religion are equally protected. All public institutions, including schools, universities, hospitals, etc., are bound by the principle of neutrality.[8]

Neutrality has not become a generally accepted constitutional principle, in fact it often seems to be a misunderstood doctrine. Critics did not regard neutrality as an instrument to ensure the peaceful coexistence of various beliefs, but instead regarded it to be an obstacle to the promotion of values. A proper interpretation of neutrality does not jeopardize the expression of cultural identity or the promotion of the values of a constitutional democracy respecting human rights.[9]

4 BETWEEN RELIGIOUS NEUTRALITY AND CULTURAL IDENTITY

Countries in transition after the fall of communism generally adopted new written constitutions that recognized religious freedom, often explicitly underlining the correlative right not to profess a religion. Constitutions also came to reflect the fundamental characteristics of church-state relations. In short, all constitutions in the region contain provisions on freedom of religion and church-state relations. Special recognition afforded to one traditional, national religious community only appears in the constitution of Poland and Bulgaria. In case of Poland the reference is rather of a technical nature (the Polish Constitution follows the Italian model by making a reference to the concordat with the Holy See and the system of agreement-based laws regulating the relation of the state with other religious communities.), whereas in case of Bulgaria it is of a symbolic nature ("Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria."). Separation of church and state is explicitly stated by the constitutions of Bulgaria, Croatia and Hungary. The Slovak Constitution recognizes that religious communities administer themselves independently from the state, whereas the Czech Charter of Fundamental Rights states that churches and religious societies administer their own affairs.

Constitutional norms and practices – from preambles to the symbolic communication of state organs – have an important role in expressing the identity of the political community. Besides ethnicity, religious identities shape national traditions to a high degree, but for various reasons they appear in formal legal documents often only in a hidden way (closely linked to historical traditions, e. g. coat of arms).[10] Symbols and customs may be felt as evident for majorities. Minorities (often

7 Sólyom, László: Alkotmányosság Magyarországon. Elvek és értékek. Sólyom, László: Az alkotmánybíráskodás kezdetei Magyarországon. Osiris, Budapest, 2001, 141, 145 – 146. Sólyom, László: Az állam és az egyház elválasztása az Alkotmánybíróság alapjogi koncepciójában. Forrai, Tamás (ed.): Az állam és az egyház elválasztása. Faludi Ferenc Akadémia – Távlatok, 1995, 104.

8 Decision 4/1993. (II. 12.) AB

9 Paczolay, Péter: Az állam semlegességének mítosza. Politikatudományi Szemle 1993/3, 129. Uitz, Renáta: Aiming for State Neutrality in Matters of Religion: The Hungarian Record. University of Detroit Mercy Law Review. Vol. 83 (2006). 761 – 787.

10 Data collected in the framework of the REVACERN project (Religion and Values: Central and Eastern Europe Research Network) www.revacern.eu Special thanks to Zabój Horák, Blaž Ivanc, Dénes Kiss, Jana Martinkova, Michal Rynkowski and Sinisa Zrinscak for the information provided.

new minorities) may challenge them by pointing to the religious content of cultural phenomena. The Lautsi-case shows the difficulties of finding a consensus based on solid arguments.[11]

4.1 National symbols

In Hungary – as in many other countries – national symbols are declared by the constitution. The national anthem is a 19th century hymn expressly referring to God. It is often sung in churches. Despite of being a national prayer, in public the anthem is regarded as religion-neutral. The national anthem of Slovenia is the seventh strophe of the poem "Zdravljica", written by the poet France Prešeren. This particular strophe in Slovenian does not explicitly refer to God. However, God is mentioned several times in other parts of the poem. Also the second strophe of the Czech national anthem (which is not usually sung) there is reference to God. The last (eleventh) strophe of the national anthem of Romania (usually not sung) claims priests to lead with crucifixes, because "our army is Christian".

Coats of arms are determined by heraldic traditions. Except of Czechoslovakia and Poland communist regimes have adopted radically new coats of arms, whereas in the above mentioned countries, as well as in Austria the coats of arms have been adopted to new political circumstances. After the collapse of communism historic coats of arms have been restored. The Slovak coat of arms and the national flag contain a double cross – originally the symbol of royal power, not that of Christianity. The same double cross is part of the coat of arms of Hungary, where the coat of arms also depicts the royal crown headed by a cross, portraying saints. The coat of arms of Romania used since 1992 is based upon the coat of arms used from 1922 to 1947. On this the aquila (eagle) is holding an Orthodox cross (but the motto of the former royal family Hohenzollern-Sigmaringen "Nihil sine Deo" was abandoned).

4.2 Currency

National currency may serve as an everyday expression of a national-cultural canon. The practice of Central-European countries shows that the religious content of cultural heritage is no ground to exclude parts of the heritage from coins and banknotes – although Slovakia having introduced the Euro in January 2009, refrained from picturing a cross (as it used to be on the 10 SK coin) or a Madonna (as it used to be on the 1 SK coin) on Slovak Euro coins. There were also proposals to have a Madonna or a cross on the new Euro coins. For Slovenia the € 2 coin shows the poet France Prešeren and the inscription "Shivé naj vsi naródi" (God's blessing on all nations) – a line taken from his poem "Zdravljica", which is also used in the country's national anthem. The € 1 coin shows a portrait of Primož Trubar (1508–1586), a Protestant reformer and the consolidator of the Slovenian literary language. Primož Trubar is one of the most important pillars of Slovenia's cultural and national identity. His portrait certainly cannot be regarded as a religious symbol, but it refers to the religious heritage, which influenced national identity and culture. On Czech coins and banknotes there are symbols of important national personalities (some of them are saints) or historic monuments connected to religion. On the 10 Crown coin there is a picture of the Catholic St. Peter's Cathedral of Brno, on the 20 Crown coin there is a picture of the Saint Wenceslas statue, on the 50

[11] Case of Lautsi and others v. Italy, Judgment of 18 March 2011. Koltay, András: Europe and the Sign of the Crucifix: On the Fundamental Questions of the Lautsi and Others v. Italy Case. In Jeroen Temperman (ed.)The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom. Brill 2012., 355 – 382.

Crown banknote there is a picture of St. Agnes of Prague, on the 200 Crown banknote there is a picture of the bishop of the Unitas Fratrum Jan Amos Komenský. On the 1 Leu banknote in Romania there is a picture of the cathedral of Curtea de Argeş. Also in Hungary the 10.000 Forint banknote shows the portrait of Saint Steven.

4.3 National day

Besides respecting certain religious holidays, such as Christmas, Ascension or All Saints, the national days of several countries have a religious origin and/or a religious content, thus religious and public elements are hardly separable. The national day of Hungary is Saint Steven's day. Saint Steven (997 – 1038) was the first, state founding king of Hungary. Church, state, civil and family celebrations are interlinked in a special way on that day. Representatives of state organs attend the solemn mass and the procession honoring of Saint Steven, and also at local festivities religious ministers – often Protestant pastors too – play an important role in the celebrations. In a remarkable way the holydays of the highly secular Czech state all have a religious background. The Day of the Slavonic Missionaries St. Cyril and Methodius on the 5th of July is a national holiday. St. Cyril, the monk and his brother St. Methodius, the archbishop, came in 863 from the Byzantine Empire to Great Moravia, the old Slavonic State spread on the present territory of Czech Republic and elsewhere in the region. Also the Day of Burning at the Stake of Master Jan Hus on the 6th of July is a national holiday. Jan Hus, a Catholic priest and the rector of the Charles University in Prague, was burnt at a stake on the 6th of July 1415 during the Council of Constance because of his theological views on the reformation of the Church. It directly affected the Hussite movement in the 15th century. Czech religious traditions, before all of the churches of reformation, have been influenced by it until the very day. The Day of Czech Statehood on the 28th of September is also a national holiday. This is the day of the martyr's death of the Czech Prince St. Wenceslas in 929.

4.4 Local communities

Beyond constitutional and national settlements local issues may not be overlooked. In all countries in the region a large part of local communities show respect to historic traditions originating from Christian faith. Local holydays have often been the festivities of the patron saint of the town or village, and also local coats of arms often show inspiration of religious symbolism – even in cases where symbols are newly designed and are not determined by historic traditions. In Slovenia certain local communities have a church (e.g. Bled, Bohinj) or a picture of a Christian saint (Sveta Ana, Sveti Jurij ob Ščavnici, Šenčur, Šentjur or a cross (Ptuj) as a part of their flag or coats of arms. Also in Croatia many local communities celebrate their days on days of certain saints. The same goes for Poland as well. This includes the figures of saints (or heads, e.g. the head of St. John Baptist) on the coats of arms. Some communes have religious references in their names themselves, e.g. the commune of Święta Katarzyna (Saint Catherine), close to Wrocław. In Hungary several counties (e.g. Csongrád, Esztergom, Fejér, Tolna) have portraits of patron saints on their coats of arms, and this is also true of a number of cities (e.g. Győr, Veszprém, Vác). Certain newly designed coats of arms use the picture of a local church. In the Czech Republic symbols of a religious origin are often used, but more as a folk tradition and local pride than as confession of some faith. On coats of arms and flags of lo-

cal communities there are often crosses in different heraldic forms, drawings of a certain Christian saint or group of saints (usually traditional patron-saints of the town or community) or a chalice, symbol that the town and community has some historical connection with the Hussite reformation movement (regardless of today's confessional adherence of local inhabitants). The symbol of the cross is connected to the foundation of Czech statehood, which was connected to the acceptance of Christianity. In a few rare cases there are symbols on coats of arms of certain historical relations to Islam, firstly as a memory of participation of inhabitants in battles in the ancient wars with Islamic powers (e.g. it can be a silhouette of a minaret).

4.5 Public places and institutions

Streets, squares and public institutions may get names of a religious character (such as the name of a saint), which usually goes back to historical names. In Croatia certain public institutions got names of a religious character. In many cases that was the restoration of older names after the fall of communism. It is hard to evaluate the ratio of such names, but they do not raise significant concern. In Hungary not only historic names of streets and public institutions (such as hospitals) were generally restored after the fall of communism, but local municipalities in certain cases gave names of saints to new institutions, too. A number of streets carry names of saints, the Holy Spirit or the Holy Trinity. These were restored after 1989 but usually no new 'religious' names are given. In 2007, the 800th anniversary of the birth of Saint Elizabeth the president of the Bishops Conference has called upon local communities to commemorate the popular saint by naming public places after her. Traditional names of many streets and squares in the Czech Republic show the originally religious character (e.g. Wenceslas Square in Prague). In many cases it is connected to the name of the church building or synagogue in such a street. Some hospitals and lot of pharmacies have traditional names of saints of religious orders.

Public institutions, such as schools, hospitals, institutions of social care etc. are special places where the coexistence of different convictions can be challenging. The neutrality of the state presupposes on the one hand the official neutrality of its institutions, on the other hand it has to provide ample room for the free expression and exercise of religion both individually and in community with others. In Slovenia in public schools religious symbols do not appear, but in public hospitals they do appear, since these institutions have to operate also special facilities for religious needs. The same is true of prisons. In Hungary and Slovakia at public institutions no religious symbols appear. Inmates, however, can post religious symbols at their own stake (like a cross above their bed). In Polish schools crucifixes have been placed. This practice has not been challenged so far. In Croatia particular symbols (cross) can be found in certain schools and hospitals, reflecting mostly the attitudes of their employees, or heads of these institutions, but this practice is not very common. Certainly there are crosses at Catholic theological faculties, which are parts of public universities, e.g. in the Czech Republic.

4.6 Public authorities

Religious symbols usually do not appear at public authorities, however in both meeting rooms of the Polish Parliament – and in many city council halls there is a crucifix. Challenging this practice was dismissed in 1999 by the Chief Administrative Court in Łódź.

5 RELIGION AND THE NEW BASIC LAW OF HUNGARY

The Basic Law begins and ends with mentioning God, but this is done in a particular way. The very first words of the preamble is a quote without quotation marks[12] of the national anthem ("God bless the Hungarians"), a poem from 1823 that was the anthem even during the communist time. Certainly the anthem is also sung sometimes at the end of church services, and in this context it bears a religious content. At soccer games or other public events probably many Hungarians singing it (or listening to it) do not have religious feelings. This way the national anthem is the manifestation of patriotism, with a text that is deeply rooted in the national culture.

At the very end of the Basic Law there is a solemn declaration reminding of the wording of the preamble of the Basic Law of Germany, referring to the awareness of the members of parliament passing the Fundamental Law to their Responsibility before God and man.

The preamble ("national avowal") contains an acknowledgement of the role of Christianity in upholding the nation. This is on the one hand the acknowledgement of a historical fact, on the other hand it is not the religious content of Christianity that is endorsed, but its role in forming the nation – the declaration is descriptive, not prescriptive. The preamble also shows respect to the various religious traditions of the country. ("We recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country.") A reference to non-religious, secular or agnostic heritage is missing;[13] the omission makes the text less inclusive than the preamble of the Polish Constitution of 1997.

As for the text of the Basic Law the provisions relating to religion do not bring novelties. The wording of the freedom of religion remains unchanged. The wording of the separation of church and state is slightly changed laying more emphasis on church autonomy and the cooperation of church and state.[14]

The Seventh Amendment of the Basic Law passed in 2018 has inserted a subsection to the text providing that "Protecting the constitutional identity and the Christian culture of Hungary shall be an obligation of all state organs." Christianity in this formula appears as a cultural and not as a religious term. The provision seems to provide for the defense of the existing culture of the country rather than as an endorsement of Christianity by the constitution.

The religious neutrality of the state is a consequence of its commitment to non-discrimination on the basis of religion. The references to Christian heritage in the preamble do not bring changes in this respect nor does the constitutional commitment to the Christian culture of the country. The expression of the cultural identity of the nation may become more intense but this has to be reconciled with the religious neutrality of the state and the respect of religious freedom.

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12 As János Zlinszky points out: the person obliged by the very first commandment of the Constitution cannot be subjected to orders prescribed by law: Zlinszky, János: Észrevételek az új Alkotmány „húsvéti" szövegéhez. Az új Alaptörvényről – elfogadás előtt. Tanulmánykötet az Országgyűlés Alkotmányügyi, igazságügyi és ügyrendi bizottsága által 2011. április 8-án azonos címmel megrendezett tudományos konferencián elhangzott előadások alapján. Budapest 2011, 26, 27.

13 Jakab, András: Az új Alaptörvény keletkezése és gyakorlati következményei. HVG ORAC. Budapest 2011, 181.

14 Instead of "In the Republic of Hungary the church shall operate in separation from the state." the new text says: "The State and Churches shall be separate. Churches shall be autonomous. The State shall cooperate with the Churches for community goals."

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POLISH CIVIL PROCEDURE: YESTERDAY, TODAY AND TOMORROW – SOME REMARKS ABOUT RECENT CHANGES OF PROCEDURAL LAW IN POLAND

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Abstract: Polish civil procedural law is still the subject of numerous legislative changes. Only in recent years the Code of Civil Procedure has been amended over 30 times. These changes resulted from various reasons. Firstly, from the need of implementation of EU procedural law. Secondly, they were the result of the introduction of provisions aimed at adapting the code to modern technologies. Thirdly, changes aimed at speeding up the hearing of a civil case and at introducing some instruments to strengthen the protection of public interest in judicial proceedings. This article focuses on three selected examples and presents the discussion of the disputable issues that they have already arisen. Firstly, the topic of electronic process activities. It presents electronic pleadings, electronic delivery in trial, electronic judicial protocol and the possibility of presenting grounds of judgment in electronic form. Secondly, the new institution of a judgement rendered at closed session (*in camera*) was discussed. Thirdly, the article describes a new extraordinary complaint against final judgement, which can challenge any final judgment of a common court as a result of a prosecutor's or other public-interest entity's initiative.

Key words: civil procedure, electronic pleadings, extraordinary complaint, Code of Civil Procedure, amendments, reform of procedural law

1 INTRODUCTION

Polish civil procedural law has undergone numerous legislative amendments, while the Code of Civil Procedure (CCP) of 1964 is the most frequently amended piece of legislation in Poland. Since 1989, the year Poland moved from the communist system to the democratic system, it has been amended over 200 times. Initially, intensive amendments to the CCP resulted mainly from the need to adjust them to the effects of economic and political transformation, yet it seemed that over time their number and intensity should go down. However, that was not what happened. Alone over the last three years (2015 – 2018), the Polish Code of Civil Procedure has been amended over 30 times.

