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Contemporary Problems and Challenges of the Judiciary in Europe

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Contemporary Problems and Challenges of the Judiciary in Europe

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VARIA

Profesor Jarosław Warylewski

Z głębokim żalem informujemy, że w dniu 1 listopada 2020 r. odszedł od nas przedwcześnie prof. dr hab. Jarosław Warylewski. Śmierć Profesora odebrała społeczności wydziałowej znakomitego naukowca, nauczyciela, szefa katedry i kolegium redakcyjnego wydziałowego czasopisma, a także przyjaciela. Dla świata nauki był On wybitną postacią polskiego prawa karnego.

Profesor dr hab. Jarosław Warylewski od 1988 r. był związany z nauką prawa karnego na Uniwersytecie Gdańskim. Jako uczeń i doktorant prof. dra Mariana Cieślaka prowadził zajęcia z prawa karnego materialnego. Stopniowo poprzez doktorat (1997 r.) i habilitację (2002 r.) umacniał swoją pozycję naukową zarówno na Wydziale, jak i w środowisku polskiego prawa karnego.

W swojej pracy naukowej ze szczególną uwagą odnosił się do pojęcia wolności – najpierw swobody decydowania w ramach kontratypu zgody pokrzywdzonego

(doktorat) poprzez przestępstwa seksualne (habilitacja) i prowadzone już po uzyskaniu habilitacji badania naukowe. W zakresie przestępczości seksualnej stał się niekwestionowanym, największym i wielokrotnie cytowanym autorytetem. Otrzymany w dniu 30 czerwca 2008 r. tytuł profesora nauk prawnych był efektem badań nad pojęciem i funkcją kary.

Spośród publikacji Profesora jako najważniejszy jawi się wielokrotnie aktualizowany podręcznik pt.: „Prawo karne. Część ogólna" (ostatnie wydanie w październiku 2020 r.). Podręcznik ten stał się podstawą prowadzonego na studiach dziennych, wieczorowych i zaocznych kierunków prawo, kryminalistyka i administracja wykładu kursowego „Prawo karne". Wspomniany podręcznik jest systemowym dziełem opisującym ogólne zasady odpowiedzialności karnej w Polsce. Praca ta zaliczana jest do najważniejszych publikacji podręcznikowych z zakresu prawa karnego. Poza tym z pewnością wspomnieć należy o dwóch niezwykle ważnych monografiach: „Przestępstwa seksualne" (2001 r.) oraz „Kara. Podstawy filozoficzne i historyczne" (2007 r.). Profesor dr hab. Jarosław Warylewski był także redaktorem tomu X („Przestępstwa przeciwko dobrom indywidualnym") „Systemu Prawa Karnego". Był On również autorem dwóch rozdziałów w poszczególnych tomach tegoż opracowania, a także około 150 innych publikacji systemowych, komentarzowych, artykułów i glos.

Wśród systemowych opracowań karnoprawnych podkreślić też należy udział Profesora Jarosława Warylewskiego w przygotowaniu tomu XIII „Wielkiej Encyklopedii Prawa" (2018). W pamięci zapisał się też artykuł Profesora pt.: „Kontratypy wiosenne" opublikowany w „Palestrze" 1999, nr 7–8. Usystematyzowano w nim problematykę pozaustawowych kontratypów związanych z wiosennym obchodzeniem świąt i obrzędów ludowych. Stanowił on bardzo ciekawe połączenie rozważań materialnoprawnych z antropologicznymi. Oddawał on też bardzo podejście Profesora do nauki prawa, która nie mogła abstrahować od świata zewnętrznego – kultury, sztuki, socjologii.

W swojej pracy naukowej Profesor przykładał szczególne znaczenie do rozwoju kadry naukowo-badawczej. Był On promotorem 12 rozpraw doktorskich oraz recenzentem 21 doktoratów i rozpraw habilitacyjnych. Ponieważ Profesor Jarosław Warylewski był też cenionym dydaktykiem, prowadzone przez Niego seminaria cieszyły się ogromnym zainteresowaniem studentów.

Profesor Jarosław Warylewski wierzył w znaczenie wymiany poglądów, myśli naukowej. Uczestniczył w dziesiątkach krajowych i zagranicznych konferencji naukowych. Także dzięki Niemu udało się zorganizować IX Zjazd Katedr Prawa Karnego, który miał miejsce w Gdańsku w dniach 16–18 września 2016 r., oraz konferencję „Czas i jego znaczenie w prawie karnym", która odbyła się w Gdańsku w dniach 19–21 kwietnia 2007 r.

Od 2001 r. Profesor Jarosław Warylewski pełnił funkcję Kierownika Katedry Prawa Karnego Materialnego i Kryminologii. W latach 2002–2004 był Prodziekanem, a w latach 2004–2012 Dziekanem Wydziału Prawa i Administracji Uniwersytetu Gdańskiego. W latach 2012–2016 był również dyrektorem Muzeum Kryminalistyki. W latach 2008–2009 pełnił zaszczytną funkcję członka Rady Legislacyjnej przy Prezesie Rady Ministrów. Ponadto Profesor Jarosław Warylewski był jednym z założycieli czasopisma

„Gdańskie Studia Prawnicze. Przegląd Orzecznictwa". Był również jego redaktorem naczelnym, a od 2019 r. pełnił tę funkcję – w wydawanym już w nowej formule – kwartalniku „Gdańskie Studia Prawnicze".

Profesor Jarosław Warylewski był człowiekiem nauki, ale cieszył się również pracą adwokata, w której znajdował praktyczne zastosowania swojej wiedzy teoretycznej. Praca ta była też polem, na którym dominowały szacunek dla przeciwnika i powagi sądów. Ale też walka o pryncypia – poszanowanie godności człowieka i przekonanie o tym, że tylko poprzez dobre prawo i odpowiednie jego stosowanie można osiągnąć prawdziwą sprawiedliwość. Temu przekonaniu Profesor dawał wyraz zarówno w swoich wystąpieniach, jak też w licznych publikacjach.

Ale to tylko suche fakty – naświetlające imponujący dorobek zawodowy znanego Naukowca i Wykładowcy, znakomitego Dziekana oraz Przyjaciela. A przecież nie możemy zapomnieć o Nim jako o prawdziwym człowieku – dobrym i cieszącym się życiem. Nie możemy zapomnieć Profesora, który kochał swoją pracę, wierzył w siłę nauki i moc dobrego prawa. Nie możemy nie wspomnieć Profesora, który cieszył się sukcesami innych, i który miał wielki dar motywowania swoich współpracowników.

Panie Profesorze! Bardzo nam będzie Pana brakowało! Pozostanie Pana pusty pokój, gdzie zawsze można było podejść, porozmawiać o planach naukowych i dydaktycznych, wadach współczesnej legislacji czy nowym numerze „Gdańskich Studiów Prawniczych". Pana wsparcie, życzliwość i uśmiech były nieocenione. A teraz, dzień po dniu uświadamiamy sobie, jak bardzo nam ich brakuje…

Cześć Pana Pamięci!

Dziekan Wydziału Prawa i Administracji UG
Katedra Prawa Karnego Materialnego i Kryminologii
Kolegium Redakcyjne „Gdańskich Studiów Prawniczych"

ARTICLES

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On the Third Power: Taking Independence of the Judiciary Seriously

The greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.

John Marshall

On the Independence of the Judiciary

The judiciary is the third branch of the government (the third state power) with the responsibility of applying the laws to specific cases and settling all disputes. The independence of the judiciary according to Parmatma Sharan "is a corner stone of ever democratic government and upon it is built the structure of civil liberty. This structure is destroyed, the moment, the judiciary becomes susceptible to political pressure."[1]

The organization of the judiciary must be based on the following features: the appointment of only highly qualified and experienced judges; the method of appointing judges must be fair, systematic, effective and transparent; the method of removing judges should be difficult; no single entity should have the power to remove judges; nevertheless, this does not mean that judges should be untouchable.

A worse state of things (Michel Montaigne would surely would agree including with regard to the judiciary) cannot be imagined than "where wickedness comes to be legitimate, and assumes, with the magistrates' permission, the cloak of virtue (…) The most extreme sort of injustice, according to Plato, is where that which is unjust should be reputed for just. The common people then suffered very much (…)."[2]

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[1] P. Sharan, *Comparative Government and Politics*, New Delhi 1976, p. 400.

[2] *Essays of Michel de Montaigne*, ed. W.C. Hazlitt, trans. Charles Cotton, London 1877, book III, chapter XII, p. 916.

Images and Parallels: In the Name of the Crown or of the People?

Francis Bacon's Bright Side: Most Gifted Mind of the English Renaissance

Francis Bacon (1561–1626) in his essay *Of Judicature* in 1612 wrote in a very elegant and convincing style:

> Judges ought to remember, that their office is *jus dicere*, and not *jus dare*, to interpret law, and not to make law, or give law. (…) Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, *integrity* is their portion and proper virtue.
> A judge ought to prepare his way to a just sentence, as God used to prepare his way, by raising valleys and taking down hills: so when there appeared on either side an high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen, to make inequality equal; that he may plant his judgment as upon an even ground.
> One foul sentence doth more hurt than, than many foul examples. For these do but corrupt the stream, the other corrupted the fountain. So with Solomon, *Fons turbatus, et vena corrupta, est justus cadens in causa sua coram adversario*. A righteous man falling down before the wicked is as a troubled fountain or a corrupt spring.[3]

Francis Bacon's Dark Side: Highest Judicial Officer in England, but…

Later on, in 1618, Francis Bacon became Lord Chancellor, the highest judicial officer in England. But by 1621 all honors came to a halt.[4] As Lord Chancellor, he was impeached by the House of Commons for accepting bribes.[5] Bacon, a lord himself, had hopes that the House of Lords, where impeachments were tried, would end the matter quietly by accepting his resignation. But the Lords refused, demanding a trial on the charges or a complete confession. Desiring above all to avoid full exposure, Bacon offered a compromise – a guilty plea but no details.

> It rested therefore that, without fig-leaves, I do ingenuously confess (…) And, therefore, my humble suit to your Lordships is that my penitent submission may be my sentence, and the loss of the seal my punishment; and that your Lordships will spare any further sentence.

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[3] "Of Judicature LVI", *Essays of Francis Bacon. The Essays or Counsels, Civil or Moral, of Francis Ld. Verulam*, www.authorama.com/essays-of-francis-bacon-56.html (accessed: 2020.08.01).

[4] J. Borkin, *The Corrupt Judge. An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts*, New York 1962, pp. 4–5.

[5] *Ibidem*, p. 4., "The articles of impeachment and the confession reveal a corruption so gross that one wonders how it went undetected for three years. The Lord Chancellor 'shook down' the French 'vintners,' using the power of his office to threaten their imprisonment; they were compelled to pay 'or else.' In some cases he took bribes from both litigants. (…) Bribes reached him in minute driblets as well as in sizable packages."

In his own defense, Bacon, although he admitted the bribes, asserted that they never influenced the final decision, that sometimes he decided against the briber, and that his decisions, once delivered, were never recalled. But he conceded that, even if he were the "justest chancellor, this was the justest censure in Parliament."

Bacon was fined forty thousand pounds, a monumental sum, and "imprisoned in the Tower during the King's pleasure." He was also barred forever from holding any office in the "State or Commonwealth," from sitting in Parliament or from coming "within the verge of the court."

A few days after his imprisonment, King James liberated him from prison. In addition it should be emphasized here that Bacon defended the royalist point of view when he wrote,

> when kings and states do often consult with judges; and again, when judges do often consult with the king and state: the one, when there is matter of law intervenient in business of state; the other when there is some consideration of state intervenient in matter of law.

Edward Coke: From the Chief Justice of Common Pleas to the Tower

In comparison – the subordination of the judicature to the royal will was strongly resisted by Chief Justice Sir Edward Coke (1552–1634), Bacon's great rival, who refused to comply with James I's wishes in a number of cases in which the royal prerogative was involved. In 1606 he was appointed Chief Justice of Common Pleas, and in this post he began to come into a conflict with James I. The first instance occurred in 1607–08 when King James attempted to assert his personal right to tax imports and exports. Coke declared this to be unlawful, arguing that the power of taxation rested only in Parliament. In a series of similar decisions, Coke resisted Archbishop Bancroft's claim, which James I favored, to the authority to remove certain church cases from the jurisdiction of the common-law courts (1606-1609). In 1610 Coke decided against the King's authority to make law by proclamation, and in 1611 he resisted Archbishop Abbot's attempt to remove ecclesiastical cases to the Court of High Commission.[6]

After the Crown dismissed him from the position of Chief Justice, Coke continued to resist. He criticized the Crown's marriage into the Catholic Spanish royal family, denounced interference with the liberties of Parliament, and served on the committee to impeach Francis Bacon. For these actions he was sent to the Tower in 1622. On his release he entered Parliament, and from there opposed King Charles I's demand for subsidies.

Recent Files From the Slovak Republic

In an event earlier this year, the National Criminal Agency in the Slovak Republic staged an intervention called "Storm" and initiated the prosecution of corrupt judges

[6] Sir Edward Coke (1552–1634). Online Library of Liberty, https://oll.libertyfund.org/pages/coke-sir-edward-1552-1634 (accessed: 2020.08.01).

and prosecutors. The Constitutional Court had in a non-public plenary session on 12 March 2020, decided on the request of the Prosecutor General for consent to take into custody 13 judges of the district and regional courts and the Supreme Court and adopted the proposal for further action. In the case of five of them, it gave consent for taking them into custody.

In May 2020, the first judge of the Constitutional Court stepped down from his post "because of health reasons and his age close to that of retirement" after being confronted with suspicious contacts with a major criminal on trial.

As of early June 2020, the former Prosecutor General was being investigated in hearings before the Disciplinary Commission at the Office of the recent Prosecutor General because of accusations of corruption and abuse of power while in office.

Are these signs not enough to indicate that the "fountain is troubled and the spring is corrupt?"

Historical Background (twentieth century) and Heritage

Some years ago, Ronald Dworkin repeatedly expressed his view about the role of judges:

> In the decades after World War II more and more of democracies gave judges new (…) and unprecedented powers to review the acts of administrative agencies and officials under broad doctrines of reasonableness, natural justice and proportionality, and then even more surprising powers to review the enactments of legislatures to determine whether the legislatures had violated the rights of individual citizens laid down in international treaties and domestic constitutions.[7]

People who are trying to defend and to pursue their rights usually place high expectations on the judiciary (judges and courts) and it its impartiality and independence.[8]

The opening formula of the judgment shows the position of the judiciary and expresses its legitimation within the existing understanding the constitution.[9] The formula "In the name of the Slovak Republic," which opens every judgement made by the Slovak courts, should not be misunderstood or overestimated, but it at least leads to some, less formal, questions of interest. Does it make any differences for a judgment to be pronounced in the name of the republic, i.e., in the name of the state and not of the people? What does it mean from the point of view of the content of a judgment?

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[7] R. Dworkin, "The Judge's New Role: Should Personal Convictions Count?," *Journal of International Criminal Justice* 2003, vol. 4, p. 5.

[8] A. Bröstl, "At the Crossroads on the Way to an Independent Slovak Judiciary" [in:] *Systems of Justice in Transition. Central European Experiences since 1989*, eds J. Přibáň, P. Roberts, J. Young, Hampshire 2003, chapter 9, p. 141 (162).

[9] See especially: P.C. Müller-Graff, "Zur Geschichte der Formel 'Im Namen des Volkes'" [in:] *Journal of the Law of the Civil Procedure* 1975, vol. 88, p. 442.; J. Limbach, *"Im Namen des Volkes." Macht und Verantwortung der Richter*, Stuttgart 1999, p.105.

Is there a relevant change towards a stabilized judiciary in post-communist countries such as the Slovak Republic?[10]

The main difference between the totalitarian state (whether referred to as "communist" or "socialist") and the pluralist and democratic state governed by the Rule of Law lies in the answer to, and solution of, the question of the concentration and separation of state power. The violent regimes of the twentieth century have confirmed James Madison's basic truth in *The Federalist*, which was inspired by Montesquieu's ideas: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."[11]

However, the judiciary was considered to be the "weakest" power in communist Czechoslovakia, in the sense that it was not empowered or intended to be a real, independent power to prevent the fundamental rights and freedoms of citizens. Its main task, especially after 1948, was to be primarily an instrument to protect the state and to be an agent of repression, as an effective threat against the enemies of the "people's democratic, socialist" state and its legal order. The social status and the prestige of the judges were so damaged that it was possible for almost anyone to become a judge. The standard requirements were very low – a minimum of only a one-year course to become a professional judge. A political examination was the first and most important subject designed to install *cadres*, i.e., politically reliable people, as judges. Nobody who failed the first part was allowed to proceed to the examination on professional subjects (constitutional law, criminal law, civil law, etc.).[12]

The courts were used as a cog in the totalitarian machine, and the judges were considered, and instructed to be no more than "servants whose obligation is to fulfil the will of the current power-holders and to accept the decisions of state administrative officials without reservation."

The system of the judiciary is based on the ideals of the all-powerful and all-deciding impact of Marxism-Leninism in all branches of social life including the judicial application of the law.[13]

The period 1948–68 can be summarized in the words of a former judge in a book about his personal judicial experience in Czechoslovakia after 1948:

> It is unrealistic to expect an orgasm to last for twenty years. Determination turns into improvisation, zeal into hypocrisy, and the Marxist Writ becomes as impractical and misplaced a source of inspiration as a Gideon Bible in a brothel.[14]

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[10] A. Bröstl, "At the Crossroads…," p. 141.

[11] J. Hamilton, J. Madison, J. Jay, *The Federalist. American State Papers*, Chicago 1958, p. 153; also see: Ch. Montesquieu, *Oeuvres completes*, Paris 1875, p. 152.

[12] A. Bröstl, "At the Crossroads…," p. 143.

[13] Z. Kühn, "Ideologie aplikace práva v době reálného socialismu" [in:] M. Bobek, P. Molek, V. Šimíček, *Komunistické právo v Československu. Kapitoly z dějin bezpráví*, Brno 2009, p. 89.

[14] O. Ulč, *The Judge of A Communist State*, Ohio 1972, p. 306.

The most tragic paradox was that it was considered, from the viewpoint of the communist regime, the greatest arrogance for a citizen to ask a court to protect his or her rights or freedoms, even though they were formally protected in the constitution. Thus, at the turning point of the Velvet Revolution in 1989 frustration had built up. Subsequently, one of the first revolutionary demands was to put an end to the period of legal nihilism that had made a mockery of human values, justice, and the supposed weakness of the citizen as an individual, with contempt for law and the legal order, because what counts is that degree to which judges have (or have not) served as protectors of human rights and freedoms.

Article 142 section 3 of the Constitution of the Slovak Republic 1992 states that "decisions are declared in the name of the Slovak Republic" although there was a brief discussion on the subject during drafting of the amendment of the Constitution in 2001.[15] Does the power of the state not originate from the people or the citizens? Should this not be mentioned in the preamble to every court decision? As a matter of fact, the state (the Slovak Republic) is often a party in court proceedings. From this point of view, it is very odd to declare decisions in the name of one participant, not even taking into consideration its success or failure in the proceedings.

Corruption is, in fact, doing partial justice, a consent to "justice" in favor of one of the parties that is following its reasons and arguments.[16]

In 2003, after the first decade of the independent Slovak Republic and the efforts to establish an independent judiciary passed, I wrote:

> No doubt, the first one hundred years of freedom or the journey on the road to freedom and to the introduction of a state, which may be called a "state of judicial independence," will be the most difficult.[17]

You Will Know Them by Their Fruits

The aim of the judiciary is to restore social peace through their judgments, which is not an easy task, especially given the expectations of the parties in individual cases.[18] What is the ideal of a fair and just judge? How is it possible to find such a person? Here we are back again touching on the opening point of our discussion regarding the decisional (personal) independence of judges.

> The judges' sense of justice must (…) be universalized. He, no less than the juryman, is a reasonable man, his sense of justice is that of the *bonus paterfamilias*. He must avoid idiosyncrasies, his views of right and wrong must conform to a practical standard, he must not

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15 P. Rohárik, "Ústavná garancia nezávislosti súdnej moci", 5 Justin 1999, no. 2, pp. 51–53.

16 *In the Name of the People* (*Renmin de mingyi*) is also the title of the 2017 Chinese TV drama (anti-corruption drama) series based on the web novel of the same name by Zhou Meisen. Its plot revolves around a prosecutor's efforts to unearth corruption in a present-day fictional Chinese city.

17 A. Bröstl, "At the Crossroads…," p. 157.

18 J. Limbach, *"Im Namen des Volkes*…," p. 89.

> be governed by mere psychological or ethical theories however attractive they may be. It is justice as it appears to the reasonable man, the good citizen that he must administer.[19]

In the wording of art. 141 of the Constitution of the Slovak Republic the judiciary in the Slovak Republic shall be administered by independent and impartial courts. As a part of the judiciary the Constitutional Court is defined in art. 124 of the Constitution as an independent judicial authority vested with the mandate to protect constitutionality.

The Constitutional Court shall be composed of thirteen judges. The judges of the Constitutional Court are appointed by the President of the Slovak Republic for a twelve-year term as proposed by the National Council. The National Council shall propose the double number of candidates for judges that shall be appointed by the President (art. 134, section 1 and 2 of the Constitution).

After almost 30 years of experience, there is a lack of answers to fundamental questions that remain undecided:

a. How to safeguard that the best candidates for the position of an independent judge of the Constitutional Court are proposed by the National Council, and after that appointed by the President?
b. What role do security examinations of the candidates for judges of the ordinary courts play within their nomination procedure? What may become the subject of a security examination? Maybe another question comes first into the mind: Should security examinations of judges take place in a state under the Rule of Law in general?
c. Focusing on the Constitutional Court as the highest judicial authority: can a constitutional amendment be challenged before the Constitutional Court at all, and may it be declared unconstitutional?

Point a. It is clear that there will be a battle between political parties on nominations in the National Council, and especially when it concerns nine of the 13 judges on the bench (for the third time in the history of the Constitutional Court). If there is a simple majority in the National Council needed to elect candidates (the double number of vacancies) for judges of the Constitutional Court, and if the result is further elaborated by a President who is not in the position of a *pouvoir neutre*, it can happen that the Constitutional Court will look "unicolored." The safety catch to prevent such an outcome – and it was signalized many years ago also by former judges of the Constitutional Court – is, for instance, to amend the constitutional rule in art. 84 section 4 of the Constitution to the following wording:

> For the purpose of adopting or amending the Constitution, a constitutional law (…) for electing the list of candidates for the position of a judge of the Constitutional Court (in case of vacant seats), which shall be submitted to the President (…) the consent of three fifths majority of all Members of the Parliament shall be required.