This was conditioned by various reasons. First, the amendments followed the need to implement procedural law of the European Union (such as provisions on the European Certificate of Succession and European Account Preservation Order). In consequence, the legislator incorporated into the Code of Civil Procedure the provisions supplementing EU Regulations: No. 650/2012 (Article 1142^{1} to Article 1142^{7} of the CCP as regards the European Certificate of Succession) and No. 655/2014 (Article 1144^{3} to Article 1144^{13} of the CCP as regards the European Account Preservation Order). These amendments are quite clear and do not give rise to any specific concerns about their appropriateness.

Secondly, some of the most recent amendments were intended to adjust the CCP to the modern technologies we have now. It applies in particular to introducing the option of performing procedural actions electronically, admissibility of electronic evidence or making an audio/video recording of the trial. This need has never been questioned[1], since the Polish civil procedure is still largely based on the actions made in writing (paperwork). With the development of modern means of communication, this had to be accounted for in the civil procedure. However, it was clear from the very beginning that at least some of the implemented amendments gave rise to serious concerns about their practical applicability.

Thirdly, a number of amendments to the Code of Civil Procedure is being made with the intention to expedite civil proceedings (such as the option of giving the verdict without a hearing, simplification of the service process, changes to recusal of a judge). The need to shorten lengthy court proceedings in Poland itself must be beyond any doubt, but the question is to what extent these changes may interfere with the basic procedural principles and rights of the parties to have their case heard in public.

Fourthly, recently, following turbulent political changes, we could also notice a tendency to introduce instruments into court proceedings that strengthen public interest. It concerns the introduction of a new remedy for civil and criminal cases as of 3 April 2018, namely an extraordinary complaint against final judgments.

This paper addresses in detail three selected topics that exemplify the above noted legislative trends and indicates practical and theoretical issues emerging from them.

First, the focus was on electronic procedural actions. The paper will discuss electronic filing of pleadings, electronic deliveries, electronic minutes and the electronic statement of reasons for a judgement (item II). Secondly, a new power of the court to issue judgements *in camera* will be discussed (item III). Thirdly, a new extraordinary remedy – extraordinary complaint – was presented. It allows for repealing almost each final judgment of a common court on the initiative of the prosecutor or another entity acting in the public interest (item IV).

2 ELECTRONISATION OF PROCEDURAL ACTIONS

2.1 Filing of pleadings via the ICT system

Until 8 September 2016, there was no high-level regulation in the Polish civil procedure that would enable filing of pleadings *via* modern means of communication. The only exceptions existing since 2010 were the electronic procedure by writ of payment (Articles 505^{28} – 505^{39} of the CCP)[2] and register procedure. It meant that on top of these procedures, the parties could communicate with the court almost exclusively in writing or orally during a hearing. Introduction of provisions that enable performance of actions electronically should be then deemed a true technological revolution in the Polish civil procedure.

[1] From comparative perspective, see KAWANO M. Electronic Technology and Civil Procedure – Applicability of Electronic Technology in the Course of Civil Procedure. In KENGYEL, M. Electronic Justice – Present and Future. Colloquium of the IAPL, Pecs, 2010.

[2] See about these regulations: KULSKI R. Some Remarks on the Course of Polish Electronic Proceedings by Writ of Payment. In KENGYEL, M. Electronic Justice – Present and Future. Colloquium of the IAPL, Pecs, 2010, p. 17.

These provisions provide that, save for exceptional circumstances, filing of pleadings via the specially created ICT system should be voluntary (Article 125.2^1 sentence 1 of the CCP). The party will be able to select this option or, as practiced so far, file pleadings traditionally in writing (in paper). A statement on the selection of or resignation from filing pleadings via the ICT system shall be submitted through that system. The statement shall be binding only on the person who has submitted it (Article 125.2^1 sentence 1 of the CCP). However, if the party made a choice, then the pleadings that were not filed via the ICT system are ineffective (Article 125.2^1 sentence 2 of the CCP). Not only pleadings are to be filed electronically but also documentary evidence. Pursuant to Article 128.2 of the CCP, pleadings filed *via* the ICT system shall be accompanied by certified electronic copies of enclosures.

In the case of filing pleadings via the ICT system, the court performs the service via that system (electronic service) – Article $131^1.1$ of the CCP. In the case of the electronic service, a pleading shall be deemed effectively served as at the time indicated in the electronic confirmation of receipt. If such a confirmation is missing, the pleading shall be deemed effectively served 14 days after the date on which the pleading was entered to the ICT system (Article $131^1.2$ of the CCP). Pursuant to Article $131^1.2^1$ of the CCP, the addressee who has opted for filing pleadings *via* the ICT system may resign from the electronic service. For the electronic service, pleadings and rulings shall have the form of documents containing data from the ICT system (Article 140.3 of the CCP).

These solutions are assessed differently. First, it is claimed that courts still do not have the necessary infrastructure and the system does not really function, even though the act has been adopted. In keeping with the law, the system should operate at all courts in Poland by September 2019 at the latest. It is still uncertain whether this will happen. Secondly, the vulnerability of this solution is that the option of filing pleadings via the ICT system is facultative, also for professional representatives (attorneys). A party may opt out of that manner of pleading filing or from electronic service during a trial. It can be assumed that the party that is planning to protract the proceedings (e.g. the defendant) will not be interested in having the correspondence delivered fast electronically and they will opt for far less effective traditional delivery *via* mail. Thirdly, it is a disadvantage that each participant in the proceedings takes an independent decision whether they will perform actions via the ICT system or not. In consequence, the court will often be required to communicate in a different manner with each participant in the proceedings. One will receive communications electronically, while the other will be sent communications traditionally in writing. This creates huge problems with keeping court records (in two versions – electronic and paper-based) and for the operations of the secretariat to communicate properly with each participant of the proceedings.

2.2 Electronic minutes and electronic statement of reasons for a judgement

The Polish legislator implemented a requirement to take electronic minutes of the hearing as of January 2010. In keeping with Article 157.1 of the CCP, minutes shall be taken by recording a session on an audio or audio/video recorder and in writing, as instructed by the presiding judge. The content of the written record is limited though; it does not detail the course of the session (Article 158.1 of the CCP). It means that the audio or audio/video recording is the only evidence of the evidentiary hearing (e.g. hearing of the witness). Electronic records shall not be subject to correction (Article 160.2 of the CCP).

In keeping with Article 158.4 of CCP, where it is necessary in order to ensure that a case is properly adjudicated, the presiding judge may order a transcript to be made of a relevant part of the minutes reported on an audio or audio/video recorder. In practice, a problem has arisen as to the signifi-

cance of the transcript of the electronic minutes. This doubt was resolved by the Supreme Court in its resolution of 23 March 2016, ref. no. III CZP 102/15 assuming that the transcript of the minutes recorded on an audio or audio/video recorder was not an official document and did not form a basis for determining the course of the session. Following this resolution, the transcript ceased to have any practical meaning since the court may base its decisions on the content of the audio/video record.

Functioning of the electronic minutes is assessed very negatively. It stems from the fact that in case of technical problems with the recording, actions performed in evidentiary proceedings need to be repeated given that the recording is the only evidence of their course. Using the electronic minutes in appellate proceedings is also very problematic. In the Polish legal regime, the appellate court is a court that adjudicates the subject matter (the merits of the case) and it is required to determine the actual and legal state of affairs. Therefore, it needs to rely on the electronic minutes, which, from the perspective of practical usability, is more difficult than using the written minutes. The judges of the appellate court often need to review long hours of recorded evidentiary hearing even if not all its elements are relevant from the appeal perspective. Hence we may hear accurate demands that apart from an audio or audio/video recording – the evidentiary proceedings should also be recorded in the written minutes, which is not the case at present. Although as of September 2016, written minutes should also contain the summary of evidentiary proceedings (Article 158.1 sentence 2 of the CCP), this solution does not seem sufficient to familiarise oneself with the course of the proceedings.

In 2014, a new form of statement of reasons for a judgement appeared in the Polish legal regime. So far it was only drafted in writing at the request of a party in general, within one week of the announcement of the operative part of the judgment or of the day it was served (Article 328.1 of the CCP). At present, pursuant to Article 328.1[1] of the CCP, if the course of a hearing is recorded with the use of an audio or audio/video recorder, the statement of reasons may be provided after the operative part of the judgment is announced, and recorded with the use of the recorder, whereof the presiding judge shall warn before providing the statement. In this case it means that the court does not draft a written statement of reasons. The court only presents the statement orally during a hearing and it is recorded with the use of an audio or audio/video recorder. Should a party apply for the issue of the statement of reasons within one week of the announcement thereof, they will only receive the transcript of the statement of reasons (Article 329 of the CCP).

The institution of the announced statement of reasons gives rise to many doubts as in practice a lot of transcripts made are of poor quality. They are hard to understand and often, due to interference in the recording, they are incomplete. What is worse, the transcript is made neither by the judge nor the court clerk, but only by a third party. Moreover, the judge that announces the statement of reasons has not impact on the final shape of the transcript. Should there be any problems with the recording or transcript, the appellate review proves difficult or almost impossible, which additionally prolongs the proceedings. This means that a large number of judges in Poland do not decide to orally pronounce the statement of reasons even though the hearing is recorded with the use of an audio/video device.

3 ADJUDICATING *IN CAMERA*

Pursuant to Article 45 of the Constitution of the Republic of Poland, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and

independent court. The principle of openness expressed in that provision is treated very seriously in the doctrine of Polish procedural law; especially as it is a repetition of the rule provided for in Article 6 of the European Convention of Human Rights. The application of that regulation leads to a conclusion that the court may not adjudicate a civil case without a hearing, except for clearly defined circumstances.

Until 8 September 2016, the court of first instance could adjudicate *in camera* the subject matter of the case in the first instance only for the order for payment procedure, procedure by writ of payment and non-contentious proceedings. In a regular civil case, it was practically impossible. The appellate court has more options here. It may hear the appeal *in camera*, should the proceedings be deemed invalid (Article 374 of the CCP) and also in summary proceedings, unless one of the parties requested a trial in the appeal or answer to the appeal (Article 505^{11}.2 of the CCP). A cassation complaint before the Supreme Court is an exception and is applicable generally if there is a major legal issue involved and the appellant has petitioned for the case to be heard in trial (Article 398^{11}.1 of the CCP).

The real revolution came in 2016 with the introduction of Article 148^{1} of the CCP. Pursuant to that provision the court may examine a case *in camera* if the defendant has acknowledged the action or if, after pleadings and documents are lodged by the parties, including after bringing of charges, an objection against a writ of payment or an appeal against a judgment rendered *in absentia* (default judgment), the court finds – considering all the presented statements and submitted motions for evidence – that it is not necessary to conduct a hearing (Article 148^{1}.1 of the CCP). At the same time, under Article 148^{1}.3 of the CCP, a case may not be examined *in camera* if a party, in the first pleading, submitted a motion for hearing, unless the defendant has acknowledged the action.

In the light of the procedural provisions, the Court of the first instance may issue a judgement *in camera* (without the participation of the parties) if the following positive conditions have been met: 1) the defendant acknowledged the action or 2) both parties filed pleadings and the court recognised at the same time that the hearing was not necessary. The negative trigger is though that none of the parties files a motion for hearing in the first pleading.

It follows from the wording of this provision that the judgement may be issued *in camera* only if the court considers open hearing as not necessary. It seems that it should happen at the initial stage when the court has collected all the case material (factual and evidentiary) and the hearing will bring nothing new to the case. Both parties then need to file pre-trial pleadings before the hearing and take a stance on the case. It is impossible to issue a default judgement *in camera* (i.e. without participation of the defendant). It will be possible in particular when the court obliges the defendant before the trial to file an answer to the complaint (Article 207.1 of the CCP) or both parties to exchange further pre-trial pleadings (Article 207.3 of the CCP). Thus the possibility of issuing a judgement *in camera* may be regarded as a harmonious development of the judge's case management implemented to the Polish Code of Civil Procedure in 2012.[3]

However, this provision gives rise to serious practical and constitutional doubts. It sets forth that the issue of a judgement *in camera* is totally dependent on the court's decision and will be possible in each category of cases (under civil law, commercial law, labour law, or family law). In fact, each party may demand a hearing, which will block such an option, but in view of a lack of the obligation in

[3] About case management system in Poland see GOLAB A. New rules regarding the concentration of procedural material. Available at <http://polishprivatelaw.pl/new-rules-regarding-the-concentration-of-procedural-material-in-the-polish-code-of-civil-procedure/> [q. 2019-02-10].

the Polish civil procedure to be represented by an attorney it may prove illusory, as citizens may not know their rights. It is also dubious whether the new solution will actually expedite hearing of civil cases. The application of that construction will be then limited to simple, undisputable cases based on documents, which do not require the taking of evidence from the testimony of the witness, i.e. those that are adjudicated quite effectively this way or another. Still, it will not accelerate the hearing of cases where it is necessary to have a complicated evidentiary hearing.

4 EXTRAORDINARY COMPLAINT

On 3 April 2018, the new Supreme Court Act took effect. On top of organisational and personal changes, its purpose was also to establish a new remedy for civil and criminal matters, namely the extraordinary complaint (Article 89 – 91 of the Supreme Court Act). Extraordinary complaint-related provisions, although applicable only for a few months now, have already been subject to a number of significant amendments.[4] They are also an important element in the dispute between Poland and the European Commission, stirring a vivid interest in the doctrine.

In the current legal regime, if it is necessary to ensure compliance with the principle of the democratic state of law that satisfies the principles of social justice, the extraordinary complaint may be lodged against a final judgement of a common court or military court that closes its proceedings provided that: 1) the judgement violates the principles or rights and freedoms of a human and citizen defined in the Constitution or 2) the judgement grossly violates the law by its erroneous interpretation or improper application, or 3) if there is an obvious contradiction between significant findings of the court and the content of the evidence collected for the case – and the judgment may not be repealed or changed by way of other extraordinary remedies (Article 89.1 of the Supreme Court Act). The extraordinary complaint shall be lodged within 5 years from the effective date of the contested ruling and if cassation or an cassation complaint[5] were lodged – within a year from identification thereof (Article 89.3 of the Supreme Court Act). The extraordinary complaint may be lodged only by public entities listed in Article 89.2 of the Supreme Court Act, out of which the widest powers are vested in the General Prosecutor and Ombudsman for Civil Rights. It means that it may not be applied by the parties to the proceedings that resulted in the contested final judgement.

Should the extraordinary complaint be approved, the Supreme Court repeals the contested judgement in full or partially and in line with the results of the proceedings it adjudicates on the merits of the case or refers the case for review to the competent court. On the other hand, the Supreme Court dismisses the extraordinary complaint if it identifies no grounds for repealing the contested ruling (Article 91 of the Supreme Court Act). However, the legislator provided that if there were reasons for the complaint, and the contested ruling provoked irreversible legal effects, in particular if 5 years lapsed from the contested ruling effective date, and also if the act of repealing the ruling violated international commitments of the Republic of Poland, the Supreme Court would only confirm that it had issued the contested ruling against the law and indicate circumstances due to which such judgement was issued, unless the principles or rights and freedoms of a human and

[4] See: amendments of the CCP by the Law of 12 April 2018(O.J. No. 847) and by the Law of 10 May 2018 (O.J. No. 1045).
[5] 'Cassation' is the name of extraordinary appellate measure in criminal cases; 'cassation complaint' – in civil cases.

citizens defined in the Constitution support the issue of the judgement to repeal the contested ruling (Article 89.4 of the Supreme Court Act).

Adjudicating the extraordinary appeal was reserved for the newly established Chamber of Extraordinary Control and Public Affairs of the Supreme Court.

The presented extraordinary complaint gives rise to serious concerns in the doctrine, in particular as regards civil cases. The transitional provisions made it possible to appeal with it for 3 years from the effective date of the Supreme Court Act (i.e. until April 2021) against all final judgments issued after the entry into force of the Constitution of the Republic of Poland, i.e. since 2 April 1997 (Article 115.1 of the Supreme Court Act). It means that it is theoretically possible to repeal each final judgment issued in Poland for over the last 20 years. Even though Article 115.2 of the Supreme Court Act provides for the fact that the Supreme Court may only announce that the contested ruling was issued against the law and indicate the reasons therefor, without the need for the ruling to be repealed, but such an option does not exist if the Supreme Court comes to a conclusion that a cassation judgment should be issued or rights and freedoms of a human and citizen defined in the Constitution support it.