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[19] A. Barak, *Judicial Discretion*, New Haven 1989, p. 125.

In my opinion, this would collaterally enable leaving out the second sentence of art. 134 section 2 (on proposing the double number of candidates by the National Council) as being superfluous.

With regard to b. and c., after heavy criticism from many corners on the state of the judiciary, the Government in 2014 announced proposed changes even in the constitutional framework of it. One main amendment dealt with tightening conditions for access to the judicial function and the use of security examinations by the National Security Office in hearings before the Judicial Council. These proposals had to clarify questions as to whether the candidates for judges of ordinary courts are, e.g., financially independent and what their property relationships are, but also help to reveal any links to organized crime or drug trafficking.

The Finding of the Constitutional Court No. PL. ÚS 21/2014 adopted on 30 January 2019, shortly before the term of the nine judges of the Constitutional Court expired, which was on the proposal of the President of the Judicial Council, declared in non-compliance with art. 147 section 1, last sentence, and of art. 154d section 1 to 3 of the Constitutional Act No. 161/2014 Coll. (by which the Constitution was amended) with art. 1 section 1, art. 141 section 1, and art. 144 section 1 of the Constitution itself (both articles deal profoundly with the principles of the Rule of Law-State) on the security examinations of judges of ordinary courts (in an *ex-post-facto* and also in a normal perspective) and also the candidates for appointments to become judges.

The finding in this case pending since 2014 was seen as a breakthrough in the Rule of Law doctrine as it had been interpreted to date, because it declared for the first time constitutional amendments or acts as being unconstitutional.[20] The idea of unconstitutional Constitutional Amendments is not unusual. "When Constitutions empower the Constitutional Authority to amend the Constitution it means that they only admit (acknowledge) them the right to change the Constitution, not to abrogate or to remove it.[21]"

The conclusion and the voice of the opinion of the majority was based on the reasoning and on the argument that the intended amendment of the Constitution does not respect the principle of the separation of powers (as a constitutional principle) and that is why it violates with a decisive constitutional intensity the material core of the Constitution.

The principles of a democratic state and the Rule of Law state that they create the material core of the Constitution and as key (constitutional) constitutive values are

[20] Compare with considerations on the topic in Y. Roznai, *Unconstitutional Constitutional Amendments. The Limit of Amendment Powers*, Oxford 2017, pp. 15, 105 and 179; R. Alexy, "Constitutional Rights and Constitutional Review," published at www.pravvni-edu.rs/conferencje/2014.10.24%Fundamental%20Rights/Alexy.pdf (accessed: 2020.08.01).

[21] See K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland. 20. Auflage*, Heidelberg 1999, Rdn. 692; R. Thoma, "Die juristische Bedeutung der grundrechtlichen Sätze der deutschen Reichsverfassung in allgemeinen" [in:] *Die Grundrechte und Grundpflichten der Reichsverfassung*, ed. C. Nipperdey, Bd. I, 1929, p. 1 (p. 39).

untouchable and create the basic criterion of the constitutional review of any decision of an authority of public power.[22]

In our opinion announced as early as in 2008[23] (this case appeared in 2014) unconstitutional or non-constitutional laws (in fact and by name Constitutional Acts of the National Council), which can become the object of examination by the Constitutional Court, do exist. The Constitutional Court in a narrow, literal sense decides only on the compliance of ordinary laws (statutes, Acts of the National Council) with the Constitution (when reading art. 125 section 1 Letter a/ of the Constitution). There is not an *expressis verbis* mentioned special power belonging to this authority concerning Constitutional Acts and their compliance or non-compliance with the Constitution. It can be considered as a gap that can be bridged by (an activist?) interpretation (Constitutional Acts are special Acts of the parliamentary body passed by a qualified majority and they also can be included into the scope of examinations on compliance in art. 125 of the Constitution). In accomplishing this consideration, it should also be added that the Constitutional Court is the only body (constitutional authority) that may interpret the Constitution and Constitutional Acts (provided for by art. 128).[24]

However, the form of a Constitutional Act should not become (and not be used as) a gold-leaf for covering up unconstitutional content, because this clearly results in the violation of constitutional principles, i.e., the principles of the Rule of Law.[25]

Thus, the decisive question here is whether the National Council in the capacity of the "Constitution-maker" touches the untouchable material core of the Constitution (in other words a "set of Rule of Law principles"), or – to borrow the expression from Yaniv Roznai, the doctrine of whom the Constitutional Court is following in the finding above – "the Genetic Code of the Constitution." The concrete principles touched on and concerned here were the principle of the separation of powers and the connected principle of checks and balances and the independence of the judiciary.

If we conclude that the majority opinion is based on the declaration of the violation of the principles of the Rule of Law (mentioned in the articles of the Constitution), and in this respect especially pointing out the violation of the material core of the Constitution, because, plainly speaking, two public authorities belonging to the executive power (the Judicial Council and an "authority fulfilling tasks concerning the protection

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[22] The principles of a democratic state based on the Rule of Law are for the first time mentioned in the Finding of the Constitutional Court of the Slovak Republic PL. ÚS 16/95 of 24 May 1995 [in:] *Collection of Findings and Resolutions of the Constitutional Court of the Slovak Republic 1995*, Košice 1996, p. 38 ff.

[23] A. Bröstl, "O ústavnosti ústavných zákonov" [in:] *Metamorfózy práva ve střední Evropě. Zborník z mezinárodní konference ve Znojmě*, eds H. Jermanová, Z. Masopust, Praha–Plzeň 2008, pp. 11–24. The leading sentences of the majority opinion are based on the theory presented recently by Y. Roznai [in:] *idem*, *Unconstitutional Constitutional Amendments*…, the views of whom are presented and cited relevantly in the respective Finding of the Constitutional Court.

[24] Compare: On the Law Amending art. 125 of the Constitution. Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014, https://www.lrkt/lt/en/court-acts/search/170/ta850/summary (accessed: 2020.08.01).

[25] A. Bröstl, "O ústavnosti ústavných zákonov…," pp. 11–24.

of national security," i.e., a constitutionally vaguely determined authority which shall screen judges), should decide on the ability of judges to hold judicial positions.[26] On a more abstract level, the Constitutional Court concluded that the Constitution contains an implicit material core; its basis is composed from the principles of the democratic state and the state Ruled by Law, among them the principle of separation of powers and the principle of the independence of the judiciary. To underline the main idea: in this context Constitutional Acts should not contradict the material core of the Constitution.

We should remember that in a Finding from 1995 the Constitutional Court stated:

> (…) also the legislative authority is without any doubts bound by the Constitution and its principles, the changing of which the Constitution does not permit, because of their constitutive importance for the democratic nature of the Slovak Republic as it is declared in art. 1 of the Constitution.[27]

Is a New Wind of Change Blowing in the Slovak Judiciary?

The main goals declared in the Program Declaration of the new Government (in office since March 2020)[28] are to renew the credibility of the judiciary by stopping corruption and cleaning up the courts and prosecutors' offices.[29]

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[26] There was *dokimasia* in ancient Athens, and it was the name of the process of ascertaining the capacity of the citizens for the exercise of public rights and duties. The examination was carried out in public by the archons in the presence of the boule, and anyone present had the right to raise objections. As far as we followed the recent development concerning the topic of security examinations of the Judges, we realized that the *Freistaat* Bavaria (statement of the Bavarian Regional Government from September 2016) decided in the future to examine all new judges from the point of view of their fidelity to the Constitution (Bavaria has a special Free-State of Bavaria Constitution). It introduced the so-called *Regelanfrage*, which is an examination by the Office of the Protection of the Constitution (*Verfassungsschutzamt*). The aim is to prevent cases like the one concerning the appointment of B. Maik to a judicial function. In 2014 it was shown that this judge for a temporary period in *Lichtenfels (Amtsgericht Lichtenfels)* was a long-term active right extremist and a member of an anti-Semitic band *Hassgesang* (Hate Singing). The Bavarian Minister of Interior proposed examinations for all officials in public service, but it was decided that this will be reserved only for judges.

[27] Finding No. PL. ÚS 16/95 of 24 May 1995 concerning, among other things, the status of the National Council (originally p. 5 of the Finding).

[28] The new coalition in power is composed of four political parties: Ordinary People and Independent Personalities (*OĽANO*, 25.02%), We Create a Family (*SME RODINA*, 8.24%), Freedom and Solidarity (*Sloboda a Solidarita*, *SaS*), For the People (*Za ľudí*, 5.77 %).

[29] One general remark: in the line with domestic reports and statistical data and according to the report of Transparency International Slovakia of 2019, the number of the judges in Slovakia had reached a historical maximum of 1350 (it has even increased in 2020 to 1370 judges). In 2016–17, 186 judges left their positions, mainly because of the age limit, but also for other reasons. This means the same number of judges should come in, chosen in a comparatively more transparent proceedings (public hearings and evaluations).

Judicial Council

Because of the bad experiences with the model of the Judicial Council introduced by Constitutional Amendment 90/2001 Code of Laws, the reforms should first of all concern the composition of this body. The problem is the recall and exchange of its members when there is a change in the Government or in the person of the President (the unified opinion of the plenary of the Constitutional Court is in favor of not-recalling the members of the Judicial Council when there is a change in the Government or the President). Keeping in mind the balance of the composition of the Judicial Council (the original idea), there are efforts to adopt a rule with a clear message that the legislative power and executive power should always nominate candidates or members who are not judges. Currently, a new attempt to elect a new President of the Supreme Court following a reshuffling of Judicial Council personnel as a relevant electoral body has just been successfully accomplished.[30]

It is expected that the Judicial Council will be assigned a new duty to introduce preventive measures against installing unreliable persons as judges (including examinations concerning the property relations of all judges). This will also take into consideration the surplus of property of their relatives, including examinations on the general reliability of judges, the property examinations of whom raise reasonable doubts in the minds of the members of the Judicial Council regarding the legality of how their property was acquired. The Judicial Council must be equipped with the appropriate tools to conduct these examinations.

Constitutional Court

Finally, reform concerning the composition of the Constitutional Court is planned. It should include checks against the passivity of the National Council in the case when no candidates for judges of the Constitutional Court are elected, and at the same time checks preventing the concentration of power in the hands of one political representation. The candidates should be elected through a public procedure focusing on their moral and professional standing. Proposed measures should also include a retirement age not only for the judges of the ordinary courts (65 years without any exception) but for the first time, for judges of the Constitutional Court (70 years of age).

Concerning another competence of the Constitutional Court, it is agreed that it is not necessary to ask the Constitutional Court to give consent to taking a judge into custody.

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[30] The Judicial Council of the Slovak Republic consists of 18 members. According to art. 141a of the Constitution the members are: a. nine judges elected and recalled by the judges of the Slovak Republic; b. three members elected and recalled by the National Council of the Slovak Republic; c. three members appointed and recalled by the President of the Slovak Republic; d. three members appointed and recalled by the Government of the Slovak Republic.

Supreme Administrative Court

Another main task, and a *de facto* step anticipated for quite a long time concerning the judiciary, is to establish the Supreme Administrative Court of the Slovak Republic as a new judicial authority (among others with the competence to become a disciplinary court for judges, prosecutors, and other members of the legal profession instead of the Constitutional Court), which may help to unburden the Constitutional Court.

Responsibility of Judges

From the traditional point of view expressed in valid laws, judges cannot be prosecuted for their decisions, i.e., opinions presented in judgements are revised, and their decision-making becomes the subject of critical review. Amendments to the Criminal Code also directed at certain behaviors of judges and prosecutors are considered to be necessary, following the example of the Austrian model. Thus, introducing the crime of *Anfütterung* (sweetening) is also believed to affect the corrupt behaviour of judges in which the connection between taking a bribe and behaving in contradiction with one's duties is not evident or provable or capable of being proved.[31] The possibility of introducing into the Criminal Code the crime of the perversion of justice, or *Rechtsbeugung*, known from the German legal order and experience will also be discussed and considered.[32]

Specialization of Judges, Unreasonable Delays

The specialization of judges, which was ignored by former Heads of the Judiciary, will be supported as will the participation of the public in the selection boards and procedures. The Government is ready to enforce time frames for decision-making in individual matters or cases (designating time periods within which cases must be finished) and to continuously monitor courts, agencies, and judges.[33]

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[31] See the amendment of the corruption criminal law (*Korruptionsstrafrechtsänderungsgesetz*) in Austria which entered into force on 1 January 2013, and concerns par. 305–308 of the Criminal Law. In the sense mentioned above, it also contains the inspiring par. 307b on the "devotion of an advantage to take influence" (*Anfütterungsverbot*).

[32] The Federal Court of Justice (*Bundesgerichtshof*) in judgement 2 StR 479/13 of 22 January 2014, declared its statement to the perversion of justice by judges and other civil servants (public officials). According to par. 339 of the German Criminal Code (*Strafgesetzbuch*) it concerns an arbitrary act of judges who intentionally and gravely veer away from the law and statutes, thus giving an advantage or disadvantage to one of the parties.

[33] Regarding one interesting decision from Germany: unreasonable delay can be, in some cases, qualified as a perversion of justice. The Regional Court (*Landgericht*) of Rostock found in its decision that a judge of the *Amtsgericht* (Local Court) Güstrow who retired in 2018 because of illness was accused of perversion of law because he did not work on 816 cases (proceedings on misdemeanors) between 2013 and 2015. The judge had repeatedly reported the case overload in many letters to the superior Regional Court and to the Ministry. The Regional Court decided that it was the task of the employer to remedy the problem.

Prosecutor General

Efforts to change the election procedure of the Prosecutor General are taking two directions; to make it possible for candidates who are not prosecutors by profession to participate in the procedure and to amend the Constitution by introducing a qualified majority (three-fifths of all members of the National Council). The possibility to recall the Prosecutor General is also under consideration and will address cases when he or she ceases to exercise his or her office properly, honestly, independently and impartially.

Conclusions

Finally, although it could be mentioned also in the beginning of this section, about the reasoning behind the actual calls to reforms the judiciary. They are looking like "reforming the reforms" (which are ongoing since 2000 when the Acts on Judges and Courts have been introduced, followed by recodifications in Criminal Law and Criminal Procedure in 2005). The Specialized Criminal Court is in life since 2009 (established in 2003 as the Special Criminal Court), and it is cooperating with the Office of the Special Prosecution in matters belonging to its competence: corruption, organized crime and crimes of constitutional authorities. But both institutions did not acquit itself very well, and their decisions at least from the last decade are even running in the opposite direction.[34]

The need of a Supreme Administrative Court has been discussed more times (last time in 2006).[35] Now it is a little bit late, because the concept of the judicial system should be thoroughly exercised at the very beginning – in 1992 (that time the powers of the expected Supreme Administrative Court could be outbalanced with those of the Constitutional Court, and other specialized courts, if needed, could be set up, too). I would like to add that in my opinion the personal element had failed – even people appointed to the highest positions. Open efforts to dominate also the third power by the leading political parties have been successfully undertaken. Anyway, this makes the reform to improve the quality of justice, to strengthen the conditions of the choice of judges and prosecutors urgent, as an ultimate step to take the judiciary – in a state under the Rule of Law – seriously.

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[34] In addition to the part on "Recent files in Slovakia" mentioned before: This development currently (during the last decade October 2020) ended in taking into the custody the person of Specialized Prosecutor (accused of taking bribes, organizing criminal groups, abuse of powers), but also the former Prosecutor General, and Judges of the Supreme Court.

[35] E. Valko, *Reforma súdnictva v Slovenskej republike*, Bratislava 2006, pp. 1–46; Ernest Valko was the first president of the Constitutional Court of the Czech and Slovak Federative Republic, who was assassinated in 2010.

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Summary

Alexander Bröstl

On the Third Power: Taking Independence of the Judiciary Seriously

The article deals with the problem of the independence of the judiciary from a historical point of view (subordination of the judicature to the royal will in the 17th century in England, examples of the two rival-judges, Francis Bacon and Edward Coke). Then it focuses on the historical background and guarantees of an independent judiciary in former Czechoslovakia, and in contemporary Slovakia. It concerns the judicial reform ready to be introduced in the Slovak legal order by 2021 with the aim to renew the credibility of the judiciary (courts and prosecution offices). Proposed legal measures are presented (security examinations, new property declarations, crime of perversion of justice committed by judges). New constitutional amendments have to do with the election of the candidates for judges of the Constitutional Court in the National Council, and the establishment of a Supreme Administrative Court.

Keywords: independence of judiciary, corrupt judges, judicial reform, new legal measures

Streszczenie

Alexander Bröstl

O trzeciej władzy: traktując niezależność sądownictwa poważnie

Artykuł poświęcony został problematyce niezależności sądownictwa. Autor przedstawia to zagadnienie z perspektywy historycznej (podporządkowanie sądownictwa woli królewskiej w XVII wieku w Anglii, przywołanie poglądów dwóch rywalizujących sędziów Francisa Bacona i Edwarda Coke'a), jak również dokonuje analizy gwarancji niezależnego sądownictwa w byłej Czechosłowacji i we współczesnej Słowacji. Artykuł dotyczy także reformy sądownictwa, która ma zostać wprowadzona do słowackiego porządku prawnego w 2021 r. w celu przywrócenia wiarygodności wymiaru sprawiedliwości (sądów i prokuratury). Autor przedstawia proponowane w ramach reformy środki prawne (badania bezpieczeństwa, nowe oświadczenia majątkowe, przestępstwo przeciwko wymiarowi sprawiedliwości popełniane przez sędziów). Nowe zmiany w konstytucji dotyczą sposobu wyboru kandydatów na sędziów Sądu Konstytucyjnego w Radzie Krajowej oraz powołania Naczelnego Sądu Administracyjnego.

Słowa kluczowe: niezależność sądownictwa, skorumpowani sędziowie, reforma wymiaru sprawiedliwości, nowe środki prawne

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Constitutional Jurisdiction and the Corona Crisis: Some Aspects from the German Experience

1. Introduction

The Covid-19 pandemic is a serious challenge for public health and also for the law. The wide-ranging restrictions of individual freedoms, challenges which have been necessary to successfully fight against the virus, have reached unprecedented levels; almost all life situations and entire populations are affected, and for indefinite periods of time. It is, therefore, not surprising that judicial protection has become one of the most important questions.

The following reflections will, therefore, deal substantially with this issue and place emphasis on constitutional justice. Administrative jurisdiction, of course, is also important in this context. For a review of the restrictions that were largely imposed by executive actions, by regulations of the governments of the Federation's Member States, the *Länder*, and also by concrete but generally applicable actions, see the so-called general administrative acts (*Allgemeinverfügungen*).

Formal legislation adopted by Parliament serves as the legal basis for these administrative actions, both for regulations and for concrete acts, and it has also directly established numerous prohibitions and restrictions. The review of the constitutionality of these laws by constitutional justice is also of relevance in our context.

2. Judicial review of protection measures

It can be stated that judicial review essentially comprises, in our context, *executive action* (the adoption of *normative acts*, in particular regulations, as well as the issue of *concrete acts*) as well as formal legislation both of the Federation and the *Länder*. However, in judicial practice, the main focus of review has been, until now, on the executive actions, in particular on the regulations.

a) Executive actions – the *Länder* competence as the basic principle

According to the German federal system, executive actions are regularly in the hands of the *Länder* that are, according to the principle of art. 83 BL, competent to execute federal law as well as law adopted by the *Land* itself.

The main body of anti-corona regulations are those issued by the *Länder* governments (see, e.g., the Regulation of Bavaria on protection measures against infections concerning the corona pandemic of 27 March 2020[1]); additionally, there are also federal regulations issued by the Federal Ministry of Health on the basis of s. 5 of the Federal Act of Protection against Infections (API), (*Bundesinfektionsschutzgesetz*, *IfSG*), after the Federal Parliament declared the existence of an "epidemic situation of national scope" (see, e.g., Regulation on the maintenance and safeguarding of intensive-care hospital capacities of 8 April 2020, based on s. 5.2 no. 7 API[2]).

While these examples refer to regulations, examples should also be pointed out that concern concrete case-related administrative decisions (administrative acts) of the *Länder* authorities and, what is very exceptional and even constitutionally doubtful, of the Federation, specifically of the Federal Ministry of Health (see as an example from the *Land* of Bavaria: the general administrative act (*Allgemeinverfügung*) of the Bavarian Ministry of Health and Care of 19 June 2020 on the "Emergency plan corona pandemic: *Allgemeinverfügung* to cope with considerable numbers of patients in hospitals"[3] based on s. 28.1 1st sentence IfSG (API) as well as on art. 22.1 no. 1 Bavarian Act on hospitals. An example from the Federation is: orders of the Federal Minister of Health of 8 April 2020 on the obligation of persons entering Germany from abroad to disclose their identity, itinerary and contact details, etc.,[4] based on s. 5.2 nos. 1, 2 IfSG (API).

b) Legislation – the importance of concurrent competences

In the field of legislation, the main example is the previously mentioned Federal Act of Protection against Infections (IfSG) (API), with various modifications that have adapted its text to the challenges of the corona virus crisis.[5]

This law has been adopted according to art. 74.1 no. 19 BL as a matter of concurrent competence. This means that the legislative competence in this matter belongs originally to the *Länder* but can be federalized by the adoption of a federal law, according to art. 72.1 BL. The federalization of the protection against infections has been effectuated by the adoption of the IfSG (API). However, it is characteristic for the concurrent competence that the original *Länder* competence remains upheld until the moment

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1 https://lexcorona.de/lib/exe/fetch.php?media=rechtsakteland:bayern:baymbl-2020-158.pdf (accessed: 2020.08.01).

2 https://www.buzer.de/gesetz/13878/index.htm (accessed: 2020.08.01).

3 https://www.verkuendung-bayern.de/baymbl/2020-347/ (accessed: 2020.08.01).

4 https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Transport/Anordnung_BMG_08_04_2020.pdf?__blob=publicationFile (accessed: 2020.08.01).

5 https://www.gesetze-im-internet.de/ifsg/ (accessed: 2020.08.01).

of the federalization, that is until the moment of the entry into force of the federal law, and, what is important in our context, it is also upheld in those fields or issues that are not covered by the federal law. This indeed has given an impulse for a legislative initiative of Bavaria to adopt a Bavarian law filling in the gaps that were deemed to be left unregulated by federal law. This Bavarian Act on Protection against Infections[6] of 25 March 2020 authorizes the Bavarian government to declare the situation of a "health emergency" if the infections in Bavaria are very numerous or of a very serious type. This declaration is the basis for the specific measures provided by this law. It is possible under this law that the competent authorities secure the supply in particular of medical, care-related and sanitary material, can seize such material if necessary and order plants to produce such material. Furthermore, it is allowed to oblige organizations such as firefighters to provide support services.