This law leads then to far reaching uncertainty in the legal regime for at least the next 3 years. It should also be stressed that the need for a remedy that could re-open especially faulty judgements was called for many years now, but it was not expected that it would be available on such a wide scale. The relation of that remedy to the existing cassation complaint and complaint for declaring a final judgment contrary to law[6] also gives rise to concern. In keeping with Article 90.2 of the Supreme Court Act, the extraordinary complaint may not be based on charges that were adjudicated in the cassation complaint adopted for adjudication by the Supreme Court. So it may be filed in case it is refused by the Supreme Court on the same grounds. In consequence, the same judgment may be reviewed many times. This may lead to uncertainty of the parties to the proceedings even for 5 years from the effective date of the judgement. It gives rise to the feeling of threat, especially of the party that won and intends to pursue further legal activities in reliance on the non-appealable judgement.

There are also concerns about the fact that the complaint may be filed by public entities, including the General Prosecutor, which in Poland is represented by a politician, notably the Minister of Justice. It gives rise to concerns about the instrumental use of that remedy, following the extraordinary appeal effective in Poland in the socialist period[7]. This legal construction was rather notorious as it was used to pursue the current policy. One cannot foresee how the discussed complaint will function (so far no complaint has been lodged with the Supreme Court), but its practical application will condition whether the hopes pinned on it will come true or whether the expected concerns will be prove correct.

5 CONCLUSIONS

Summing up the discussed examples in the Polish civil procedural law, we may arrive at the following conclusions: In recent years, the number of amendments to the Code of Civil Procedure has

[6] About these two extraordinary measures in Polish Civil Procedure see ERECINSKI T. Civil Procedure. In Introduction to Polish Law. FRANKOWSKI, T. (ed.) Hague: Kluwer Law International, 2005, pp. 140 – 141.

[7] About historical background of CCP see ERECINSKI T. Civil Procedure. In Introduction to Polish Law. FRANKOWSKI, T. (ed.) Hague: Kluwer Law International, 2005, pp. 117 – 118.

increased significantly, instead of decreasing gradually. While, objectively speaking, those amendments were often justified, their quality and consistency with the entire legal regime give rise to concerns. The amendments made are very often quite chaotic and underdeveloped, which is proven by their subsequent fast revisions. Often, they do not take account of the practical functioning of provisions and do not provide sufficiently for the effects of their implementation. Probably, the reason behind it is the fact that the provisions are established following the initiatives of multiple entities and do not take account of the entire system of civil procedural law.

A new, consistent code taking account of the actual state of knowledge and research would be a much better step rather than those numerous, incidental amendments to the Code of Civil Procedure. The Code of Civil Procedure that meets the requirements of the 21 century. Such a decision was taken a few years ago by the Civil Law Codification Commission acting under the Prime Minister of Poland that prepared preliminary assumptions. However, the Commission was dissolved in 2015 and no new composition has not been announced so far. It seems to hamper creation of a new, consistent legal act that would be resistant to numerous legislative changes.

The foregoing does not change the fact that the representatives of the Polish doctrine do not have a clear-cut vision about the future direction of the civil procedural law. On the one hand, there is a visible need to adjust it to the contemporary requirements, on the other it is necessary to strengthen public interest. Higher effectiveness of actions is also emphasised. It is also important that these changes do not limit the rights of parties to the proceedings to a public and reliable hearing. However, it does not seem to be sufficient to create a vision of further development of civil procedural law in Poland.

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SOME ETHICAL CONSIDERATIONS REGARDING THE PHENOMENON OF MIGRATION AND ITS MANAGEMENT IN THE EU

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Abstract: The European Union's policy toward migration issues, especially after the peak of the crisis in 2015 is a contentious question among the Member States. Adopted legislation refers to different aspects of this policy area aiming to manage the highly complex reality of the phenomenon of migration. This article seeks to sketch a framework for the ethical evaluation of migration-related policy choices and regulation from a theoretical perspective. After identifying the general context and some tensions of this policy area, a tentative matrix is introduced offering some angles for ethical evaluation.

Key words: migration management, European Union, ethics, policy choices

1 INTRODUCTION

The immigration policy has become of significant importance after the crisis of 2015 in Europe; some even think that this issue will shape the future of the European Union.[1] A wide range of literature has been published regarding the phenomenon of irregular migration that the European continent experienced, from the legal-political-sociological implications to the re-actions implemented by the European Union, so far. Even the focus of the research agenda has shifted significantly, according to the new approaches discussing the possible solutions of the emerged problem.[2] It is a cliché that a highly complex issue is at stake and the basis of any policy implementation is a result of sensitive, sometimes even contradictory interests. This paper tries to analyse and theorise the ethical basis of policy choices concerning irregular migration at EU level. The scope of this paper is inevitably limited given a multi-faced problem map, the shared competence between the EU and the Member States in this area and the highly complex issue itself. Yet, an attempt to theorise decision-making from an ethical perspective might deserve some scholarly attention.

2 THE ETHICAL PERSPECTIVE

The migration phenomenon is a highly complex reality that might be subject to different scientific approaches; nevertheless, human decisions, as well as complex policy choices, could be analysed from an ethical perspective, too. The question arises: what way are we able to evaluate a certain

[1] See at: <https://www.theguardian.com/world/2018/jun/28/future-of-eu-hinges-on-solving-migration-issue-says-merkel> [q. 2019-01-30].

[2] PIJKERBOER, T. Changing paradigms in migration law research. In GRÜTTERS, C., MANTU, S., MINDERHOUD, P. (eds.) Migration on the move. Nijhoff: Brill, pp. 13 – 26.

reality, quite remote from individual human decisions, instead being a result of a complex, multidimensional and institutional decision-making process? What circumstances need to be assessed as a prerequisite of such an investigation? What are the changing characteristics that might influence the outcome of any such inquiry? Is it possible to provide a general matrix that is applicable for ethical consideration in a comprehensive area of migration policy choices? In this paper I try to answer these questions hereinafter, first 1) by reviewing the basis of policy choices at a strategy making level, then 2) by exploring the theoretical tensions behind policy choices regarding migration management, and finally 3) sketching up a general matrix that could serve as a tentative reference factor for assessing certain policy choices of migration management.

3 A BRIEF OVERVIEW OF THE STRATEGIC STAGES OF EU LEGISLATION REGARDING MIGRATION

The European Council declared in its conclusions as of 18 October 2018 that while the number of detected illegal border crossings into the EU has been brought down by 95% from its peak in October 2015[3], still, some internal and recent external flows warrant sustained attention.[4] Indeed, the overall policy-making of migration management has become a keystone issue within the Union in the last years, and massive policy-making and legislative efforts have been made in order to overcome the crisis.

Without providing a detailed overview on the EU legislation in the area of free movement of persons, asylum and immigration[5] as it works within the framework of the area of justice, freedom and security,[6] I would hereby like only to draw the attention to the shifting emphasis of the EU's general approach to immigration, by referring to the five-years programmes adopted as basis of this policy area after the Treaty of Amsterdam.[7] First, after the European Council meeting in October 1999, the Tampere Programme was adopted.[8] In the Tampere Programme, the European Council sets a rather ambitious aim before the Member States, focusing mainly on the integration of third-country nationals residing legally in the EU territory. The Hague Programme[9], however, adopted in November 2004 in the wake of September 11, is less ambitious and places security-related questions into the foreground. Later on, the Stockholm Programme[10] titled "An open and secure Europe serving and

3 Conclusions – European Council meeting (18 October 2018), EUCO 13/18.

4 Ibid.

5 Available at: https://eur-lex.europa.eu/summary/chapter/justice_freedom_security/2301.html?root=2301 [2019-01-30].

6 The creation of the area of freedom, security and justice is based on the Tampere (1999-04), Hague (2004-09) and Stockholm (2010-14) programmes. It derives from Title V of the TFEU, which regulates the "Area of freedom, security and justice". For an overview of the relevant legislation visit:<https://eur-lex.europa.eu/summary/chapter/justice_freedo_security.html?root_default=SUM_1_CODED=23> [2019-01-30].

7 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997, p. 1 – 144.

8 Tampere European Council 15-16 October, 1999, Presidency Conclusions. See at: < http://www.europarl.europa.eu/summits/tam_en.htm > [2019-01-30].

9 Council of the European Union, Brussels, 13 December 2004, The Hague Programme: strengthening freedom, security and justice in the European Union, 16054/04.

10 Council of the European Union, Brussels, 2 December 2009, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 17024/09.

protecting the citizens" and related communication from the European Commission[11] tries to strike a balance between the Tampere Programme – that focuses mainly on the rights of third-country nationals and puts the emphasis on human rights –, and the security-oriented Hague Program. By doing so, the Stockholm Programme, accepted in December 2009, focuses on the interests of citizens – even third-country nationals – and declares that the EU ensures rights to whom it owes responsibility. Also, the Stockholm Programme tends to put more emphasis on freedom and ensuring human rights instead of security issues. After the Stockholm Programme, the European Council determined the agenda[12] for the period between 2014 and 2020 in its summit, held on June 2014, regarding legislation and operative programmes within the area of justice, freedom and security.

After Jean-Claude Juncker took his office in November 2014 as president of the European Commission, he nominated a distinct commissioner for migration-related issues, Dimitris Avramopoulos from Greece. Somewhat later, the migration crisis of 2015 put the Commission into action, and it adopted the European Agenda on Migration[13] as a comprehensive answer to challenges. Implementation of the European migration Agenda is still in progress with several secondary legislative instruments.[14]

4 THE THEORETICAL CONTEXT TO EVALUATE EU MIGRATION MANAGEMENT

4.1 Sovereignty of state versus international legal environment

In the history of the international relations theory, debates arise from time to time on whether the privileged position of the international system belongs to the (nation)state or rather the importance of the international institutions are rising significantly as the more essential actors of the international system, due to the deepening interdependence and cooperation in the international arena. Traditionally, neorealism emphasises the first and neoliberalism put more attention to the second.[15] These two different approaches of international relations have a radically different view even on human nature, and this will lead to different conclusions on progress, development, the possible cooperation within the society and at an interstate level. Also, these two standpoints fundamentally differ in considering the importance to maintain state sovereignty and thus subserving to act unilaterally and entering into an agreement on a bilateral basis, or the general belief in solving significant challenges at international level through extensive cooperation and by reaching international agreements on a multilateral basis. These different approaches certainly have significant implications for identity-management related issues as well. Chantal Thomas observes that migration, including unauthorised migration, appears to be an inescapable dimension of a globalising economy. Consequently, as Chantal Thomas continues, it is unsurprising that there is an

11 COM(2005) 184 final – Official Journal C 236 of 24.9.2005. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l16002&from=RO > [2019-01-30].

12 European Council, Conclusions, 26/27 June 2014. EUCO 79/14.

13 A European Agenda on Migration, Brussels, COM(2015) 240 final 13.5.2015.

14 Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en [2019-01-30].

15 JACKSON, R., SORENSEN, G. Introduction to International Relations, Theories and approaches. Oxford: Oxford University Press, pp. 42 – 46.

increased attention to the matter of what laws, rights, remedies, and regulations should pertain to migrants. An emerging body of international law inscribing rights of migrants appears to be challenging what has conventionally been thought a cornerstone of statehood, the 'plenary power' over the determination of rights of aliens.[16] In his observation, Chantal Thomas investigates the legal and philosophical aspects and the relationship between sovereignty, the notion of 'biopower', liberalism and international law on migration and introduces a new concept of 'new organicism' by proposing to reframe the discourse of ethics.[17]

Joseph H. Carens distinguishes between a realistic and an idealistic approach from a moral perspective. Carens uses these terms as two different ways of understanding morality on migration. Further, Carens suggest that a realistic approach wants to avoid a gap too large between what 'ought to be' and what 'is' and focuses on what is possible in a given reality. The idealistic approach, in contrast, requires us to assess current reality in light of our highest ideals. Carens also points out the weaknesses of both approaches. The realistic one, he says, inhibits us from challenging fundamentally unjust institutions and policies, while idealists may not help us answer the question of how to act in a non-ideal world.[18] Carens moreover identifies three kinds of realities for the evaluation of policy choices regarding migration, namely the institutional, the behavioural and the political.[19] Institutional reality refers in Carens' understanding to the modern state that is, at least formally, sovereign and independent. Behavioural reality is connected to the admission of refugees, and political reality expresses the power and interest-based decisions primarily. It is interesting to observe how the collision of these different narratives has recently been expressed again by a phenomena like Brexit, the rising importance of a strong man approach in state leadership, and the fact that certain states are leaving the discussion of UN Global compact for migration.[20]

4.2 Security issues versus a humanitarian approach

The tension between securing the safety and lifestyle of a certain political community and to respect "others" in an inclusive way, by offering them access to the advantages of the community, could lead to some contradiction in a theoretical and practical level as well. On a theoretical level, the notion of solidarity among the members of the political community and the ability to integrate new members will emerge. By articulating mainly security-related issues in connection with migration, suggests that the scope of solidarity is limited to the members of the political community; moreover, this implies, that this solidarity needs to be protected. According to this view, refugees and third-country nationals considered as a challenge to the internal solidarity of the political community. In addition, their possible integration into the society is seen as a difficult, if not an impossible task. On the other hand, the humanitarian approach emphasizes the same human dignity of all human beings and refers to the essential solidarity among humans that commands us to treat others as we wish

16 THOMAS, CH. What Does the Emerging International Law of Migration Mean for Sovereignty? In Cornell Law School research paper No. 13, p. 72.

17 Ibid.

18 CARENS, J. H. Realistic and Idealistic Approaches to Ethics of Migration. In The International Migration Review. 30/1. 1996. p. 156.

19 Ibid., p. 158.

20 Available at: https://refugeesmigrants.un.org/migration-compact> [2019-01-30].

to be treated ourselves. The ethical responsibility derived from these two different approaches will result in rather different policy choices and practical answers as well regarding the first admission of the migrant people.

By interpreting the meaning of solidarity, especially within the EU, to provide access for the social security for a migrant worker, Wolfram Lamping emphasizes the significance of the concept of 'welfare state'.[21] The core consisting elements of a welfare state are the benefits that the state provides for its citizens through reallocation systems and public services. These welfare services cannot be equally available to everyone, since this would have a specific financial cost, but only to the members of a specific solidary community. In the welfare state, however, the collective identity is taken for granted given the language, the cultural and historical heritage; thus, citizens undertake to pay the additional costs of maintaining the social benefit systems. However, as Lamping points it out, overemphasising the social element of the EU might imply some risk, given that the EU is aiming to achieve some social-oriented development at the same standard that characterises the welfare state itself, yet without having the same cohesion within the EU[22] and that would need some substantial justification. Similarly, the understanding of the scope of solidarity with regards to third-country nationals will occurs even more sharply by the adjudication of the admission system both in the case of granting international protection or allowing entry on a different ground to the EU.

On the other hand, there is a remarkable initiative implemented, first in Italy, based on the humanitarian approach. According to a Memorandum of Understanding, signed by the Italian government and several religious and non-governmental organisations, a humanitarian corridor was established for highly vulnerable refugees to directly enter Italy. A small number of refugees with safe travel and visas were evacuated directly to Italy, along with housing and resettlement assistance upon arrival. The initiative aims to integrate refugees into the society[23] and is a subject of scholarly research, as well.[24]

4.3 A need for a normative map on EU migration management

Ricard Zapata-Barrero notes that human mobility and migration toward liberal democratic states have significantly increased in the recent decades and that patterns of migration are becoming more complex and diversified, involving more and more countries.[25] Accordingly, Zapata-Barrero finds it essential to develop a normative map in a world in motion, and he proposes an ethical code of practice regulating state behaviour.[26] Zapata-Barrero identifies three levels of state behaviour that needs to be addressed in such guidance with respect the EU countries: admission policies, diplomatic relations with sending states, and inter-European state relations.[27] Under the first ethical context, Zapata-Barrero raises the issue of first admission practices of the states with selective migration

21 LAMPING, W. Limits and Perils of Institutionalising Post-National Socal policy. In ROSS? M., PREBIL, Y. B. (eds.) Promoting Solidarity in the European Union. Oxford: Oxford University Press, 2010, pp. 46 – 48.