Another example for legislation of the *Länder* in this context is the Bavarian Act of the Protection against Catastrophes that has complementary significance to the infection protection legislation. The legislative competence for taking measures to overcome catastrophes has remained in the exclusive competence of the *Länder*. Thus, Bavaria adopted such a law in 1996,[7] defining such a catastrophe generally in art. 1.2 of the law. It is foreseen by this law that emergency plans must be prepared and assistance must be provided. Specific measures are not foreseen so that it would not be a sufficient legal basis for the protection against infections that would require a multitude of specific measures and interventions into personal freedom.

c) Administrative and constitutional jurisdiction – Some introductory remarks

(1) Short overview

Questions of judicial protection arise with respect to executive actions as well as to legislation. The review of executive actions is primarily in the hands of administrative courts, while the review of formal legislation is up to constitutional courts.

It is evident that administrative action has to be compatible with formal legislation as well as with the Constitution. The primacy of the Constitution, the central element of rule of law, requires that all public power actions have to conform with constitutional law. Therefore, administrative courts have to examine both legality *and* the constitutionality of the impugned actions.

Legislation can be federal or *Länder* legislation. This latter type of legislation must be compatible with the *Land* Constitution and also with federal law, especially with the Federal Constitution. Of course, compatibility with federal legislation or even federal regulations must also be given. However, this question does regularly not arise due to the alternative competence distribution between the Federation and the *Länder*.

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[6] https://www.gesetze-bayern.de/Content/Document/BayIfSG?AspxAutoDetectCookieSupport=1 (accessed: 2020.08.01).

[7] https://www.gesetze-bayern.de/Content/Document/BayKatSchutzG (accessed: 2020.08.01).

The review of federal legislation is reserved to the Federal Constitutional Court (FCC) while that of *Länder* legislation is effectuated either by the Constitutional Court of the Land (examining compatibility with the Land Constitution) or of the Federation (examining compatibility with the BL). However, it is also possible to launch both remedies.[8]

(2) Review of regulations according to s. 47 Code of Administrative Justice (CAJ)

As to administrative justice, *regulations* of the *Länder* governments or other *Länder* authorities can be reviewed by the superior administrative courts of the *Länder* according to s. 47 Code of Administrative Justice (CAJ) if this remedy has been introduced into the legal order of the *Land*. This is the case in 13 of 16 *Länder*; in the remaining three *Länder* the regulation can be reviewed incidentally in an ongoing proceeding if the validity of the regulation is relevant for the final decision of the court. A further possibility is a declaratory judgment according to s. 43 CAJ.

It should be said that the instrument of s. 47 CAJ is not applicable in the case of federal regulations, such as those issued by the Federal Ministry of Health in accordance with s.5 API; to have them reviewed is only possible by an incidental control or a declaratory judgment, as mentioned above.

(3) Review of administrative acts

Administrative acts related to a particular case or certain types of cases (orders – *Anordnungen*, general orders – *Allgemeinverfügungen*) can be impugned by the action of annulment (s. 42.1 CAJ), under the condition that the plaintiff claims the violation of his/her own subjective right (which can be a legal or constitutional subjective right).

It must be mentioned in this context that in the event of a negative decision of the first instance court, an appeal to the Superior Administrative Court (SAC) of the *Land* can be made and if this is unsuccessful, a revision (which must be admitted) to the Federal Administrative Court. After having exhausted these legal remedies, the claimant can lodge an individual constitutional complaint to the FCC.

An individual complaint to the FCC is also possible after having launched the s. 47 CAJ remedy without success. Of course, the regulation in question must affect the complainant directly and individually in his/her fundamental right.

(4) Constitutional review of legislation

Constitutional justice is involved in various respects. As already pointed out, the review of formal legislation can only be carried out by a Constitutional Court. Federal legislation is subject to the examination exclusively by the FCC, legislation of the *Länder* can be reviewed both by the Constitutional Court of the *Land* (which cannot, of course, examine federal legislation) and the FCC. The criteria of the review are mani-

[8] See s. 90.3 Act on the FCC as well as K. Schlaich, St. Koritoth, *Das Bundesverfassungsgericht*, 11th ed., C.H. Beck 2018, Rn. (par.) 349, p. 270–271.

festly different: the BL for the review of the FCC, the constitution of the *Land* for the constitutional court of this *Land*.

Before the FCC, the review of formal legislation can be initiated by certain State institutions (the Federal Government, the Government of one of the 16 *Länder* or on the demand of a quarter of Federal Parliament members, art. 93.1 no. 2 BL, abstract control of norms) or by request of a court claiming the unconstitutionality of formal legislation that the court has to apply (art. 100.1 BL, concrete control of norms). Furthermore, an individual constitutional complaint can be launched against formal legislation if it affects directly, individually and presently the complainant's fundamental rights or other subjective constitutional rights enumerated in art. 93.1 no. 4a BL. If there is a dispute between the Federation and a *Land* regarding the alleged violation of a constitutional obligation, that is a federal dispute in the sense of art. 93.1 no. 3 BL, and a piece of legislation can also be involved.

It is evident that administrative as well as constitutional jurisdiction offer a large spectrum of remedies that can be used for the review of coronavirus protection measures. This corresponds to art. 19.4 BL that requires, as a fundamental right, the existence of an adequate and efficient judicial protection system.

d) Judicial review with regard to anti-coronavirus measures

In the following analysis emphasis will be placed on some of the typical constellations of court proceedings that have played a role in practice.

It can generally be said that judicial actions against anti-coronavirus restrictions have been rather frequent but to a great extent unsuccessful. Since the most important and consequential measures where those established by regulations, the abovementioned instrument of the administrative judicial review of regulations (and bylaws) according to s. 47 CAJ was the most widely used. This is the reason why those judgments that considered the restrictions to be disproportionate came, to a large extent, from the administrative courts, specifically from the SAC of a *Land*. Since the regulations were quickly changed and adapted to the dynamically developing infection processes, there was a real need for interim decisions of the court, as it is foreseen in this type of proceedings by s. 47.6 CAJ. In cases in which the application addressed to the SAC was unsuccessful, the FCC was then requested to issue a preliminary injunction according to s. 32 Act on the FCC.

3. Constitutional and administrative jurisdiction in the pandemic context – procedural aspects

In the following, selected jurisdictional aspects are considered, in particular with regard to the FCC and, as there is a frequent connection in the practice of the SAC. A quick look at the system of jurisdiction, in particular the interaction of administrative and constitutional jurisdiction, follows.

In this context, it is only possible to deal with a very few decisions, in particular with those of the FCC that were (in part) successful for the complainant. It should be noted that almost all of the constitutional complaints to the FCC against anti-coronavirus measures have been unsuccessful.

Main subject of judicial review: *Länder* regulations

Regulations are the main instrument for establishing restrictions of individual freedom. They are normative actions adopted by the executive on the basis of an authorization by formal legislation. Despite their normative character they fall within the category of executive actions. They can be reviewed by the regional SAC under s. 47 CAJ.

(1) Review according to s. 47 CAJ

This is the procedure of direct judicial review of executive normative actions (*Normenkontrolle*) that can be established in accordance with s. 47 CAJ by the *Länder*. Thirteen of the 16 member states of the German Federation (among them Bavaria, Baden-Wuerttemberg, Saxony) have introduced this judicial remedy, while the remaining three states use the indirect review of normative executive actions (that is the incident review of such action in an ongoing legal proceedings) or the action for a declaratory judgment according to s. 43 CAJ instead of a remedy according to s. 47 CAJ.[9]

(2) Authorizations for the issue of regulations (art. 80.1 FL)

The remedy according to s. 47 CAJ is of central importance for the judicial control of anti-corona measures. This results from the fact that, according to the federal system in Germany, the execution of federal law, that is in our context the Federal Act of Protection against Infections (API) (*Bundesinfektionsschutzgesetz*, *IfSG*), is in the hands of the member states' executives (art. 83 BL). The federal law provides, what is necessary according to art. 80.1 Basic Law (BL), the authorization for the *Länder* governments to adopt regulations (as a means of the execution of the federal law) by s. 32 API. These regulations must be predetermined in their contents, objectives and extents by the federal law itself, as art. 80.1 BL explicitly requires. In Germany, there is no room for autonomous regulations by the executive; only authorizations by formal legislation (of the Federation or of the member state, according to the distribution of legislative competence) given to the executive for issuing regulations are constitutionally allowed. These authorizations must be clear and detailed enough to satisfy the requirements of the rule of law. This corresponds to this idea that art. 80.1 BL explicitly requires the legislator to determine in advance the possible "program" (that is, as stated above, the content, objective and extent) of the regulations. This must be expressed by the legislator explicitly or in a way that it can be recognized by interpretation.[10] The more fun-

[9] T. Würtenberger, D. Heckmann, *Verwaltungsprozessrecht*, 4th ed., C.H. Beck 2018, par. 507, p. 206; see also: footnote 1060.

[10] FCC vol. 58, 257, 277.

damental rights are interfered with, the more the authorization must be determined.[11] Furthermore, the regulations as normative executive action are not allowed constitutionally to regulate "essential issues"; this is reserved to the formal legislator, the Parliament, according to the so-called *Wesentlichkeitstheorie*.[12] It must also be mentioned in this context that the formal law as a legal basis for the adoption of regulations has to express the addressees of this authorization; art. 80.1 BL clearly says that the Federal Government, a Federal Minister or the *Länder* Governments can be authorized for this.[13] S. 32 API gives the authorization to adopt regulations to the *Länder* Governments and enables them to transfer the authorization, through regulation, to other executive units (s. 32, 2nd sentence).

(3) Admissibility requirements of the s. 47 CAJ remedy

The remedy established on the basis of s. 47 CAJ is destined to examine *Länder* law *inferior to formal legislation* of the *Länder*. This means that *regulations* (*Verordnungen*) issued by an authority of the *Land* (Government or administration below the Government) as well as *by-laws* (*Satzungen*)[14] issued by a legal person of the *Land* can be reviewed by this remedy. These types of executive action have normative character and are ranked below formal *Länder* legislation that is adopted by *Länder* Parliaments.

The further requirements for the remedy according to s. 47 CAJ is the standing to make the application that is possible for a natural or legal person, within a year from the issue of the impugned provision, aggrieved (or being aggrieved foreseeably in the future) in his/her subjective rights[15].

The subjective rights mentioned are particularly the fundamental rights that are restricted to a great extent by the anti-coronavirus protection measures of the public power. These are clearly the fundamental rights as guaranteed by the Federal Constitution, the BL, possibly also the parallel fundamental rights as embodied in the *Länder* Constitutions.

The finality of the remedy is to examine the validity of regulations or of the by-laws and, if necessary, to declare them void with effect *erga omnes*. If the impugned provision is contrary to law that is superior to it, it has to be regarded as void, without legal effect. This results from the hierarchy of norms. These norms are ordinary legislation of the *Länder* and ordinary and constitutional law of the Federation.

(4) Fundamental Rights parallelism in the German federal system

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11 FCC vol. 62, 203, 210; see also: A. Haratsch, in: H. Sodan, *Grundgesetz*, art. 80 Rn. (par.) 14.