22 Ibid.

23 Available at: https://www.ecre.org/humanitarian-corridors-for-vulnerable-refugees-to-italy-opening/ [2019-01-30].

24 Available at: https://kellogg.nd.edu/ford/humanitarian-corridor-initiative [2019-01-30].

25 ZAPATA-BARRERO, R. European Migration Governance: From „Anything Goes" to the Need for an Ethical Code. In American Behavioral Scientist, 59/9, p. 1184.

26 Ibid.

27 Ibid.

policies, in order to attenuate the need of labour force in specific sectors or by defining skill-based distinctions. He argues that these laws are substantially related to discriminatory and utilitarian approaches.[28] The second ethical context raised by Zapata-Barrero is diplomatic relations. His main concern here is the rapidly growing number of agreements with nonliberal democratic states that contains state practices to externalize the tension of migration policy. Also, the third ethical context is the internal EU Member States relation, eventually, to support the Member States that are most exposed to migratory pressure, accordingly Zapata–Barrero refers here to the solidarity among member states.[29] By analysing these given realities and referring to the international institutions and the global civil society as the possible normative source thereof, Zapata-Barrero proposes an Ethical code of practice and demonstrates its basic concepts.

5 AN ATTEMPT TO REACH A SYNTHESIS FOR ETHICAL EVALUATION

Several policy choices and legislative acts have been introduced since the peak of the migration crisis in 2015 in the EU. In the framework of the European Agenda on Migration, extensive legislation work aims to manage the crises. Already in the first implementation of the package, decisions were taken on the following issues: relocation schemes to give support for Italy and Greece,[30] resettlement,[31] EU Action Plan against migrant smuggling,[32] guidelines of obligatory fingerprinting[33], a public consultation on the EU Blue Card and the EU's labour migration policies[34] and even a new operation plan for Operation Triton. There is no place here to refer all the legislative acts adopted by the EU so far in the framework of the European Migration Agenda and the accompanying fierce debates, driven mainly at Member State level. The last communication issued by the European Commission is titled "Managing migration in all its aspects: Progress under the European Agenda on Migration".[35] The document quotes Jean-Claude Juncker's speech on the State of the European Union 2018: "Member States have not yet found the right balance between the responsibility each must assume on its own territory (…). We cannot continue to squabble to find ad-hoc solutions each time a new ship arrives. Temporary solidarity is not good enough." To find the balance is a still a challenge for the EU and the Member States to effective and ethically appropriate migration management. This paper obviously cannot provide a comprehensive ethical tool, but as a tentative step, the following figure tries to provide one possible matrix to evaluate the ethical aspects of migration-related policy choices.

28 Ibid., p. 1188.
29 Ibid., p. 1191.
30 Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM/2015/0286 final – 2015/125 (NLE).
31 Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, Brussels, 22 July 2015, 11130/15.
32 COM(2015) 285 final, Brussels, 27.5.2015 (between the period 2015 – 2020).
33 Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints Brussels, 27.5.2015. SWD(2015) 150 final.
34 Available at: https://ec.europa.eu/home-affairs/what-is-new/public-consultation/2015/consulting_0029 [2019-01-30].
35 COM(2018) 798 final, Brussels, 4.12.2018.

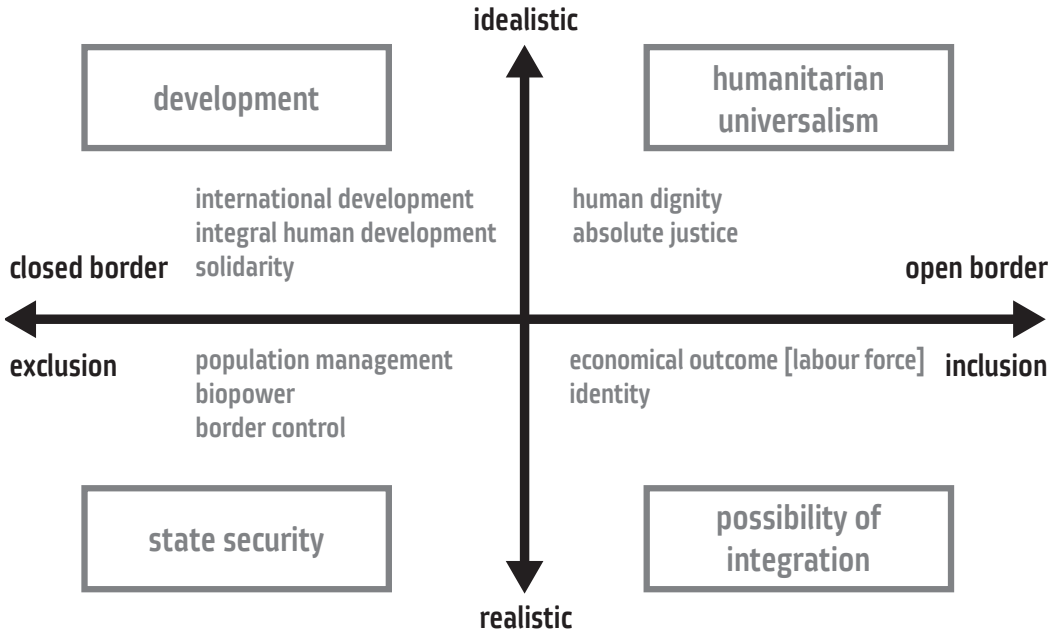

Chart 1: Ethical evaluating matrix of migration management related policy choices

In this graph, the vertical axis refers to the idealistic-realistic ethical narrative, and the horizontal axis refers to the outcome of policy choices, whereas the determining issues are listed in the relevant section of the coordinate system

6 CONCLUSION

The phenomenon of migration and the adequate answer thereto on the European level is still a challenge the EU faces. Given the highly complex reality of regular and irregular migration and the different policy choices of individual Member States', this issue will plausibly remain an important aspect of European politics in a medium term. This article focuses on the ethical aspect of the migration-related policy choices, and by doing so, tries to determine the different narratives that shape policy choices of this area, and some of the main tensions. The article introduces a matrix that provides some angles for evaluating the policy choices from an ethical perspective. The most significant specifics that shapes the ethical narrative are indicated with the vertical and horizontal axis of the matrix, namely, the dichotomy of idealistic and realistic approach and the reception or exclusion shown by the society toward migrant persons. Further factors of the ethical evaluation are placed in this context, whether and to what extent policy choices correlate with state security, support international development especially in the region from mass migration originates, respect human dignity, and take into account the host society's capacity to integrate migrant persons.

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CRIMINAL LAW MEASURES OF ENSURING THE SECURITY OF THE CRYPTO SPHERE

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Abstract: In the first issue of the Bratislava Law Review magazine for 2018, our article addressed the problem of legal regulation of relations related to the crypto sphere "Failure to repatiate funds in foreign currency from abroad and modern issues of currency regulation" was published. In December 2017, Bitcoin predicted the cost of $ 40 – $ 100 thousand. However, in 2018, the situation changed-the Bitcoin exchange rate began to lose from $ 0.5 to $ 1 thousand per day, and its market capitalization fell to $ 70 billion[1]. The crisis of the crypto market has affected not only the capitalization of cryptocurrencies, but also the issues of legal regulation of relations associated with its use. Currently, only three countries – Sweden, the Netherlands and Japan – recognize cryptocurrency as a legal means of payment. In Spain, the cryptocurrency is classified as an electronic means of payment only in relation to the gaming business. The legislation of Germany, as well as Finland, allows to classify cryptocurrencies as financial instruments. In China, Singapore and Norway cryptocurrency is considered as a financial asset in the US – as property, i.e. developed countries are in no hurry to equate cryptocurrency to means of payment. In Russia, the use of cryptocurrencies is not regulated by any rules, but there is no legislation prohibiting the circulation of cryptocurrencies as means of payment. At the same time, the draft bill "On digital financial assets", designed to regulate financial relations in the crypto sphere, completely excludes the issues of mining and circulation of existing crypto-currencies. However, new electronic entities carry certain risks associated with their turnover. In this regard, many States seek to develop mechanisms to ensure the security of actions in the new crypto sphere of legal relations before the direct legalization of cryptocurrencies and other modern electronic entities. The purpose of the article is to analyze the approaches related to the security of the crypto sphere in modern society by criminal law measures taking into account foreign experience.

Keywords: cryptocurrency, cybersecurity, cryptosphere development, FATF, criminal law measures, Germany

1 INTRODUCTION

According to the estimates of the European Bank (ECB)[2] and a number of national banks, including the Central Bank of Russia, the circulation of private cryptocurrencies, which are not secured and

[1] SAVKIN, Alexey. Cryptomarket: game end, what next // Money. Addition to «КомерсантЪ». 19. 12. 2018. P. 26 – 27. Available at: <https://www.kommersant.ru/doc/3828779>.

[2] Available at: <https://assets.kpmg.com/content/dam/kpmg/ru/pdf/2017/11/ru-ru-cryptocurrency-legislative-regulation-worldwide-november-2017-upd.pdf> (A review of the legislative regulation of the cryptocurrency in some States); Virtual Currency Schemes. ECB Report. October 2012. P. 13. Available at: <https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf>.

guaranteed by any state, carries high risks for both consumers and investors, and operations with cryptocurrencies can be used to launder proceeds of crime.[3]

It is important to note that in recent years, not only in Russia but also in other countries are paying more attention to the topic of ensuring the security of the crypto sphere. Thus, on November 12, 2018, the President of France E. macron spoke at the UNESCO Forum on Internet governance with the so-called Paris call for trust and security in cyberspace, which proposes to develop common principles for ensuring security in cyberspace. The Declaration was supported by 51 States, 50 international and regional organizations, more than 170 private companies and corporations. Among them are such leading multinational corporations as Microsoft, Facebook, IBM, Siemens, Daimler Group, Dell Technologies, Hitachi, Panasonic, Airbus and others. At the same time, the entities supporting the Paris appeal undertake, in particular, to work to strengthen law enforcement measures and resistance to malicious actions in the online space, as well as to improve the security of digital products and services, universal "cyber-hygiene".[4]

In addition, it should be noted that in July 2018, the G20 member countries signed an agreement, according to which in 2018 a standard for combating money laundering (AML) in the cryptocurrency sphere was to be developed.[5] At the same time, FATF (The group for the development of financial measures to combat money laundering[6]) expressed its readiness to present AML standards for cryptocurrencies[7], related to countering money laundering and financing of terrorism for the cryptocurrency market only in June 2019.

Although the details of these rules are not yet known to us, in 2019 the existing FATF rules should be applied to regulate the digital asset market in the member States of the organization, whose governments are required to implement new standards in their legislation before the visit of the FATF assessment Commission in March 2019. In this regard, for example, the government of Japan has already announced its intention to establish mandatory supranational rules for the regulation of crypto-exchanges no later than 2019.[8]

Independently deciding to what extent to regulate the activities of cryptocurrency companies in connection with their obligations, FATF member countries are called upon to give legal status to such standards in each jurisdiction.

In Slovakia, the supervision of virtual currencies is not carried out, although the need for this is obvious in view of the development of financial and economic relations in the European Union[9].

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3 Forgotten mining: why business is dissatisfied with the law on crypto regulation. Available at: <https://www.rbc.ru/finances/28/11/2018/5bfd22239a794758092fe326>.

4 Available at: <https://ria.ru/20181112/1532642131.html?referrer_block=index_archive_10>.

5 G20 will develop standards for combating money laundering with the use of cryptocurrencies. Available at: <https://forklog.com/g20-razrabotaet-standarty-protivodejstviya-otmyvaniyu-dohodov-s-pomoshhyu-kriptovalyut/>; <https://complyadvantage.com/blog/aml-compliance-trends-2019/>.

6 FATF currently consists of 37 jurisdictions and two regional organizations representing most of the major financial centers in all parts of the globe. Available at: <http://www.fedsfm.ru/activity/fatf>.

7 Available at: <https://www.financemagnates.com/cryptocurrency/regulation/financial-action-task-force-to-issue-its-crypto-guidelines-by-mid-2019/>.

8 FATF will develop common rules for Bitcoin-exchange in the whole world. Available at: <https://forklog.com/fatf-razrabotaet-edinye-pravila-dlya-bitkoin-birzh-vo-vsem-mire/>.

9 BELOMYTTSEVA, Olga. On the position of the EU countries in relation to the issue and circulation of virtual currencies // Problems of Accounting and Finance. 2015. № 1. P. 26 – 30.

2 FUNDAMENTAL PRINCIPLES OF ENSURING THE SECURITY OF THE CRYPTO SPHERE

Legal insecurity of the crypto-sphere, exposed to criminogenic risks, makes it socially dangerous. Moreover, the criminogenic risks in this case is understood as the probability (possibility) of the occurrence of criminogenic consequences caused by the uncertainty of the parameters of social and legal regulation of social relations. These are risks that have a positive impact on the formation of a criminal plan, the purpose of the crime and are associated with the creation of favorable conditions for achieving a criminal result.

It is important to note that currently the creation of such conditions is hampered by the lack of legal capacity of law enforcement agencies to prevent and respond to criminal manifestations in this area, in particular related to the payment of terrorist activities "virtual currency", the use of which implies the anonymity of transactions and users, fast speed of transactions.

Meanwhile, the practical implementation of measures to neutralize the criminal threats associated with the use of cryptocurrency involves the implementation of appropriate conditions for the implementation of legal regulation of the development of the crypto sphere. The implementation of such conditions is due to the need for a consistent criminal law policy, which should be based on the following basic principles:

- the principle of justice, according to which measures taken against a particular person about his actions related to the use of cryptocurrency should be based on the possibility of balancing the interests of the individual, society and the state;

- the principle of adequate response to any criminal manifestation, on the basis of which the offender is necessarily subjected to specific measures of state influence, regardless of his official, professional, property status, and law enforcement agencies are designed to ensure the neutralization of negative consequences in the context of digitalization of public practice. At the same time, law enforcement officers should acquire new skills in the use of information technologies (cryptodetective skills) related to the structuring of large amounts of information, its correct search, analysis and selection, i.e. they should move from "repeaters" to the category of "communicators" of legal information designed to quickly navigate in its flow, master the logic of its search. It is on this that the success of their investigation of crimes will depend to a large extent.

According to experts, almost every day on the Internet there are financial pyramids based on cryptocurrency investments, because the blockchain technology is convenient for building such pyramids – eliminates the need to make payments manually and maintain any databases to someone who, using smart contracts, controls the accession to the pyramid.[10]

There are no legislative methods to combat this phenomenon. There is no crime, there is no evidence, there is no possibility to find the organizer. In this regard, the issue of improving criminal legislation is becoming more urgent.

The system of means providing effective criminal and legal impact on new social relations, as such, is a combination of interrelated legal, socio – economic and psychological elements that determine the volitional behavior of participants in crypto-relations. Therefore, we can talk about a specific set of means of regulating social relations using different approaches.

[10] «КомерсантЪ». 21. 12. 2018. № 236.

In this regard, it is very important to analyze the General and special rules for the construction of crimes [11] on qualifying and privileged grounds[12], as well as the allocation of rules for the construction of qualified compositions[13], rules for the construction of sanctions of criminal law[14].

According to V. K. Andrianov analysis of the structural patterns it is logical to carry out the private patterns, which expresses the internal structure of a separate criminal legal phenomena, to more General, characterizing the internal structure of the criminal law system.[15]

3 GERMANY – A VIEW ON THE DEVELOPMENT OF CRIMINAL LAW MEASURES TO RESPOND TO NEW TECHNOLOGICAL CHALLENGES

At the same time, in our opinion, the experience of Germany is interesting, where it is considered inappropriate to introduce new crimes in the criminal code of the country, including in response to the development of the crypto sphere.

Comprehensive legal regulation of relations arising in connection with the development of the digital economy involves the establishment of the grounds and conditions for bringing persons to responsibility for illegal actions in the new crypto sphere of legal relations, including criminal. At the same time, this issue is most acute in connection with the emergence and evolution of crypto – currencies-digital entities that erase any boundaries, allowing you to move away from accounting for income, paying taxes, controlling financial flows, and so on. The latter is related to the risks and threats posed by this "new money"[16]. After all, unlike the use of digital technologies (i.e. the appropriate software) for criminal purposes, where a certain qualification of the attacker is required, almost everyone can use the cryptocurrency to commit illegal actions.

Recall that since 2013, the government of Germany began to recognize Bitcoin as a digital currency, indicating that such currency does not apply to electronic money or to the so-called "functional" currency (including foreign). In the future, virtual currencies in Germany were recognized as a financial instrument (2017), and in the banking legislation of Germany they were recognized as private funds and specific units of financial accounting.

However, according to experts, the new " money "carry an excessive number of risks that can have a negative impact not only on the welfare of specific citizens, but also the national economy, and "anonymity"[17] and the lack of control of national authorities attracts the attention of crime

[11] IVANCHIN, Artem. Conceptual bases of designing of structure of a crime: dissertation, doctor of law. Yaroslavl, 2014. 462 p.

[12] LESNIEWSKI-KOSTAREVA, Tatiana. Differentiation of criminal responsibility. Theory and legislative practice. Moscow, 2000. P. 257 – 271.

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[15] ANDRIANOV, Vladimir. Structural regularities of criminal law: concept, types, correlation of concepts // Journal of Russian Law. 2018. № 10. P. 91 – 100.

[16] PECHEGIN, Denis. Cryptorisks // Russian Journal of Legal Studies. № 3. 2017. P. 153.

[17] At its core, cryptocurrency is anonymous, although there already exist programs that allow to de-anonymize the ultimate owner of a particular cryptocurrency or cryptoasset.

in the legalization (laundering) of proceeds obtained by criminal means to modern money surrogates[18].

Thus, the German police are increasingly faced with criminals and entire groups that commit crimes on the Internet using high-tech equipment. The Central task of the German law enforcement agencies in this area is to prevent the Commission of illegal actions. The response to the development of crime in the economy 2.0, 3.0, 4.0 should be adequate. Forensic techniques and techniques should also meet levels 2.0, 3.0 and above. This is done by the departments for combating cybercrime and digital investigations of criminal investigation of a particular land of Germany.

However, the investigation against cybercriminals is further complicated by some factors. For example, cybercriminals are increasingly operating from Darknet – the so-called "dark" Internet. In this area of the Internet, criminals can use special encryption tools and technologies to maximize the anonymity of their traffic.

Another factor that complicates the possibility of combating cybercrime is that most crimes in this area are not local. This implies that the public authorities of different States should cooperate more closely at the international level. However, such cooperation at the international level is complicated by the fact that the common principles of interaction between countries related to the understanding of the nature of modern digital entities have not yet been developed, which is largely due to national differences in the sphere of legislative regulation of various issues arising in the field of innovation and monetary relations.

Meanwhile, all criminal actions in the virtual world are somehow connected, as representatives of the German legal doctrine believe[19], with the interface of entering the real world. This is the key to the success of the investigation by the relevant departments of the criminal investigation Department of a particular state of Germany[20].

Cybercrime in Germany includes all crimes against the Internet, additional data networks of information systems or their data in accordance with the national definition. Cybercrime also includes crimes committed with the help of information technology.[21]

The German law enforcement officer thus proceeds from a broad understanding of cybercrime and includes, among other things, acts committed by means of speech (including the dissemination of pornography and extremist propaganda), as well as invasion of the personal sphere of human life, fraud and computer fraud, software and hardware attacks (including preparation for information

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18 POLASIK, Michal, PIOTROWSKA, Anna, WISNIEWSKI, Tomasz, KOTKOWSKI, Radoslav, LIGHTFOOT, Geoff. Price Fluctuations and the Use of Bitcoin: An Empirical Inquiry, 2014. p. 20 – 21. [online]. Available at: <https://ssrn.com/abstract=2516754>; LUTHER, William. Bitcoin and the Future of Digital Payments. 14 p. [online]. Available at: <https://ssrn.com/abstract=2631314>; BRYANS, Danton. Bitcoin and Money Laundering: Mining for an Effective Solution // 89 Ind. L.J. 2014. P. 441 – 472. [online]. Available at: <https://ssrn.com/abstract=2317990>; etc.

19 Available at: <https://www.bitcrime.de/presse-publikationen/pdf/BITCRIME-RegulRep.pdf>; BRENIG, Christian, ACCORSI, Rafael, MÜLLER, Günter. Economic Analysis of Cryptocurrency Backed Money Laundering // ECIS Completed Research Papers. 2015. Paper 20. [online]. Available at: <https://aisel.aisnet.org/ecis2015_cr/20/>; GRZYWOTZ, Johanna, KÖHLER, Olaf, RÜCKERT, Christian. Cybercrime mit Bitcoins – Straftaten mit virtuellen Währungen, deren Verfolgung und Prävention // StV. № 11. 2016. P. 753 – 759 [online]. Available at: <https://www.bitcrime.de/presse-publikationen/>.

20 So, the police of Baden-Württemberg for several years ago introduced a special position of cybercriminality. Particularly skilled professionals serve in the cybercrime and digital investigations division of the criminal investigation Department, as well as in the relevant criminal inspections of the twelve regional police headquarters.

21 Available at: <https://lka.polizei-bw.de/wp-content/uploads/sites/14/2017/06/Cybercrime_Digitale_Spuren.pdf>; <https://cyberleninka.ru/article/v/kiber-i-internet-prestupnost-v-germanii-i-rossii-vozmozhnosti-sravnitelnogo-issledovaniya>.

theft), forgery of documents by means of a computer, falsification of data essential for proof, and other computer crimes[22]. In other words, this category of crime in German criminal law is basically related to property acts. However, the realities of cybercrime and the scale of the increase in the number of criminal acts in this area are far ahead of the legislator.

The Federal criminal police service of Germany (Bundeskriminalamt) presented the annual report on the state of cybercrime in the country for 2017.[23] This report also included information about crimes related to cryptocurrency. Moreover, many malicious programs today focus on illegally and imperceptibly using the it resources of a company or an individual user in order to carry out hidden cryptomining, including the well-known digital currency Bitcoin. And for this today it is not necessary to infect the computer of a particular user, the corresponding scripts that will "exhaust" the energy of your computer can now be embedded in sites and videos (music). Going to a particular resource and clicking "Play" the user automatically allows such a resource to use the computing power of his computer as long as he uses this resource.

The complexity of the qualification of such an act is that such programs often do not violate the integrity of the system itself, but simply load it much more while the user accesses the Internet resource. In other words, as soon as the user closes the site or browser, the corresponding script will stop its execution and will not harm the user's system. The criminal code of Germany contains a separate crime, provided for in § 303a, which establishes responsibility for illegal deletion, conversion, scrapping, and modifying user data.

However, in order to qualify the case described above under § 303a of the Criminal code of Germany, the corresponding script must penetrate into the affected system and create conditions in this system for constant communication with the corresponding server. In the latter case, such an act falls under the signs of the crime provided for in § 303a of the Criminal code of Germany, since here, most likely, there will be a secret and unauthorized change of user data. At the same time, for such a conclusion, the software of the corresponding computer, in theory, should become a single, in the likeness of blockchain technology, when any change requires the creation of a new block, which will easily identify unauthorized changes in the system. But even without such a structure of the software of a particular user, this case, in General, falls under § 303a of the Criminal code of Germany.

The land court of Kempten (Bavaria), in its decision[24] of 27 July 2017, pointed out that the change in data within the meaning of paragraph 1 § 303a of the Criminal code of Germany occurs as a result of a violation of the functions of data that lead to a change in their information content or indicator. This includes any form of transformation of the contents of the stored data, and it does not matter whether it is an objective improvement. Rather, it is crucial that the state of the system is different from the previous one. At the same time, the user is obliged to take measures to protect their information, for example, to use a firewall that will not allow an ordinary user without special training to access the information system. However, this does not mean that the offender will avoid responsibility in the latter case. In the case of 75% of infected computers, the firewall was turned on

[22] SIEGMUNT, Olga. Cyber and internet crime in the Federal Republic of Germany and the Russian Federation: possibilities for a comparative research // Legal Science and Law Enforcement Practice. № 4 (34). 2015. P. 182.

[23] Available at: <https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Cybercrime/cybercrimeBundeslagebild2017>.

[24] BGH 1 StR 412/16 – Beschluss vom 27. Juli 2017 (LG Kempten). [online]. Available at: <https://www.hrr-strafrecht.de/hrr/1/16/1-412-16.php>.

automatically, whereas in 25% cases, this program has been deactivated. At the same time, malicious software was secretly installed on users computers and had the ability to bypass firewall protection. Therefore, all cases established by the court were correctly qualified under § 303a of the Criminal code of Germany.

On the other hand, modern technologies make it possible to do without changing the relevant data or infecting the computer, which requires independent understanding from the point of view of the description of the criminal act in the doctrine of criminal law and further, respectively, in the criminal law. In particular, the border beyond which criminal liability will be established in case of unauthorized use of the computer resources of the user who visited this or that Internet resource requires a separate understanding[25]. After all, these scripts can be very successfully used by advertisers instead of referring to banners, which sometimes too intrusively offer any product to the user and to a greater extent load the operating system of the user's computer. However, this problem in the science of criminal law in Germany has not been solved.

4 CONCLUSION

Analysis of foreign legislation in connection with the problem of determining the order and grounds of liability in the new crypto-sphere of legal relations allows us to distinguish four approaches to changing the criminal law: 1) introduction of specific compositions listed in the Special part, additional provisions related to the crypto-sphere; 2) establishment and definition of new crimes; 3) use of existing crimes to regulate liability in the new crypto-sphere of legal relations; 4) partial or full use of all listed options at the same time.

Attempts to solve this problem in Germany are based on the fact that the German doctrine States cases of crimes committed using digital technologies. But since such acts are often cross-border in nature, this significantly complicates the ability of German law enforcement agencies to obtain timely and full evidence in criminal cases. In addition, there are some difficulties in the qualification of crimes committed with the use of digital technologies, since most of them are German law enforcement officers trying to bring under the existing compositions. However, this approach does not make it possible to conclude unequivocally that the punishment determined by the current norms of the criminal code of Germany really corresponds to the social danger that the crimes committed with the use of digital technologies contain.

It seems that the identified problems can be solved at a qualitative level only if there is an international standard for combating crimes committed with the use of modern digital technologies. As part of the definition of approaches to ensuring the security of the crypto sphere, illegal actions of the individual can rightly be considered as part of the General chain of natural relationships and processes associated with its development. In order to study such actions, it is necessary to identify and analyze the causes of both criminal liability and the adaptation of criminal legislation to the new historical realities not only at the national but also at the international level.

[25] KHABRIEVA, Talia. Law Facing the Challenges of Digital Reality // Journal of Russian Law. № 9. 2018. p. 5 – 16; KHABRIEVA, Talia, CHERNOGOR, Nikolay. The Law in the Conditions of Digital Reality // Journal of Russian Law. № 1. 2018. P. 85 – 102.

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RULE OF LAW IN THE 21ST CENTURY

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Abstract: Rule of law is one of the core principles of constitutions and also the essential value of the European Union. Still, rule of law does not have a unanimous understanding either in the academic sphere or in the jurisprudence of the countries. The paper explains some theories on rule of law, then it considers how the doctrine prevails in the praxis of the Venice Commission and in the wording of the Treaty on the European Union. The paper concludes that interpretation of international fora involves the meaning of rule of law in a national level, even though the base of interpretation is unclear.

Keywords: rule of law, Venice Commission, constitutional interpretation, European Union

1 RULE OF LAW IN HUNGARY AFTER THE TRANSITION

A new constitution called *Basic Law of Hungary* (*Magyarország Alaptörvénye* in Hungarian) was adopted in 2011 and entered in force on 1st January 2012. It can be accepted as generally known event that the new constitution lead to tensions among Hungary and the Venice Commission or the institutions European Union (EU). The trivial explication of these tensions is that circumstances of adoption and some regulations of the Basic Law seemed to challenge the rule of law as fundamental value of the European Union (enacted in Article 2 of the Treaty on European Union (TEU)) and of the Council of Europe (CoE). Some accustomed aspects of the text (like the long and ceremonial preamble called National Avowal; the hermeneutical rule of Article R prescribing that the regulations of the Basic Law should be interpreted in accordance with their purposes, the National Avowal and the achievements of the Hungarian historical constitution; the limitation of powers of the Constitutional Court regarding economical cases) and the quick amendments of the Basic Law were and are under disputes also in Hungary. However, the degree of tension needs some more explanations, hence other regulations of the Basic Law reflect the former achievements of interpretation by the Constitutional Court that should have been welcomed. On the other hand, some amendments of the former Constitution (amended for more than 50 times in 20 years) had reshaped completely the division of powers between the Parliament and the Executive without any reaction of the EU or CoE institutions.

If we project the events on the background of nearest history it can be concluded, that preparation and adoption of the Basic Law met important moments of development of the concept of the rule of law. This special circumstance had sharpened the position of the interested institutions.

The first milestone of the actual constitutionalism in Hungary was the transition itself. On 23rd of October 1989 the Hungarian Parliament accepted an interim Constitution (formally as a comprehensive revision of the former Bolshevik constitution). It was consciously interim, as its preamble stated that it would be in force until the adoption of a new constitution. Article 2 of the interim Constitution declared that Hungary is an independent, democratic state under the rule of law. The

declaration had been unprecedented in Hungary. Also, on political considerations, it was an answer (a reaction) to the state establishment and the concept of law of the former period ruled by ideology.

No-one could be in doubt about the existence of implacable controversy between the Constitution and the inherited legal system. These were controversies for the solution of which the constitution institutionalized a strong Constitutional Court, in power to annul statutes. The actual situation and the constitutional empowerment both demanded that the Constitutional Court, by using their means, should speed up "clearing the law".

In this process the rule of law clause was a legally relevant issue which the Constitutional Court needed to assess and to give certain interpretation to. But how to fill the content of rule of law, what is allowed to do and what shall be done; such information was not available by any live, domestic model. From the first decisions clause of rule of law was interpreted by the Constitutional Court broadly at their discretion. The Court took the decision that a loophole is impossible to exist in a state governed by rule of law; i.e. every single detail of state power shall be laid on constitutional norms. Beyond enshrining the abstract meaning of rule of law in a decision, the Constitutional Court likewise assessed the content of the concept in several of its decisions. They reached the conclusion that:

"Declaration of rule of law in Hungary (…) can be comprehended only as in a formal sense, and in substantive matters it has further references to other, specified constitutional rights. Principle of rule of law may be directly called up only if there is no other specific right regulated within the Constitution."

In fact, the wording of the Constitutional Court is quite uncertain because, firstly, it elevated rule of law above other (substantive) provisions ('formal' rule of law). Secondly, rule of law was assumed to be a subsidiary rule (further reference to nominated rights). Thirdly, it is presumed as a mysterious (secret) substantive rule from which (in the absence of other provisions) individual constitutional rights can also be deduced. In a different decision, this multi-fold character is further enhanced (true for normative acts only).

The above examples show how, from the principle of rule of law, the Constitutional Court emphasized the relevance of legal certainty, elevating that to be the source of the most various constitutional requirements under various qualifiers. Thus, it was legal certainty the key element to open any legal dogmatic lock: the Constitutional Court could deduce almost anything from this principle and its individual decisions enlarging the concept enhanced more and more this discretion. From here on, the Constitutional Court has been entitled to do anything.

The new constitution called Basic Law of Hungary was ready-made and accepted by the Easter of 2011. Its structure was strongly different from the interim Constitution. Some regulations remained unchanged, others got new formulation, and very new regulations appeared within the text. But one regulation remained the same. Article B) declared that Hungary is an independent, democratic state under the rule of law.

2 GROWING INTERNATIONAL INTEREST REGARDING RULE OF LAW

2.1 The Venice Commission and the Report on Rule of Law

The first knight with rule of law on its shield was the Venice Commission, officially known as the European Commission for Democracy through Law, was established at 10th of May 1990 by the Committee

of Ministers of the CoE for a period of two years. The Commission, composed of individual members appointed by the governments of the member states, has designed the cooperation between the member states of the CoE and other Central and Eastern European states (not members at that moment) including first and foremost mutual knowledge and approximation of the legal systems of the states concerned, understanding of differing legal cultures and resolving and improving the functioning of the democratic institutions. In its work, the Commission was to give priority to constitutional, legislative and administrative principles and methods for the effectiveness and the rule of law of democratic institutions, the protection of fundamental rights, public participation of citizens and the protection of self-governments. The founding document was revised by the Committee of Ministers in 1992, as a result of which the activities of the Venice Commission continued for an indefinite period.

In the first years of its activity the Venice Commission published one opinion regarding Hungary, and the situation is the same for Central Europe and the Baltic States.