12 German Federal Constitutional Court (FCC) vol. 49, 89, 126; vol. 61, 260, 275; vol. 78, 249, 272; vol. 136, 69, 114; vol. 139, 19, 47; vol. 150, 1, 99.

13 A sub-authorization (sub-delegation) to further executive units is also possible if the formal law of authorization allows it (art. 80.1 4th sentence BL).

14 See T. Maunz, G. Dürig, V. Mehde, *90th Suppl*., Febr. 2020, *GG*, Art. 28 Rn. (par.) 63.

15 Furthermore, it is possible that a public authority which has to apply to provision in question, makes an application for review (s. 47.2 1st sentence). This is hardly relevant in our context.

As to the review of the anti-corona virus regulations by the SAC, a violation of fundamental rights could occur both under the perspective of the *Land* Constitution and of the Federal Constitution. Normatively, the guarantees of both Constitutions coexist according to art. 142 BL, as far as they give equal protection or offer a higher degree of protection and also if they give less protection.[16] Only in the case of contradiction does federal law prevail according to art. 31 BL.[17]

Independently from the parallel existence of fundamental rights in the German federal system, there is a specific problem resulting from the overlap of administrative and constitutional jurisdiction in this context. The question arises of whether fundamental rights of the *Land* Constitution are exclusively examined by the *Land* Constitutional Court or can also be examined by the regional SAC in proceedings according to s. 47 CAJ. The answer is that the administrative jurisdiction is subsidiary, in this respect, to the constitutional jurisdiction. As, for example, in Bavaria, art. 98 4th sentence of the Bavarian Constitution establishes the so-called *actio popularis* (*Popularklage*), which enables anybody to address the Bavarian Constitutional Court claiming the incompatibility of a Bavarian law (legislation and regulations as well as bylaws) with the fundamental rights embodied by the Bavarian Constitution. The complainant must not necessarily be affected in one of his/her fundamental rights but is regarded as a guardian of the fundamental rights protection with respect to Bavarian law. This *actio popularis* is seen as an exclusive jurisdiction on Bavarian legal norms for their conformity with the fundamental rights provisions of the Bavarian Constitution. The remedy according s. 47 CAJ does therefore not include the review of regulations under the criteria of Bavarian fundamental rights. It must be noted that the *actio popularis* is unique in Bavaria and that this sort of subsidiarity is not applied in most of the *Länder*.[18]

(5) Provisional orders according to s. 47.6 CAJ

It is important to note that s. 47. 6 CAJ establishes the possibility that the SAC issues a provisional order in order to prevent serious disadvantages or for other important reasons that urgently require such an order.

(6) S. 47 CAJ remedy and the exhaustion of all relevant recourses according to s. 90.2 Act on the FCC

A further question arises of whether the application according to s. 47 CAJ is necessary to exhaust the legal remedies before lodging an individual constitutional complaint to the FCC. An individual complaint to the FCC is an extraordinary, subsidiary recourse for the defense of the fundamental rights guaranteed by the BL. As s. 90.2 Act on the FCC stipulates, the claim for fundamental rights violation must be brought to every competent court, from the first instance on. Fundamental rights are so impor-

16 See H. Sodan [in:] *eadem*, *Grundgesetz*, Art. 142 Rn. (par.) 45.
17 See T. Maunz, G. Dürig, St. Korioth, *GG*, Art. 142 Rn. (par.) 13–15.
18 See T. Würtenberger, D. Heckmann, *Verwaltungsprozessrecht*…, (note 1), Rn. (par.) 530; see also: footnote 1130.

tant that their violation must be remedied as soon as possible, that means by all the competent courts within the whole range of existing legal recourses, before the FCC speaks the final word in this matter. To have a regulation examined by the SAC is a presupposition for access to the FCC.

This applies to regular proceedings on the merits as well as for preliminary injunction proceedings according to s. 32 Act on the FCC. In the practice of anti-corona regulations, this point has played an essential role. Requesting a preliminary injunction from the FCC has been dependent on the fact that the applicant first tries to get a temporary (preliminary) injunction (or even a decision on the merits) from the SAC.

The fact that anti-corona measures have often only been valid for a limited time and have been rapidly replaced by new regulations has not been a hindrance for a review either for the SAC or the FCC. The reason is that regulations or other acts of public power have been so important for its interference with fundamental freedoms or have had effects that continue into the present. This has been regarded as a justification to examine the constitutionality of these measures even after their expiry dates.

(7) Individual constitutional complaint

The constitutional complaint (*Verfassungsbeschwerde*) according to art. 93.1 no. 4a BL is the instrument for defending fundamental rights before the FCC, after having exhausted the legal remedies, against all types of public power, legislation, executive action and judicial decisions. The precondition is that the complainant alleges to be violated individually, directly and presently in his/her fundamental right (or another right as mentioned by art. 93.1 no. 4a BL). As far as formal or substantive legislation is concerned, the direct impact on fundamental rights could be doubtful because it is only given if this impact is not effectuated by an action executing the legislation but by the legislation itself. Legislation in our context can be formal anti-corona legislation both federal (such as the API) or of the *Land* (such as the Bavarian API) or anti-corona regulations as mentioned before.

The most crucial point is the subsidiarity of the constitutional complaint as an extraordinary remedy that has already been mentioned in the context of s. 47 CAJ application. Subsidiarity means that all relevant remedies or even extrajudicial remedial possibilities must be exhausted before the FCC comes into action.[19]

Furthermore, the complaints have to be admitted to be dealt with by the FCC itself, regularly by committees of three judges that give access only if the matter is important for the development of constitutional law or non-admittance would cause irreparable damage to the complainant. More than 92% of all complaints are refused *a limine* in this way.[20]

(8) Preliminary injunction according to s. 32 Act on the FCC

[19] See K. Schlaich, St. Korioth, *Das Bundesverfassungsgericht*…, note 8, Rn. (par.) 244 *et seq*.
[20] See H. Lechner, R. Zuck, *BVerfGG*, 7th ed., C.H.Beck 2015, p. 797 *et seq*.

In practice, the adequate remedy during the corona crisis is to require a provisional decision by the FCC by means of a preliminary injunction. An example for such a request is the decision of the 2nd Chamber (composed of three judges, see § 93 d. 2 Act on the FCC) of 7 July 2020[21] that refused to issue a preliminary injunction against the Regulation on combating the corona pandemic adopted by the member State *Saarland*.[22]

The request for a preliminary injunction leads to a summary proceeding that weighs up the consequences in case the request is granted with those in case it is refused. The FCC is obliged to issue such an injunction if this is urgently required to avert serious disadvantages, to prevent imminent violence or for another important reason for the common good. The request is based on the assertion that the regulation interferes in a disproportionate way with the fundamental rights embodied by art. 1.1 and 2.1 and 2 BL, in particular by means of contact limitations, contact tracing and the obligation to wear mouth and nose coverings. Weighing up the consequences of the issue of the injunction on the one hand and the refusal on the other hand, the FCC clearly gives preference to the refusal with regard to the serious consequences for the expansion of infections if the injunction is issued.

In other cases the FCC examines, before weighing up the consequences in the above mentioned sense, whether the main proceedings will be *evidently* successful or unsuccessful. If the main proceeding, the individual complaint proceedings, would be clearly inadmissible or unfounded, the request for a preliminary injunction would be refused by the FCC. It must be underlined that the success of the main process is *not* examined in the preliminary injunction proceedings that are of a summary nature. However, if there is an *evident* hindrance for the admissibility of the main proceedings, the request for the preliminary injunction must be refused. This occurred various times in cases in which the complainants had not tried previously to get a preliminary injunction by the SAC according to s. 47.6 CAJ. If the requirement that all remedies must be exhausted before lodging a constitutional complaint is not fulfilled for the main proceedings (which are closely connected with injunction proceedings[23] even if they are not necessarily already pending at the time), the injunction proceedings would be refused as evidently inadmissible.[24]

(9) FCC and the principle of proportionality

Proportionality is the most frequently applied concept of constitutional law. Restrictions of fundamental rights must respect this principle that says that only really necessary interventions in an individual's freedom are constitutionally legitimized. Proportionality indicates the frontier line between freedom and restriction. It is ap-

[21] http://www.bverfg.de/e/rk20200707_1bvr118720.html (accessed: 2020.08.01).

[22] This request was combined with an individual constitutional complaint against the SAC *Saarland* decision, in a preliminary proceedings according to s. 47.6 CAJ that was directed against the Regulation mentioned in its previous version. The above analysis is limited to the argumentation within the proceedings according to s. 32 Act on the FCC.

[23] See K. Schlaich, St. Korioth, *Das Bundesverfassungsgericht*…, note 8, Rn. (par.) 464 (p. 355).

[24] See H. Lechner, R. Zuck, *BVerfGG*…, (note 20), § 31 Rn. (par.) 21, footnote 50.

plicable for the legislator that is authorized by the Constitution to restrict a fundamental right (reservation for restrictions through legislator) as well as for indicating the inherent limits of fundamental rights that are restricted not by the legislator but by the Constitution itself, that is by constitutional norms and principles other than the fundamental right (inherent limitations of a fundamental right).

As already mentioned, only a few judicial decisions have stated the partial unconstitutionality of the anti-corona measures. The decision of the FCC of 29 April 2020[25] declared inapplicable the regulation of the *Land* of Lower Saxony insofar as it excluded any exceptional permission, even if adequate protective measures would be taken, to participate in a religious reunion in churches and other places of worship. The high importance of freedom of religion (which is expressed also by the fact that art. 4 BL cannot be restricted by the legislator but only other constitutional provisions have impact on this freedom and can provide limits) was taken into account.[26]

Another request for a preliminary injunction to the FCC concerning the prohibition of an assembly was successful because it violated, in the opinion of the FCC, *manifestly* the freedom of assembly (art. 8.1 BL). This prohibition, a unilateral administrative act, was based on the relevant regulation of the *Land Hesse* that had not foreseen a strict prohibition of assemblies of more than two persons not belonging to the same house stand but had provided a discretionary power for the authority to prohibit it. In essence, the authority when prohibiting the assembly did not duly exercise its discretionary power and therefore violated the fundamental right. The administrative courts that were addressed by the concerned person confirmed this prohibition. This means that the legal remedies have been exhausted and a provisional injunction could be requested, with success.

It must be noted that the FCC rejected requests in nearly all cases so the abovementioned decisions stand out as specific cases that were successful even in the context of provisional injunction proceedings.[27]

4. Conclusion

Judicial protection within the corona virus crisis was and is of high importance and a pillar of the rule of law. It can be said that the judiciary has remained without any limitation of its function. The confidence of the population in the judiciary and in particular in the Federal Constitutional Court is highly significant. All kinds of anti-corona measures are subject to the jurisdiction of the courts. The principles of legality and constitutionality apply in their full dimensions. However, the analysis of the jurisprudence shows the clear tendency that most of the measures are considered as con-

[25] http://www.bverfg.de/e/qk20200429_1bvq004420.html (accessed: 2020.08.01).

[26] See also: FCC http://www.bverfg.de/e/qk20200410_1bvq002820.html (accessed: 2020.08.01).

[27] See the jurisprudence of a few: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=2020-04-15&Aktenzeichen=1%20BvR%20828/20 (accessed: 2020.08.01).

forming to the Constitution. The principle of proportionality as a flexible instrument of distinction between freedom and restriction has evidently been used appropriately.

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Summary

Rainer Arnold

**Constitutional Jurisdiction and the Corona Crisis:
Some Aspects from the German Experience**

The fight against the Covid-19 crisis is being conducted in Germany on the basis of the Federal Law on Protection against Infectious Diseases and has led to numerous restrictions, particularly in the area of fundamental rights. Nevertheless, the requirements of the Rule of Law have been respected. Fundamental rights have been restricted in accordance with the rules of the Basic Law and jurisdiction has been fully maintained. The constitutional justice has the final say on the constitutionality of the restrictions. In accordance with the German federal system, measures to combat the restrictions based on the above-mentioned federal law are implemented by the executive authorities of the *Länder*, the Member States of the Federation, mainly by means of regulations. These are executive normative acts which are reviewed by the Supreme Administrative Court (SAC) of the *Land* (the Member State) in accordance with par. 47 of the Code of Administrative Justice (CAJ) and, if this is unsuccessful, by the Federal Constitutional Court by means of a constitutional complaint, as a rule in a preliminary procedure. However, a number of such procedures have failed due to the subsidiarity of the constitutional complaint. The analysis of the jurisprudence shows the clear tendency that most of the measures are considered as conforming to the Constitution.

Keywords: restrictions of Fundamental Rights, requirements of Rule of Law, regulations, constitutional complaint, Federal Constitutional Court, Supreme Administrative Court of the *Land*, preliminary procedure, subsidiarity of the constitutional complaint

Streszczenie

Rainer Arnold

Sądownictwo konstytucyjne a kryzys związany z koronawirusem: niektóre aspekty w świetle doświadczeń niemieckich

Walka z kryzysem spowodowanym Covid-19 jest prowadzona w Niemczech na podstawie federalnej ustawy o ochronie przed chorobami zakaźnymi. Wprowadzone środki doprowadziły do licznych ograniczeń, zwłaszcza w zakresie praw podstawowych, niemniej jednak wymogi praworządności były przestrzegane. Ograniczenia praw podstawowych wprowadzane były zgodnie z przepisami Ustawy Zasadniczej, a jurysdykcja Federalnego Trybunału Konstytucyjnego w pełni zachowana. Ostateczne słowo w sprawie zgodności ograniczeń z Ustawą Zasadniczą miał Trybunał Konstytucyjny. Zgodnie z niemieckim systemem federalnym, ograniczenia wynikające z ustawy federalnej są realizowane przez władze wykonawcze krajów związkowych Federacji, głównie w drodze rozporządzeń. Są to wykonawcze akty normatywne kontrolowane przez Naczelny Sąd Administracyjny kraju związkowego, zgodnie z § 47 kodeksu sądownictwa administracyjnego, a w przypadku gdyby okazało się to bezskuteczne, przez Federalny Trybunał Konstytucyjny w drodze skargi konstytucyjnej, co do zasady w postępowaniu przygotowawczym. Niemniej jednak, szereg takich procedur zakończył się niepowodzeniem ze względu na pomocniczość skargi konstytucyjnej. Analiza orzecznictwa wskazuje też na wyraźną tendencję do uznawania większości środków za zgodne z Konstytucją.

Słowa kluczowe: ograniczenia praw podstawowych, wymogi praworządności, rozporządzenie, skarga konstytucyjna, Federalny Trybunał Konstytucyjny, Naczelny Sąd Administracyjny, procedura wstępna, pomocniczość skargi konstytucyjnej

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Judicial "Independence" in Belarus: Theory and Practice

I expect the German legal profession to understand
that the nation is not here for them
but they are here for the nation…
From now on, I shall intervene in these cases
and remove from office those judges who evidently
do not understand the demand of the hour
(Adolf Hitler, address to the Reichstag, 26 April 1942).[1]

We have been carefully watching the rulings judges
made when the tax agency went to court. We will
make the final analysis, and if there are unsatisfactory rulings
– ones not in favor of the state – we will take respective measures
according to the legislation…
How is it possible that many of the judges of the
capital did not appear in the media or labor
collectives last year?
I seriously warn the Minister of Justice and the heads
of courts about their personal responsibility
for the state of affairs in this area.
(From a speech given by Alexander Lukashenko, President of Belarus, 5 December 1997).[2]

And about the courts. Many people want –
and in the judicial community itself –
some independence.
Although I am ready to argue with anyone
that the most independent court is in Belarus.
Let no one laugh.
(From a speech given by Alexander Lukashenko during a meeting
with the Chairman of the Supreme Court of Belarus, 31 August 2020).[3]

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[1] H.P. Graver, "Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State", *German Law Journal* 2018, no. 4, p. 846.

[2] *The First Congress of Judges of the Republic of Belarus: Documents and Materials*, Minsk 1998, pp. 21, 41.

[3] https://www.belta.by/president/view/lukashenko-poprosil-sukalo-podkljuchitsja-k-rabote-po-obnovleniju-konstitutsii-404842-2020/(accessed: 2020.09.11).

Introduction

On 9 August 2020, presidential elections were held in Belarus. They were rife with unprecedented fraud and gross violations of electoral legislation before and during election day and included refusing to register opposition candidates, totally excluding independent observers, an incredible 42% of votes cast early,[4] jailing two opposition candidates and forcing another to flee the country. On the evening of election day immediately after polling stations closed, Belarusian state television aired exit poll results in which Alexander Lukashenko received 80.23% of the votes, while Svetlana Tikhanovskaya – the main opposition candidate – received only 9.9%. The next day, the Central Election Commission of Belarus announced the preliminary results of Belarus's presidential election; the incumbent president, Lukashenko, who has occupied his post for 26 years, received 80.23% of the votes.[5]

These incredible figures and the refusal of many local electoral committees to report to the people waiting near the polling stations the real voting results, which is contrary to electoral legislation, sparked a wave of peaceful protests. During the period of 9–11 August, almost 7,000 protesters were detained, and a significant number of them were subjected to degrading treatment, violence and torture by law enforcement agencies and special troops while being transported to detention facilities and in them. At least four people were killed, and hundreds were severely injured and required urgent medical attention.[6]

Belarusian society was shocked by the electoral fraud and a level of violence that was comparable only to the Nazi occupation of the country during the Second World War. Several high-ranking officials resigned in protest, including the Belarusian ambassador to Slovakia and the Chargé d'affaires in Switzerland.[7] Some high and low ranking policemen, law enforcement officers and military personnel also applied for early retirement[8] despite some lacking only a few months more of service to be granted a very good pensions. However, not one of the country's 1,239 judges resigned. Moreover, judges who conducted administrative proceedings against the beaten, dirty, hungry and often humiliated detainees in detention facilities failed to react to their dire condition, visible injuries or testimony of ill-treatment.[9] Administrative proceedings during

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4 http://rec.gov.by/sites/default/files/pdf/2020/d_gol.pdf (accessed: 2020.09.22).

5 https://www.belarus.by/en/press-center/news/preliminary-election-results-lukashenko-gets-8023-of-votes_i_0000117252.html (accessed: 2020.09.22).

6 See for instance: UN human rights experts: Belarus must stop torturing protesters and prevent enforced disappearances, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26199&LangID=E (accessed: 2020.09.22).

7 https://news.tut.by/economics/697024.html (accessed: 2020.09.22); https://www.dw.com/ru/shoroh-s-mtz-belorusskij-diplomat-o-tom-chto-mozhet-zastavit-lukashenko-ujti/a-54704000 (accessed: 2020.09.22).

8 See for example: https://news.tut.by/society/699280.html#ua:news_bytime~1 (accessed: 2020.09.22).

9 Belarus – Human Rights NGOs call on torture and arbitrary arrests of peaceful protesters to stop. 24 August 2020 Press Release, https://www.fidh.org/en/region/europe-central-asia/belarus/belarus-

which the participants of the peaceful protests were sentenced to arrest for up to 15 days, lasted from two to ten minutes for each of the accused. Some of them report seeing on a table court decisions that had been prepared in advance.[10] Not a single person was acquitted.

The aim of this article is to try to answer how it was possible to build such a judicial system, which legal instruments were used in its creation and how the principle of the independence of the judiciary, which is proclaimed in the constitutional legislation of the Republic of Belarus, is implemented in practice.

A brief history of the judicial system of Belarus

From 1923 until the end of 1991, the Republic of Belarus was part of the Soviet Union, in which neither the notion of "judicial power" nor the principle of separation of powers existed. Although art. 88 of the Constitution of Belarus of 1937[11] and the similar art. 154 of the Belarusian Constitution of 1978 proclaimed that judges and lay judges are independent and subject only to the law,[12] in practice the courts have not been independent. "Courts are independent and subordinate only to the law and (…) to the District Committee of Communist Party of the Soviet Union" was a famous saying in Soviet times. All state bodies including courts were subordinated to the governing bodies of the Communist Party, which was the only party in the Soviet Union and was officially named "the leading and guiding force of Soviet society and the nucleus of its political system, of all state and public organizations."[13] All serious decisions made by judges had to be approved in advance by local Communist Party apparatchiks. This process was widely known as "telephone justice." The Soviet concept of the "independence" of judges was nicely described by an author of a textbook for the students of law faculties:

> The independence of Soviet judges cannot be understood as independence from the socialist state. The court is an organ of the state and as such cannot be independent from the entity to which it belongs. The Soviet court cannot serve other purposes than those of a socialist society; it cannot implement policies other than those of the Communist Party and the Soviet Government.[14]

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[10] https://soundcloud.com/user-761067396/vypusk-10-pravosudie-za-5-minut-kak-sudili-na-okrestina (accessed: 2020.09.22).

[11] https://pravo.by/pravovaya-informatsiya/pomniki-gistoryi-prava-belarusi/kanstytutsyynae-prava-belarusi/kanstytutsyi-belarusi/konstitutsiya-1937-goda/ (accessed: 2020.09.22).

[12] https://pravo.by/pravovaya-informatsiya/pomniki-gistoryi-prava-belarusi/kanstytutsyynae-prava-belarusi/kanstytutsyi-belarusi/konstitutsiya-1978-goda/ (accessed: 2020.09.22).

[13] Art. 6, Constitution of Belarus 1978, http://actbssr.pravo.by/WorkDoc/ShowDoc?RegNum=Y07810000 (accessed: 2020.09.22).

[14] *Moscow* 1948, p. 84.

Local court judges were "elected" by citizens for three years (there was always one candidate for each vacant position), while judges of the Supreme Court of Belarus were elected by the Supreme Soviet for five years.

After the collapse of the Soviet Union, it became obvious that transforming the judicial system was necessary to bring it in line with the new reality and international standards.