The opinions of the Commission, which had become increasingly prestigious symbolised by the number of its members, are unavoidable, even if the opinions are formally non-binding. The "soft" opinions cannot be ignored due to the prestige of the institution, its criticism is unpleasant for the member state in case. Thus, the Commission appears as a quasi-court to the applicant, there is no other body to supervise the opinion once published.

The consistency of "case-law" of the Commission was facilitated by the opportunity granted the Commission to act even in lack of request. Without infringing the powers of other bodies of the CoE, the Commission may on its own initiative, carry out research and, if it is justified, draw up studies, drafting directives, legislative and international agreements that the legislative bodies of the CoE may discuss and accept. This activity is very effective.

The turning point of the activity of the Venice Commission was 2011, when its Report on the Rule of Law was adopted and published. The report states that the rule of law is an essential component of democratic societies, it concerns the relationship between the state and the individuals, but it also concerns the effects of globalization and state deregulation, as well as the private, international and supranational public actors on individuals. The central finding of the Report is the definition of the rule of law derived from Tom Bingham:

"Every private or public person and authority within a State must be subordinated to, and should be, as a beneficiary of the law, which is publicly accepted with a view to the future and which is used by the courts in public proceedings" (Article 36).

Based on the definition of Bingham, the Report observes as conceptual components of the rule of law: certainty of law, which includes its perception, clarity and predictability, the assurance of subjective rights based on law (rules) and non-discretionary decisions, equality before law, the lawful, fair and rational exercise of state power, the protection of human rights, the resolution of disputes by fair trial and the respect of States' obligations under international and domestic law. By the Report the Venice Commission created its strong instrument appropriate to push any member state in the direction conceived by the Commission to be right and correct. The instrumentalisation was completed by a technical questionnaire that made it even more effective, the Rule of Law Checklist.

2.2 Rule of law in the TEU

The EU and the CoE are different entities with different institutions. However, the concept of rule of law served as a promoter of coordinated procedures. The key moment was the adoption and entering

into force of the TEU. Rule of law, this paradigmatic principle of multi-source and multi-component has become normative rule not only in Hungary but also in other countries and finally in the European Union. The basic document of the European Union provides for the values of the Union:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

TEU has become binding since 1 December 2009. We can say that the rule of law has become a normative concept for the European Union. Due to the differences in terms of use, it seems appropriate to mention that the different terms (all of them official): e. g. rule of law, *Rechtsstaatlichkeit, État de droit* (and *jogállam* in Hungarian) are more than a linguistic feature. The instability of terms opens up space for arbitrary interpretations (now we can generously not consider that the European Union is certainly not a state at this moment, but in many languages it is based on the value of Rechtsstaat). The TEU, therefore, stipulates without any conceptualization that one of the basic values is the rule of law or *Rechtsstaatlichkeit* or *État de droit* or *jogállam*. As a result of Article 2, the raising of the principle of rule of law to normative rank opens a gate that would probably never be closed: a tool for the EU bodies that can be used without restrictions.

2.3 The new framework for strengthening the rule of law as link between EU and the Venice Commission

There was no need to wait much for a soft (looking) and therefore easy to use tool. The European Commission, at the invitation of the Council and Parliament, developed a tool for the new EU framework for strengthening the rule of law by 2014, which in fact is partly political and partly legal. One of the key features of the "framework" is that it excepts the rule of law from other values of Article 2 and gives priority to its protection whenever "threats to the rule of law" occur which are of systemic nature (point 4.1). This wording undoubtedly demonstrates how easy is to formulate an accusation of the violation of the uncertain content of the rule of law, yet it is worth taking a look at the examples of offensive situations:

"The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national "rule of law safeguards" do not seem capable of effectively addressing those threats."

The Communication on the "framework" for the rule of law contains another surprise:

"The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis."

In other words, the question of whether a Member State violates the rule of law is not necessarily answered by the European Commission but it may take over the findings of the CoE constitutional advisory body based on an informal procedure. With this non-legislative Communication the European Commission, body of the supranational EU that holds some characteristics of a state linked

its rule-of-law-protection-mechanism to the interpretation of the pan-European international organization based on a much wider membership (47 CoE Member States), the constitutional advisory body of the CoE, to the soft case-law of the Venice Commission.

As a result, we are witnessing the emergence of an unprecedented institutional linkage, which makes applicable the normative formulation of the rule of law paradigm, extracted from fundamental values in a free interpretation against any member state. Member states that are involved in suspected "systemic" threat are thus faced with a multi-faceted defense, in which the "accusers" are coordinated. The "systemic" concept, as we recall, was published in the European Commission's "Framework" Communication. It is necessary to emphasize it because it allows arbitrary "accusations": it is not necessary a large number of serious individual injuries committed by authorities of a member state and considered by national or international courts. It is enough if the soft opinion of the Venice Commission based on its informal inquiry on a political request suggests such a systematic threat.

The free interpretation opens space to bypass the declaration of Section 2 Article 4 of the TEU stating that "The Union shall respect the equality of Member States before the Treaties", hence the Venice Commission has no similar limitation.

3 COINCIDENCE OF CHANGES IN INTERPRETATION OF RULE OF LAW

If the developments of the EU, the Venice Commission and the Hungarian constitutionalism are examined in their projection to each other, it can be seen immediately that the new Basic Law was prepared and adopted in a period of time (2010 – 2011) when the concept of rule of law and its international (or supranational) context got into the focus of interest. The TEU added the rule of law to the fundamental values of the EU – firstly in the history of the Union. Due to this legal phenomenon an inevitable need have been risen for interpretation of rule of law as normative principle – interpretation that could serve as universal principle in cooperation among the EU and its member states. One of the answers to this need for interpretation was given by the Venice Commission, the advisory body of the CoE in constitutional matters which had a two-decade long expertise in endeavour of harmonising different legislations. The Report on Rule of Law filled perfectly the temporary hermeneutical vacuity around the Article 2 of the TEU. Hungary's Basic Law was dropped into this international euphoria of constitutional interpretation. The moment was neither the time for constitutional specialties nor for national identities, for constitutional unorthodoxy. CoE and the EU decided to use the principle of rule of law and their mechanisms to guarantee a kind of orthodox interpretation of rule of law and orthodox state practice.

4 CONCLUSION: COMMON AND NATIONAL VALUES IN EUROPE

However, the situation is disturbing not only for Hungary or Poland, but for any European State. The dispute between universalist and local (or sovereigntist) approaches of constitutions or of the principle of rule of law did not come to an end. The experience of the last years shows that international cooperation in protection of the universal concept of rule of law is more and more emphasised, and

the role of international institutions, constitutional and supranational courts have strong positions even against legislations of the member states. These effects were facilitated by TEU, by the Venice Commission and by linkage between the European Commission and the Venice Commission.

But in the same time constitutional specialties were not left unreflected. The ECJ in *Internationale Handelsgesellschaft* used the new term of "constitutional traditions common to the Member States" with focus on the common and homogenous protection of human rights. As the danger of overcoming the constitutional judicature of the member states was quite clear and present, the answer did not delay. The German *Bundesverfassungsgericht* reacted in 1974 with *Solange I* based on the Grundgesetz, namely on its eternity clauses stated that community law, consequently the common constitutional traditions protected by the ECJ does not have priority over the protection granted by the Grundgesetz and protected by the German courts. In this way Solange I tried to go against the international common traditions by highlighting the role of national constitutions. The quiet battle was going on for decades. Solange II, Solange III and many other cases were the nodes of this tug of war. Finally, The Treaty on European Union tried to give a peaceful equilibrium.

Articles 2 and 6 of TEU identifies common values of the member states, but in the same time Article 4 rules that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It means that common traditions as international or supranational values will be protected later on by the ECJ which perhaps will maintain the primacy of the EU law against national constitutions. But on the other hand, just the TEU gives a strong background for the standpoint that the common European constitutional heritage must not be opposed to national constitutional identity and vice versa. The two set of values should be equilibrated.

It means that constitutional identity of the different nations cannot be dissolved in an artificially constructed common formula. The common values contain what is common, the national values cover what is not common. But values that are not common are also values and these values also need legal protection. If constitutional identity disappears, the common part also loses its importance, it will be reduced to a mere formal order. From institutional aspect this means that if the common European heritage is developed and protected by international and supranational courts, the ECJ and the ECtHR, the equilibrium needs a similar court protection. This protection is vested in the constitutional courts of the member states of the EU. Thus the constitutional courts may have different tasks but their primary mission is protection of their own constitutional identity. This is not only national but – if we accept the regulation of the TEU – it is also a European mission.

The path was shown by the German Bundesverfassungsgericht in the Solange decisions, and many of the constitutional courts made their contribution to fulfil this mission. The Hungarian Constitutional Court tread on this path by its decision 22/2016. (XII. 5.) AB. The Court stated that it "interprets the concept of constitutional identity as Hungary's self-identity". "The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today (…) These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon. (…) The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the

protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State".

It is beyond any doubt that there will be long debates regarding the co-interpretation of the universal principle of rule of law and national constitutional identities. Among the EU institutions and member states there is a common ground of interpretation, the TEU. Among member states and the Venice Commission the common ground is less clear.

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THE ROLE OF DIGITAL TECHNOLOGIES IN THE NEW CODE OF CIVIL PROCEDURE

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Abstract: In my essay, I will examine the role played by electronic technologies in the new Code of Civil Procedure. My hypothesis is that despite the *sensu stricto* text of the law, the new law is built around entirely the use of electronic means of contact to be utilized instead of the traditional, paper-based solutions. The essay will on one hand uncover the overarching structure of the legislation, and on the other hand it will analyze and evaluate the substance and remits of the choice of electronic means of contact. Furthermore, it will uncover the special rules governing communication with experts, and administrative and other authorities as well as between courts. Additionally, it will scrutinize the regulations pertaining to actions taken via electronic means of contact.

Keywords: civil procedure, new Code of Civil Procedure, digital technologies, written electronic communication, oral electronic communication, electronic document management, electronic communication networks

1 INTRODUCTION

On 22st of November 2016 the Hungarian National Assembly adopted Act CXXX of 2016 on the Code of Civil Procedure, which shall be applied in civil proceedings brought before a court as of 1st of January 2018. The major goal of the codification process during the creation of the new legislation was from the beginning to apply and use the possibilities of new technologies in order to ensure effective, fast and timely closure of civil procedures.[1]

In this essay I explore the roles of electronic technologies with regard to the renewed system of civil procedures in its entirety. In my initial thesis I state that contrary to current legislation the new code constructs a system of rules based on electronic communication rather than a paper-base one. Besides providing an overall picture of the regulatory system, in this essay I also analyse and assess the provisions regarding the rights and the scope of choosing electronic means of communication, the specific rules of electronic communication with experts, courts and public authority bodies and the regulations of electronic submissions.

2 THE SPIRIT OF LEGISLATION

While establishing the civil procedural framework for Hungarian jurisdiction the Civil Procedure Main Codification Committee considered dematerialisation appearing in "The concept of the new

[1] The concept of the new Code of Civil Procedure (hereinafter referred to as the Concept") adopted by the Hungarian Government on 14 January 2015, 1., p. 18 – 19. http://www.kormany.hu/download/f/ca/30000/20150128%20Az%20%C3%BAj%20polg%C3%A1ri%20perrendtart%C3%A1s%20koncepci%C3%B3ja.pdf [cited 29. 09. 2018]

Civil Procedure Code" (hereinafter referred to as the "Concept") adopted by the Hungarian Government on 14th of January 2015, as an asset facilitating the effectiveness of procedures. The Concept accentuates the correct use of information technology solutions: the acceleration of proceedings shall not mean the dismantling of procedural guarantees.[2] The Concept highlighted the benefits of five aspects of dematerialisation: a) written electronic communication; b) oral electronic communication; c) electronic document management; d) electronic administration; e) electronic archives.[3]

In the draft concept and the study providing the base thereto prepared in the first phase of the codification, the author Professor Viktória Harsági drew the attention to the limitations of the usability of information technology. The professor elaborated on the limitations of the possibilities of modern technology through the comparative analysis of basic principles and arrived at the conclusion that the spread of information technology "may lead to the relative reinterpretation of certain traditionally accepted principles."[4]

After several years of concentrated efforts, work committees that assumed an active role in 2013 and went through a major reorganisation in May 2015, compiled an "Expert proposal" as part of the preparation for codification which stated that infocommunication tools shall be "embedded as an integral part of legislation"[5]. The Expert proposal placed the provisions on electronically lodged submissions among the general rules of submissions. It also suggested the drafting of separate legislation to regulate other issues related to electronic communication.

Pursuant to the new code adopted by the Hungarian National Assembly as the prevailing legislation, the use and adoption of electronic technologies in civil procedures is jointly governed by Act CCXXII of 2015 on the general rules of electronic procedures and trust services (hereinafter referred to as the "e-Procedure Act") and the Code of Civil Procedure. Government Decree 451/2016 should also be mentioned as the implementing regulation of the e-Procedure Act, which defines technically detailed provisions.

At the level of legal sources, the provisions of the e-Procedure Act and the Code of Civil Procedure are applicable both as general and specific rules. The e-Procedure Act constitutes the legal framework for the applicability of electronic technologies and shall be considered governing in the issues not regulated under the Code of Civil Procedure. The e-Procedure Act defines the basic principles of electronic procedures and electronic communication while clarifying primary notions, issues of interpretation,[6] and sets the rights and obligations of clients bound to or having the right to use electronic communication as well as the responsibilities of authorities granting access to electronic procedures.

The Code of Civil Procedure effective as of 1st of January 2018 outlines the rules of electronic communication primarily and as per its objective in a separate chapter. However, having reviewed the entire system of regulations within the code, both the general part on institutions and the one on special procedures contain rules related to the application of electronic tools.

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2 See Concept, p. 89.

3 See Concept, pp. 89 – 90.

4 HARSÁGI, V. Az információs technológia felhasználhatóságának határai a polgári eljárásjogban (The Limitations of Applying Information Technology in Civil Procedures). In NÉMETH, J. – VARGA, I. (ed.) Egy új polgári perrendtartás alapjai (The Basis of a New Code of Civil Procedure). Budapest: HVG-Orac Kiadó, 2014. p. 327.

5 Expert proposal, p. 224.

6 JUHÁSZ, L.: A felek, jogi képviselők és a bíróság közötti elektronikus kapcsolattartásra vonatkozó szabályok kérdései. (Issues on the Rules Pertaining to Electronic Communication between Parties, Legal Representative and Courts). In *Gazdaság és Jog*, No. 11 – 12 (2016), p. 3.

Therefore, in my opinion, the system of rules defined in the Code of Civil Procedure is multi-layered: with regard to electronic communication, law enforcement officials need to comply with the specific procedural rules applicable for electronic communication during specific procedures in combination with the specific rules outlined in Chapter XVI of the Code of Civil Procedure. In any matters not governed by these parts, the provisions of the general sections of the Code of Civil Procedure and the rules of the use of electronic technologies shall be applicable.

3 ELECTRONIC COMMUNICATION AS A PRIMARY FORM OF COMMUNICATION

The place of detailed rules for electronic communication within the code and among the special procedures indicates, that the rules of the new Code of Civil Procedure, similarly to the system of rules of the former one, define paper-based communication as the primary mode of communication. According to Bertalan Baranyi's approach the so-called reference rule in Section 604 of the Code of Civil Procedure[7] also supports this concept.[8]

This taxonomic interpretation is somewhat contradicted by the general rule of legal representation prescribed for legal proceedings, which if reviewed from the aspect of communication establishes electronic communication as a general rule. This approach is further reinforced by the fact that the legislator designated general courts as courts of first instance (where legal representation is obligatory).[9]

The right to electronic procedures is defined by Section 8 (1)[10] of the e-Procedure Act, which is further limited in legal proceedings by the right of choosing electronic communication as outlined in Section 605[11] of the Code of Civil Procedure. Parties are entitled to the right of choice regarding electronic communication if they act in person or through representatives not qualifying as legal representatives. Thus it can be stated that the right of choosing electronic communication is only provided for parties in proceedings initiated in front of district courts.

No deadline for defining the mode of contact is prescribed by the Code for Civil Procedure, consequently the party not obliged to use electronic communication may decide to use electronic communication at any stage of the procedure. However, after reporting it, requesting party is bound

7 See Section 604 of the Code of Civil Procedure "[Reference Rule] During electronic communication the provisions of this act shall be applied in harmony with the differences outlined in this chapter."

8 BARANYI, B. Az elektronikus technológiák és eszközök alkalmazása. (The Application of Electronic Technologies and Tools). In VARGA, I. (ed.) A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja. (Commentary on the Hungarian Code of Civil Procedure and Related Legislations). Budapest: HVG-ORAC Kiadó, 2018. p. 2090.

9 See Section 72 (1) of the Code of Civil Procedure: "Legal representation is obligatory in civil proceedings unless stipulated otherwise by law. (2) Unless otherwise defined by law, legal representation is not obligatory for the party lodging the defence in proceedings of district court jurisdictions – including appeal or retrial procedures – and in review procedures pertaining to a lawsuit of district court jurisdiction."

10 Section 8 (1) of the e-Procedure Act: "Lacking any provisions to the contrary in any law or government decree created through original legislative power, clients are entitled to execute their administrative tasks through electronic means and submit their declarations electronically towards an authority that provides for electronic communication."

11 Section 605 of the Code of Civil Procedure "[Optional communication through electronic means] (1) In civil procedures the party not obliged to use electronic communication or its representative not qualified as a legal representative – except for the cases outlined in paragraph (5) – may submit any claims, other submissions and annexes thereto or documents (in this chapter furthermore referred to as "submissions") electronically as by their choice pursuant to the modes outlined in the e-Procedure Act and the implementation regulations thereof.

by the chosen mode of communication, which is governing for them in proceedings of the first as well as the second instance. The choice of communication through electronic means is dependent on the person not legally obliged to use electronic communication[12]. Legal successors are not bound by this definition of the mode of communication: if legal succession occurs during the procedure, the successor may choose the mode of contact, as long as they are not obliged to use electronic communication.[13]

The new code provides some, albeit limited, grounds for switching from electronic to paper-based communication. The switch shall be requested by the interested party and the reason for the switch together with justification for the changes in party's circumstances shall be indicated to support the claim that electronic communication would place a disproportionate burden on the party from that point on. Such reasons may be: accident, illness,[14] or the loss of technical capacities due to the failure of computers.

The case may be such, that only one of the parties in a procedure is obliged to use electronic communication, or only one of the parties is willing to adopt it. In such cases the digitalisation of documents and their electronic forwarding to the recipient party is the responsibility of the court.[15] The court shall digitalise documents received on paper within five working days. The time needed for digitalisation shall be disregarded when considering procedure deadlines.[16]

4 OBLIGATORY ELECTRONIC COMMUNICATION

It is the e-Procedure Act, that defines who is obliged to communicate electronically, not the Code of Civil Procedure.[17] Bertold Baranyi identifies three categories of liable parties: 1) business entities, 2) public entities (including in particular the state, local governments, budgetary bodies, the prosecutor, notaries, public bodies and other public administration authorities), 3) a client through legal representative.[18]

The party, or the representative thereof, who, by its own right outlined in Section 605 of the Code of Civil Procedure, is not obliged to use electronic communication, but chooses to do so, after

12 VITVINDICS, M. Az elektronikus technológiák és eszközök alkalmazása. (The Application of Electronic Technologies and Tools). In WOPERA, ZS. (ed.) A polgári perrendtartásról szóló 2016. évi CXXX. törvény magyarázata. (The Interpretation of Act CXXX of 2016 on the Code of Civil Procedure). Budapest: Wolters Kluwer Kft., 2017. p. 684.

13 See Section 607 of the Code of Civil Procedure: "The predecessor's choice of electronic communication or a completed switch to the paper-based delivery of documents to predecessor shall not be binding for a successor without a legal representative."

14 BARANYI, ibid, p. 2096.

15 See Section 606 (2): "No separate court order is necessary in case of a switch to paper-based communication. The court shall notify any parties or their representatives not qualifying as legal representatives about the rejection of a request for switching to a paper-based format."

16 Section 613 (2) of the Code of Civil Procedure.

17 Section 9 (1) of the e-Procedure Act: " Unless a law based on an internationally binding contractual obligation or an international contract defines provisions to the contrary, the following parties are obliged to apply electronic communication in cases pursuant to Section 2 (1): a) party proceeding as a client, and is either aa) a business entity, ab) a state, ac) a local government, ad) a budgetary body, ae) a prosecutor, af) a notary, ag) public body, or ah) any other public administration authority not named under points ac) – ag), b) legal representatives of clients.

18 BARANYI, ibid, pp. 2097 – 2098.

reporting such choice shall use electronic means of contact towards the court during proceedings (even legal remedy cases), and the court shall send any documents to party electronically.[19]

The Code of Civil Procedure defines specific provisions pertaining to communication with experts, the courts, any public authority bodies or other authorities. Electronic communication is obligatory between courts or when contacting other authorities except for cases where the presentation of a paper-based document becomes necessary during an evidence procedure. Rules of communication with experts may depend on whether the expert is bound for electronic communication by the e-Procedure Act or not.

5 THE POSSIBILITY OF USING ELECTRONIC COMMUNICATION NETWORKS

The new code, just as well as the old one, ensures the possibility of using electronic communication networks during legal proceedings too.

A new rule in civil procedures states that electronic communication networks (for the purposes of audio and video connections) may not only be used during court hearings but at inspections as well. It may be applied upon request by parties, but the court has the right to order it too. The code defines three cases where ordering electronic communication is possible. In my opinion, all three cases aim at enforcing each and every basic principle within the code: a) the rule, pursuant to which the use of electronic communication networks may be ordered in cases where their application seems suitable to accelerate the legal process, may be considered an instrument to ensure the principle of procedure concentration and efficiency, b) ensuring access to justice and legal assistance is the purpose of the provision prescribing the potential order of electronic communication in cases where conducting a hearing or an inspection would otherwise be difficult or entail disproportionately large extra costs, and c) witness protection as the third category of cases enforcing the requirement of data privacy (protection of personal data) as well as the protection of personal rights.

During a hearing or inspection through audio or video connection two main principles arise, namely the principle of immediacy and the capability of ensuring the adversarial principle of procedures. The purpose of the rule is to ensure the practical application of these two main principles by prescribing that electronic communication networks shall only be applied, if the communication tool is capable of transmitting the image and the sound simultaneously thus providing direct connection between separate locations of the procedure.

The new code accurately defines the requirements for the location of hearings through electronic communication networks and the mode of such hearings. It stipulates that the principle of publicity shall be ensured at the location of the hearing, therefore at such sites connected through electronic means only the person to be heard, the owner of the subject of inspection and the technical staff ensuring the electronic connection shall be present.

So-called secret hearings may also be requested in procedures applying electronic communication networks. In such cases the court may order the distortion of any characteristics by which a witness could be identified, or a mode of hearing which would disallow for the identity or place of residences of the witness to be recognised.

[19] VITVINDICS, ibid, p. 682.

When using electronic communication networks, special rules shall be applied for the preparation of minutes as well. The minutes shall include the conditions of the personal hearing and the identification of the people present at the separate location.

6 SUMMARY

The review of current rules and regulations reveal that the new code contains more progressive and considerable rules for electronic communication. It is a positive development that the legislator provides opportunities for the use of electronic communication networks during witness hearings as well as inspections. Nonetheless, the multiple layers of rules and regulations do not lift the burden from law enforcement officials during both obligatory and optional electronic communication.

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DOES IDENTITY MATTER?

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Abstract: During Brexit campaign leave supporters reckoned that their sovereignty is priceless. They meant that Britain's status within or outside the European Union should not be decided upon economic reasons only. The campaign was successful and now the Kingdom is paying the price of her sovereignty. In Hungary in 2015 the government decided to ban shops to open on Sundays which was against the aspirations of both enterprises and consumers. The government found the measure so symbolic, so close to its identity that it did not respect any criticism. The government paid the political price of the unpopularity of the measure. Later on the government realised that the stake was too high and withdrew the piece of legislation. Such events clearly highlight that maintaining identity always has its price. Such price can be either economic or political. The question is if governments are ready to pay the price. It does not seem proper if mere economic and political expectations overrule symbolic issues. Neither it is acceptable if the government gives the nation's entire fortune for symbolic reasons. It must always be considered how much identity costs and if it is worth paying the price. The question can be answered upon the identity test that has two factors: first how important the issue is (how close it is to identity) and if the price of identity is proportionate to the economic, political price. The more important the issue is the greater price can be paid. And conversely, the greater the economic or political price is, the more cautious one should be. The present article sums up the most basic information on constitutional identity and analyses the factors of the identity of the Hungarian constitution, the Basic Law, with special attention to the contemporary identity debate. It argues that constitutional identity is not a strict and non-changing phenomenon but rather the procedure of continuous development.

Keywords: constitutionalism, identity, European Union and Member States

1 ABOUT IDENTITY

Identity is the collection of characteristics according to which a living entity or a thing can be differentiated from others.[1] Identity is a defining part of personality; without identity you could not be distinguished from others, so you would not be the same person any longer. Moreover people can only partly form their own identity. As identity is given, one should neither show off, nor be ashamed of it.

In constitution theory the question arises if constitutions have identities and if they do, what makes their basic features. The question is important because the cultural identity of a society is not homogenous. People as members of society have different views on the meaning of life, role of the state, etc that makes impossible to define a constitutional identity that perfectly fits the iden-

[1] DOMJÁN, K. A személyiség problémái a pszichológiában (Problems of Personality in Psychology). In GYŐRGY, G. (ed.): Pszichológia. Budapest: Nemzeti Tankönyvkiadó, 1974, p. 118.

tity of all people. In other words: does constitutional identity not segregate people whose personal identity is different? The answer connects to the legitimacy of constitutions. Constitutions can only be legitimate if it accepts not only one view but, even if the constitution stands for a specific value, accepts that some people may stand for other values. Constitutions have to protect the minority opinion in this sense.[2]

Was it not better if the constitution contained no values at all? Not at all. A constitution is not only a legal document that contains the most fundamental regulations on human rights and state organisation. Yet it is a catalogue of principles and values on which the state and the society base. It is essential for a constitution to implement values and principles, as a result of which it is also essential for a constitution to have identity. Lack of identity is not equal to neutrality but to emptiness. Neither does neutrality mean the lack of values.[3]

This also explains why constitutions are different. At first sight, constitutions are very similar. Human rights are universally acknowledged, they are regulated in a similar content. All civilised constitutions declare rule of law, separation of powers, equality, popular sovereignty, etc. Although there are differences in the work of state administration, all countries have parliaments, judiciary, executive power and so on. Despite all similarities if you read several constitutions you may find an utterly different picture on the constitutions and on societies. Constitutions can be individualists or collectivists, social or capitalists, secular or religious. Such differences may not reveal from the provisions at first sight; they root in the different identity of the constitution.

One may conclude that all constitutions have identities. Obviously, the statement is a personification; not the legal text itself but the society (the nation) has identity that manifests in the constitution.

2 HEREDITARY AND ACQUIRED PARTS OF IDENTITY

When analysing the identity of a constitution, one of its peculiarity must not be forgotten: it keeps changing. Some parts of identity are hereditary, genetically determined, while some other parts are acquired, formed by external effects i.e. the effects of the social environment. For sociologists and psychologists it is an everlasting debate to what proportion they determine identity but they mostly agree that both have roles in stipulating identity.

The situation is much the same at the case of constitutions. Hereditary elements are the ones that are explicitly stipulated in the constitution. They are not affected by jurisprudence or social behaviour, they manifest the will of the Parliament (the creator of the constitution) only. As politicians decide on the constitutional text, it is a political decision which values to base on. Theoretically, the creator of the constitution is free to implement any value to the constitution, there is no constitutional limit for a constitution. It is an entirely different issue if it is wise to implement whatsoever values to the constitutional text or if it can be successful in the end.

Hereditary elements always play a great role in constitutional identity. Jurisprudence must respect theological interpretation, i.e. the constitutional aim beyond the provision. However, the con-

[2] KUKORELLI, I. Magyarországot saját alkotmánya nélkül kormányozni nem lehet (Hungary cannot be Governed without Her Own Constitution). Budapest: Méry Ratio, 2014, p. 167.

[3] SCHANDA, B. Keresztény vagy semleges? Az Alaptörvény identitásának a kérdése (Christian or Neutral? On the Identity of the Basic Law). In Magyar Jog, 2015/3, p. 131.

stitution is more than the will of the constitution-maker. Constitutions are not in vacuum. They strongly connect to the society: the constitution stipulates the basic rules of the society on the one hand and society and politics form the constitution itself on the other. Moreover, the constitution is interdependent to jurisprudence, because "the constitution is what the judges say it is".[4] As soon as the constitution enters into force, it became affected by its environment. Jurisprudence interprets the text, giving special meanings for some provisions.

State organs, the society apply the constitution during which they emphasise some provisions while neglect some others. All such factors form the constitution, during its lifetime the same provisions can have very different interpretations. A good example for that is the US Constitution. Now it has a very different consideration on equality, property, human beings than it had at the time of its creation in 1787. As it is very difficult to pass amendments to the constitutional text, it developed mostly by judicial interpretation. Consequently, the identity of the constitution is formed by some factors other than the will of the parliament (acquired factors).

Acquired and hereditary factors often compete each other and their combination results in identity. This is also the case concerning constitutional identity. Judicial interpretation, social law-application influence the meaning of the text. This phenomenon is absolutely natural. The change of the meaning of the text signs that the constitution is a living entity; reacts to the influences of its surroundings.

3 PRACTICAL EXPERIENCE: IDENTITY OF THE HUNGARIAN CONSTITUTION

When comparing the Basic Law (the current constitution of Hungary) to the previous Constitution, one can easily find rhetoric discontinuity.[5] The Basic Law has a different view on human beings, society and state from the previous Constitution. Little does the difference manifest in the detailed provisions of the Basic Law. Instead, the entire picture is different. The spectacular and debated provisions of the Basic Law (protection of foetal life, marriage is only for people of opposite sex, constitutional aim may be ground for limiting fundamental right) are not new elements but were previously manifested in older jurisprudence of the Constitutional Court. Yet the Basic Law bases on a very different philosophy.

In 2010 and 2011, at the time of the creation of the Basic Law, the constitution maker had an utterly different moral background than in 1989, at the time of the political transition. When the republic was proclaimed, the constitution-maker intended everything but socialism. It considered that the communitarian approach is an obstacle for people to be independent. The constitution that time based on capitalism and individualism to free the people from socialism. Twenty years thereafter when moral and economic crisis emerged nationally and globally, the role of the community enlarged. Therefore, the Basic Law roots much more in collectivism and solidarity than in individualism.[6]

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4 HUGHES, C. E. Speech before the Chamber of Commerce. New York: Elmira (3 May 1907); published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), p. 139.

5 SONNEVEND, P. et al. The Constitution as an Instrument of Everyday Party Politics. In: BOGDANDY, A., SONNEVEND, P. (ed.): Constitutional Crisis in the European Constitutional Area. Oxford, Portland : Hart Publishing, 2015, p. 65.

6 ABLONCZY, B. Az alkotmány nyomában (In Search of the Constitution). Budapest : Elektromédia, 2011, p. 87.

To evaluate the entire Basic Law one would say that it emphasises moral considerations to reach social justice, instead of formal rule of law. Remarkably, the Basic Law brings closer the cultural nation to the political one, cultural and religious symbols and respect of tradition.

According to the hereditary factors, the constitutional identity of the Basic Law seems to be very different from the identity of the previous constitution.

Among the acquired factors one should consider how stable the Basic Law is politically. Stability is a value in itself. The frequent or continuous change of the social order endangers security and certainty. When making a constitution the Parliament has to set the base of the society, should define norms and principles in a long run.

Besides stability, the constitution should be flexible, too. Different ages, ideas and values should find their place in the constitution. If the Parliament reveals the majority opinion only, people in minority intend to change the constitution and reveal their own opinion as majority one. Revealing both majority and minority opinion is neither only a gesture towards others, nor it is because of pluralism but also for the stability of the constitution.

As for constitutions, stability has two aspects. On the one hand, social stability means that the constitution contains principles that meet the acceptance of a great part of the society. No constitution will be applied if it neglects the particular social relations. On the other hand, constitutions should be politically stable, too. Constitutions are stable if different governments can implement their various policies within the frames of the constitution. Constitutions can be successful if most political forces accept them as the common "rule of the game". Otherwise the stake of the election is not only to define policies in the next couple of years but to change or to maintain the constitution. Yet this results in a permanent constitution-making and the society will miss its solid ground.

Considering such aspect, one may conclude that the political influences towards the Basic Law are not favourable. In the first six years of its application the Basic Law was amended seven times (five of them in the first two years), moreover several amendments were because of daily political issues. Manifesting daily political battles in the Basic Law does not serve stability.

Besides politics, constitutional adjudication also has an impact on the Basic Law. How does the Basic Law prevail in practice? The Constitutional Court has obviously adopted the new provision of the Basic Law but has not (or just partly) adopted its new value content. The Constitutional Court upheld its former jurisprudence, due to the continuity of content between the old and the new constitution. "The Constitutional Court's interpretation of certain institutions, principles and provisions can be found in its decisions. The Constitutional Court's statements made on the fundamental values, human rights and freedoms and on the constitutional institutions that have not been changed fundamentally by the Fundamental Law remain valid. The principal statements expressed in the Constitutional Court's decisions based on the previous Constitution shall remain applicable as appropriate also in the decisions interpreting the Fundamental Law. However, the statements made in the decisions based on the previous Constitution cannot be taken over automatically without any examination; the provisions of the previous Constitution and of the Fundamental Law have to be compared and carefully weighed. If the comparison results in establishing that the constitutional regulation has not been changed or it is essentially similar to the previous one, then the interpretation can be transposed. On the other hand, when the contents of the provisions of the previous Constitution and of the Fundamental Law are the same, the reasoning is required for not taking into account the legal principles presented in the former decisions of the Constitutional Court, and not in the case of applying them".[7]

[7] 22/2012 (V. 11.) CC.

The Fourth Amendment to the Basic Law proved to be an interesting novelty concerning continuity. It states: "The decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions." Still, against the intention of the Parliament, the Constitutional Court upheld the use of its previous decisions. Admittedly, their use is not automatic but needs reasoning. With using the former jurisprudence the Constitutional Court also formulates the identity of the Basic Law.

4 IDENTITY ISSUES IN CONTEMPORARY CONSTITUTION-MAKING: THE SEVENTH AMENDMENT TO THE BASIC LAW

Migration issue has become a great and symbolic quarrel between the European Union and some member states including Hungary. As Hungary is rather repulsive in accepting refugees, the European Union blames the state with infringing human rights and breeching international obligations. On the contrary, Hungary's position is that the European Union violates the nation's sovereignty that includes the decision on who to welcome to the country.

In this debate identity is a frequently quoted reference points. The European Union reckons that rule of law and respect of human rights are identical values; values whom Hungary does not respect. Hungary considers that national identity is a kind of essential core of the constitution, a part of national sovereignty that not even EU law can touch. In this debate the Parliament adopted the Seventh Amendment to the Basic Law that introduced important novelties concerning identity. The preamble states that "The protection of our identity is the state's basic obligation" and among the Fundaments the Basic Law stipulates that "All state bodies are obliged to protect constitutional identity and Christian culture" [Art. R (4)]. It also reckons that "Participation in the European Union may not infringe Hungary's territorial integrity, population, form of state, state structure" [Art. E]. Although the amendment intended to create the constitutional base of not accepting asylum seekers as the EU Decision requested, it is unlikely to reach the target. Not only because member states cannot refer to their own constitutions but also because temporarily hosting asylum seekers does not seem to be an intervention to Hungary's population. Consequently it is not the infringement of identity.

At present, constitutional identity seems to concur the identity of the European Union. But is it really the case? Interpreting the constitution the Constitutional Court stated that the elements of identity are especially separation of powers, rule of law, dignity, human rights, achievements of historical constitution[8] – most of which are also respected by the European Union. There can be political and constitutional debates, misunderstanding between the Union and a member state. Yet such debates do not mean that identities cannot be harmonised.

5 TO CONCLUDE

Having regard the seven years that have passed since the adoption of the Basic Law, one may conclude that the identity of the Basic Law is formed by various factors. The acquired factors are different

[8] 26/2012 (V. 18.) CC

from the hereditary ones. Such difference requires the dialogue among the institutions forming the identity of the Basic Law. The language of the dialogue is constitutional law; this is the language constitutional lawyers speak and understand even if they disagree.

Does the Basic Law have identity? Certainly it does. Its present identity is not the one it had at the time of its creation but it is not problematic at all. If it were the same it would mean that the Basic Law does not react to the influences of its environment, yet this is the sign of life. The constitution-maker has only a small impact on such change. Identity should not be an obstacle of any change; instead, the constitution must be ready to change. Yet the constitutional identity should not be changed for light causes; it has to preserve what is worth preserving.

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THE PROBLEM OF PROTECTION OF NATIONAL CONSTITUTIONAL IDENTITY IN INTEGRATION PROCESSES

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Abstract: The problem of protecting the constitutional identity, in contents of modern constitutional developments, becomes a top discussed topic by lawyers. We share the opinion of scholars that the constitutional identity is the manifestation of the national and political identity of the society, which is reflected in the content of the Constitution. Having a millennium history, including a rich legal history, Armenia is probably one of the states that, according to geopolitical situations and historical circumstances has very often had to defend its national, including constitutional identity. The report presents specific historical examples. Nowadays Armenia is actively integrating into globalization processes: on the one hand we join the Eurasian Economic Union, on the other hand, conclude a Comprehensive and Enhanced Partnership Agreement with the EU. These circumstances are new challenges for our country. The report also highlights the importance of the role of the Constitutional Court of the Republic of Armenia in maintaining the constitutional identity and in legal protection of national constitutional values.

Key words: constitutional identity, national identity, national constitutional values, the role of the Constitutional Court, integration process.

1 INTRODUCTION

As a result of modern globalization processes, the issue of maintaining national and, especially, the constitutional identity, has been discussed by different social-humanitarian sciences in various formats. The problem of protecting the constitutional identity, in the context of modern constitutional developments, becomes a top discussed topic by lawyers. And the problem is that the term „constitutional identity" has different interpretations in the modern legal literature.

We share the opinion of scholars that the constitutional identity is the manifestation of the national and political identity of the society, which is completely reflected in the content of the Constitution[1]. Whether the Constitution works and how it works depends on the national, religious and cultural identity of those who are affected by the constitution. We also agree with the opinion of former President of the Constitutional Court of the Republic of Armenia prof. G. Harutyunyan according to which the person's constitutional identity is characterized by the integrity of the values and civil qualities by which he determines his place and role in constitutional relations as a direct bearer of constitutional values.[2]

[1] SAJO, A., UITZ, R. The constitution of freedom an introduction to legal constitutionalism. Oxford university press, 2017, pp. 63 – 67.

[2] HARUTYUNYAN, G. The epistemological and axiological characteristics of constitutional identity of a human being. Available at http://concourt.am/armenian/structure/president/articles/article-january2018.pdf.

2 THE PROBLEM OF PRESERVING CONSTITUTIONAL IDENTITY IN A HISTORICAL RETROSPECTIVE

Exploring the constitutions of different countries, we can see how the constitution can reflect specific features and accents of national identity in each specific society at a certain stage of its development. The constitutional law of foreign countries is a unique source of information about the problems in the field of national identity faced by each state.

Of course, each country has its unique history. Having an age-old history, including rich legal history, Armenia is probably one of the states that, according to geopolitical situations and historical circumstances has very often had to defend its national, as well as constitutional identity.

Armenia faced the problem of protecting its constitutional identity, in the modern sense of that term in the period of Soviet Union, where as you know the central authority attempted to eliminate all kinds of differences between member republics: national, religion, linguistic, cultural, legal and so on.

But we are proud to be the representative of one of the few nations, which in Soviet reality struggled as much as it was possible and preserved some elements of their national constitutional identity at the constitutional level.

One of those elements was the national language. The Constitution of the ASSR of 1937 and further Constitutions fixed the principle of the national language of judicial proceedings "Judicial proceedings in Soviet Armenia are conducted in Armenian language, in regions with Russian and Azerbaijanian habitants respectively in Russian or Azeri".

Special attention should be paid to the phenomenon of religious identity, which is protected at the constitutional level as an element of constitutional identity.

If we consider the history of legislative amendments to the constitutional law of the European countries, we can reveal that the religious motive is gradually being excluded out of the legislation. It is obvious that the positions of religious identity in the West are losing significance. Among the existing European constitutions with a strong religious component, can be mentioned the constitutions of Greece and Armenia.

Notwithstanding that Armenia is a secular State and according to Article 17 of the Constitution which establishes: "1. The freedom of activities of religious organizations shall be guaranteed in the Republic of Armenia. 2. Religious organizations shall be separate from the State".

Article 18 of the Constitution of Armenia establishes: "Article 18. The Armenian Apostolic Holy Church

1. The Republic of Armenia shall recognize the exclusive mission of the Armenian Apostolic Holy Church, as a national church, in the spiritual life of the Armenian people, in the development of their national culture and preservation of their national identity.2. The relations between the Republic of Armenia and the Armenian Apostolic Holy Church may be regulated by law".

In spite of the fact, that Armenia is a secular state and there are a number of religious organizations in it, such constitutional regulation is understandable, because Armenia, being the first state that adopted Christianity as a state religion in 301 AD, has a strict Christian heritage, which has its strong impact on the national constitutional identity.

3 ROLE OF THE CONSTITUTIONAL COURT IN PRESERVING CONSTITUTIONAL IDENTITY

Nowadays a huge role in preserving constitutional identity and developing national constitutional law is delegated to the Constitutional Courts.

The judicial practice of the constitutional and supreme courts of many states, such as Germany, France, India, etc. uses the concept of constitutional identity as one of the methods of legal cognition in constitutional legal proceedings, particularly as a method of limitation in the implementation of international treaties. The same tendencies are observed in the practice of the Constitutional Court of the Republic of Armenia.

According to our Constitution, the Constitutional Court of the RA assumes a very important function: to ensure the supremacy of the Constitution. We attached great importance to the implementation of this function, especially when it comes to determining the issue whether accession to the international or integration organizations is in conformity with the Constitution.

As regards the integration processes in the modern world, it should be noted that Armenia is participating in both European and Eurasian integration processes, which undoubtedly have their impact on the development of the constitutional law of Armenia.

In this process, as was already mentioned, the Constitutional Court has a great role in maintaining the constitutional identity.

The issue is that for participating in any international organization it is necessary to sign an agreement or treaty. According to our Constitution the international treaties shall come into force only after being ratified or approved. Armenian Constitution and legislation stipulate that international treaty can be ratified only after being subject of preventive (preliminary) constitutional control by the Constitutional Court. Thus, the role of the Constitutional Court in preserving the Constitution and national constitutional values is very important.

While speaking about European integration it should be noted that on January 25, 2001 Armenia became a full member of the Council of Europe and, in accordance with Article 13 of the Parliamentary Assembly Opinion No. 221(2000)[3], has undertaken the number of commitments upon its accession to the Council of Europe. The first of them was to sign the European Convention on Human Rights (ECHR).

At that time there was a situation when not all Conventional rights and freedoms were prescribed in the text of Constitution of 1995 edition. Taking into account this fact the Constitution Court declared that: "The fact is, that part of the rights and fundamental freedoms set out in the Convention and its Protocols are in conformity with the human rights and freedoms stipulated in the Constitution, and others are stipulated in the Constitution with other editions and formulations, and the rest of the rights stipulated in the Convention and its Protocols are not directly envisaged by the RA Constitution"[4].

Our Constitutional Court resolved this constitutional problem on the basis of the fact that the constitution is a living organism, and the perceptions of fundamental rights can and should develop over time.

[3] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16815&lang=en.

[4] Full text see: http://concourt.am/armenian/decisions/common/2002/sdv-350.htmd.

So the Constitutional Court declared: "But taking into account that the rights and freedoms set forth in the Constitution are not exhaustive and shall not be construed to exclude other universally accepted human and civil rights and freedoms. And, based on the fact that the Constitutional norms on human rights and freedoms are not prohibitive, but authoritative, the Constitutional Court can declare that the Convention and the Protocols are in conformity with the norms and principles fixed in the RA Constitution".

With this decision, the Court, on the one hand, made it possible to ratify the European Convention; on the other hand, it launched new constitutional developments which resulted in the Constitutional Reforms in 2005.

Another integration process in which the decision of the Constitutional Court played an important role, especially in terms of protecting the fundamental constitutional principles is the issue of Accession to the Eurasian Economic Union.

On November 14, 2014 the Constitutional Court examined the Case on conformity of the obligations stipulated in the Treaty on "The accession to the Treaty of May 29, 2014 on "The Eurasian Economic Union" signed by the Republic of Armenia" signed on October 10, 2014 in Minsk with the Constitution of the Republic of Armenia[5].

In this case the Constitutional Court faced some provisions of the Treaty which stipulated that a number of acts adopted by the Eurasian Union Institutions shall have direct application to some legal relations in the field of economy within the territory of Union.

Meanwhile according to our Constitutional (2005 edition) requirements numerous issues shall be prescribed exclusively by the laws of the Republic of Armenia, among which are:

1) terms and procedures for the exercise and protection of the rights by natural persons and legal entities;
2) restrictions on the rights and freedoms of natural persons and legal entities, their obligations, as well as forms, extent and procedure for liability thereof, means of compulsion and the procedure for such, types, amounts and procedures for the payment of taxes, duties and other binding fees paid by natural persons and legal entities;
3) cases, terms and procedures for control and oversight over the activities of legal entities and natural persons engaged in entrepreneurship (including checks, examinations and inspections); etc.

In its decision Constitutional Court declared that when the decision of the Institution of International organization does not conform to the current internal legislation or there is a lack of such kind of legal regulations, the decision of that kind of institutions are not applicable unless appropriate legislation is adopted.

This is a unique decision within the Eurasian Union because other Member States admit that the decisions of Eurasian Union Institutions can have direct application on legal relations arising within their territory.

This decision was grounded by the Court as follows: …there are precise constitutional requirements, stemming from both axiology and a number of specific provisions of the RA Constitution. These are: 1) guaranteeing state and national sovereignty; 2) equality and mutual benefit of international relations; 3) provision of such possible restrictions on human rights, which are equivalent to the norms and principles of international law; 4) possibility for the actions of Armenia regarding

[5] Full text see: http://concourt.am/armenian/decisions/common/2014/pdf/sdv-1175.pdf.

the decisions of supranational bodies only within the framework of the Constitution of the Republic of Armenia. The Constitutional Court of the Republic of Armenia considers that any decision that does not comply with these requirements, adopted by any supranational body, to which the Republic of Armenia is a party, is not applicable in the Republic of Armenia."

In another case the Constitutional Court also opposed to the customary principles of economic unions in order to protect the Armenian Constitutional order and principles thereof.

In its decision on conformity of the obligations stipulated by the Treaty on the Customs Code of the Eurasian Economic Union signed on April 11, 2017 with the Constitution of the Republic of Armenia[6], the Court declared that: "Having examined the nature of the international treaty in dispute as a legal act, the Constitutional Court of the Republic of Armenia states that this act, in fact, is considered to be ranked to the sources of supranational law. In the classical sense, the difference between international law and supranational law is mainly that the norms of the latter regulate not only the relations between states (horizontal), but also the relations operating within the state (vertical). The international practice of constitutional justice shows that the implementation of the preliminary constitutional control over the legislative acts, regulating vertical legal relations, which are the source of supranational law, cannot objectively guarantee the observance of the constitutional requirements for ensuring the mechanisms and procedures necessary for the direct action of the fundamental rights and freedoms of a person, proportionality and certainty of their limitations, as well as the effective implementation of these rights and freedoms".

On the basis of the above-mentioned, the Constitutional Court of the Republic of Armenia considers that the provisions of law that are the source of supranational law, corresponding to the content of the category „law" and regulating, the vertical legal relations may be a subject to constitutional review in the Constitutional Court in the procedure of „further constitutional control", taking into account also the interpretation provided in the law enforcement practice to any position prescribed in them.

As we can see this approach is different from the practice of other supranational organizations such as EU.

4 CONCLUSION

The study of aforementioned cases enables to conclude that the Constitutional Court of the Republic of Armenia very frequently uses the concept of constitutional identity as a method of limiting the impact of supranational law provisions on the internal constitutional order. In our opinion, this practice derives from the lessons taught by our history.

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[6] Full text see: http://concourt.am/armenian/decisions/common/2017/pdf/sdv-1381.pdf.

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