The Declaration of State Sovereignty of Belarus was proclaimed on 27 July 1990, and from 25 August 1991 Parliament granted it the highest legal force in the hierarchy of legal acts.[15] For the first time in the history of Belarus this document established the norm according to which "[T]he separation of legislative, executive, and judicial power shall be the most important principle of the functioning of the Republic of Belarus as a rule of law state."[16] On 23 April 1992, the Parliament endorsed the Concept of the Judiciary and Legal Reform outlining a step-by-step program of reforming the legal system of Belarus, including establishing an independent judiciary as the principal guarantor of rights and freedoms of individuals and the effectiveness of laws.[17] A new Constitution of the Republic of Belarus was adopted in March 1994. It confirmed the principle of the separation of powers, incorporated the notion of the judicial branch of government and recognized its independence (art. 6 of the Constitution). Chapter 5 of the Constitution The Judiciary proclaims the following fundamental constitutional principles of the judiciary:

1) judicial power shall rest with the courts (art. 109, part 1 of the Constitution);
2) the judicial system shall be based upon the principles of territorial delineation and specialization (art. 109, part 2 of the Constitution);
3) the creation of special courts shall be prohibited (art. 109(3) of the Constitution);
4) the administration of justice shall be based on the Constitution, laws and other normative legal acts enacted in accordance with them (art. 112 of the Constitution); in administering justice judges shall be independent and subordinate to the law alone. Any interference in the activities of judges in the administration of justice shall be impermissible and liable to legal action (art. 110 of the Constitution);
5) judges may not be members of political parties or other public associations that pursue political goals (art. 36(2) of the Constitution);
6) justice shall be administered on the basis of the adversarial proceedings and equality of the parties involved in the trial (art. 115(1) of the Constitution);
7) proceedings in all courts shall be public, except for instances prescribed by law (art. 114 of the Constitution);
8) the parties and participants of judicial proceedings have the right to appeal rulings, sentences and other judicial decisions (art. 115(3) of the Constitution).

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[15] Official Journal of the Supreme Council of the Belorussian SSR 1991, No. 28, art. 425 (Viedomosti Vierchovnoho Sovieta Biełorusskoj SSR).

[16] Art. 7 of the Declaration of State Sovereignty.

[17] Official Journal of the Supreme Council of the Republic of Belarus 1992, No. 16, art. 270.

These principles were enshrined and further developed in the Law on the Judiciary and the Status of Judges.[18] However, a striking contrast between the letter of the law and the practice of its application, or, as Prof. Olimpiad S. Ioffe wrote the "irreconcilable divergence between legal promises and everyday life"[19] has always been a hallmark of Soviet law. Unfortunately, in this sense the situation in Belarus remains unchanged compared to Soviet times, and in some ways, paradoxically, it is even worse. Soviet traditions are deeply rooted in minds of the representatives of the legal professions in Belarus, including in the minds of the professors and lecturers at the law faculties. These traditions were supported and maintained by the first (and only) President of Belarus, Lukashenko, who was elected four months after the first Constitution of independent Belarus was adopted. In 1995, 1996 and 2004, he organized and won (with many violations of the law) three referendums that proposed changes to the Constitution. The binding force of the 1996 referendum was pronounced unconstitutional in a Conclusion of the Constitutional Court,[20] but Lukashenko ignored it. The referendums were also condemned by international organizations including the Parliamentary Assembly of the Council of Europe and the OSCE Parliamentary Assembly since they fell far short of democratic standards. As a result of the referendums the form of government in Belarus has shifted from a parliamentary democracy with a strong president to a super-presidential republic without the rule of law, no real separation of powers and the absolute power of the president. Lukashenko sincerely believes that the best form of government is that in which the head of the state stands above all other branches of government and can control and influence all of them but not vice versa. As early as in 1995 he openly spoke about his credo in the interview to the German newspaper *Handelsblatt*:

> Germany was raised from ruins thanks to firm authority of well-known figure Hitler (…) German order evolved over the centuries and attained its peak under Hitler. This is perfectly in line with our understanding of a presidential republic and of the role of its president (…) Hitler formed Germany due to the strong presidential power (…) Germany rose thanks to this strong force, thanks to the fact that the whole nation united around its leader (…) The head of state is the president, his influence, his leading role is the main thing (…) The history of Germany teaches us this.[21]

It is important to bear this in mind in order to understand the current situation of judicial independence in Belarus.

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18 Official Journal of the Supreme Council of the Republic of Belarus 1995, No. 11, art. 120.

19 O.S. Ioffe, *Soviet Law and Soviet Reality*, Kluwer Academic Publishers 1985, p. 1, p. 5.

20 http://kc.gov.by/document-11453 (accessed: 2020.09.20).

21 https://charter97.link/en/news/2009/9/11/21887/ (accessed: 2020.09.20).

Structure of the judicial system in Belarus

The judicial system of Belarus consists of two pillars. The first one is the Constitutional Court, which is composed of the Chairman, Deputy Chairman and ten judges. The Constitutional Court of the Republic of Belarus is a judicial body tasked with reviewing the constitutionality of normative legal acts and to ensure the supremacy of the Constitution.

The second pillar consists of the courts of general jurisdiction that adjudicate on civil, criminal, economic and administrative cases. The system of courts of general jurisdiction is organized into three tiers and is structured according to the administrative division of the country, i.e., it is based on the principle of territorial jurisdiction. The lowest tier is represented by district and city courts. The second tier includes six oblast courts of general jurisdiction and the Minsk city court plus six oblast courts and one Minsk economic court. At the top of the system of courts of general jurisdiction stands the Supreme Court, which consists of the Chairman, First Deputy Chairman, deputy chairmen (currently 4) and 58 judges. The total number of judges working in the country as of the end of August 2020 was 1,239.[22] Around 60% of all judges are women. Judges under the age of 30 make up 4%, from 30 to 40 years old – 32%, from 40 to 50 years old – 33%, from 50 to 60 years old – 25%, over 60 years old – 6% of the total number of judges (excluding Supreme Court, where, for obvious reasons, the average age of judges is higher).[23]

Selection of Judges

According to the Constitution of Belarus, "the grounds for electing (appointing) judges and removing them from office shall be determined by law."[24] The law in question is the Code on the Judiciary and Status of Judges which sets out the requirements for candidates for the positions of judges. Persons are eligible for judge positions, if they:

1) have reached 25 years of age;
2) possess knowledge of the Belarusian and Russian languages;
3) have graduated from university with a degree in law;
4) have at least three years of professional experience calculated in accordance with the rules determined by the Government of the Republic of Belarus or by a designated government agency;
5) are of good moral character;

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[22] https://www.sb.by/articles/osmyslennoe-dvizhenie-vpered.html (accessed: 2020.09.20).

[23] Composition of judges in courts of general jurisdiction by age and sex as of 24 April 2019, http://www.court.gov.by/ru/infografika/5829facd9e3e4458.html?version=print (accessed: 2020.09.20).

[24] Art. 36(2) of the Constitution of the Republic of Belarus. https://www.constituteproject.org/constitution/Belarus_2004.pdf?lang=en (accessed: 2020.09.20).

6) have successfully passed qualification examinations for judge positions.

Candidates for positions of judge at the oblast level or the Minsk city court must have served as judges for at least three years; judges of the Supreme Court must have served as a judges for at least five years. Persons may not be appointed as judges if they have been convicted of a crime by a court verdict which has entered into force; are incapable of performing the duties of a judge for health reasons, the fact of which has been confirmed by a medical statement; or have been limited in their legal capacity or incapacitated by court decisions which have entered into force.[25]

The process of selecting candidates for judicial positions is rather lengthy and complicated. It is regulated by the Code on the Judiciary and by unpublished documents of the Supreme Court of Belarus and consists of several steps. The first is being admitted into the so called "reserve groups". The selection of persons applying for positions of judge in courts of general jurisdiction is conducted by the Supreme Court of the Republic of Belarus and the oblast (Minsk city) courts. In practice, these judges are usually recruited from court staff, such as the secretaries of court proceedings (i.e., members of court staff responsible for ensuring that trials are ready to proceed), heads and members of court chancelleries, assistants to chairmen. Sometimes candidates are chosen from the staff of the local prosecutors' offices and (very rarely) they are recruited from among the members of the bar association.

The second step is to pass a qualification examination designed to "assess the level of professional knowledge and skills, and professional, moral and psychological qualities of persons running for positions of judge."[26] The qualification examination is conducted by an examination commission created by the Supreme Court of the Republic of Belarus.

The third step is the decision on the registration of persons as candidates for judges that is taken by the Qualification Commission of Judges created at the oblast level and the Minsk city courts. The same commission recommends registered candidates for appointments as trainee judges.

However, the final approval of all candidates for positions of judge is not made by judicial bodies but by the security services and the Department for Relations with Legislative and Judicial Authorities, Citizenship and Pardon Issues of the Administration of the President. This body submits for the President's consideration proposals on the appointment and dismissal of judges in accordance with the legislation of the Republic of Belarus, assigning qualification classes to them, prepares the relevant acts of the President, develops draft acts of the President on issues related to the activities of (…) judicial authorities.[27]

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[25] Code of the Republic of Belarus on the Judiciary and Status of Judges, art. 76, https://pravo.by/document/?guid=3871&p0=Hk0600139 (accessed: 2020.09.20).

[26] Art. 96(1) Code of the Republic of Belarus on the Judiciary and the Status of Judges, https://pravo.by/document/?guid=3871&p0=Hk0600139 (accessed: 2020.09.20).

[27] A. Kramnik, *Course of the Administrative Law of the Republic of Belarus*, 2nd ed., Minsk 2006, pp. 322–323.

The usual practice is that before possible appointment a candidate has an interview with the Deputy Head of the Presidential Administration in charge of legal matters.[28]

Thus, the first problematic issue in the process of judicial selection is a lack of transparency. Until 2014, the Ministry of Justice and its regional departments were in charge of judicial selection together with the Supreme and oblast courts, and they regulated this process in detail. These regulations were published and available to everyone. However, since 2014, only the Supreme Court and the oblast courts are formally in charge of judicial selection. This is why all the previous regulations of the Ministry of Justice were abolished, but the new ones adopted by the Supreme Court have not been published.[29] Secondly, the weak position of the judicial qualification commissions is also problematic; their decisions are only advisory for the executive, who is in full control of the selection process.

Nomination of Judges

According to art. 84 (8–10) of the Constitution and art. 81 of the Code on the Judiciary, all judges of the courts of general jurisdiction are appointed by the president from among candidates proposed by the Chairman of the Supreme Court of the Republic of Belarus. Judges of the Supreme Court of the Republic of Belarus are appointed by the president with the consent of the Council of the Republic of the National Assembly of the Republic of Belarus (the upper house of Parliament). The president has full and unlimited discretion in the appointments. Several cases have been reported of candidates who were previously recommended by the qualification commissions and were not appointed, but no explanation was given.[30] It is also worth noting that even in cases in which the "consent" of the House of Parliament is required, the act of nomination always occurs in advance. Sometimes the decision on consent is issued several months after the nomination. For example, on 1 August 2016 the president nominated Mr. Kovalchuk as a judge of the Supreme Court.[31] The consent of the Council of the Republic of the National Assembly was given only on 3 October 2016.[32] It is necessary to bear in mind that since November 1996, when new version of the Constitution came into force, the Parliament has not rejected any presidential appointees.

One more interesting detail: the six judges of the Constitutional Court are appointed solely by the president. There is no requirement for him to engage in consulta-

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[28] A. Petrash, "The court system in action", *Justice in Belarus* 2005, no. 8, p. 15.

[29] See for example: O. Fedotov, *Commentary to the reform of the judicial system of Belarus of 2014*, part 3, "Transparency of reform", https://nmnby.eu/news/analytics/5651.html (accessed: 2020.09.20).

[30] Independence of the judiciary in the Republic of Belarus, https://belhelcom.org/sites/default/files/bhc_report_judiciary.pdf (accessed: 2020.09.20).

[31] http://president.gov.by/ru/news_ru/view/aleksandr-lukashenko-podpisal-ukaz-o-naznachenii-i-osvobozhdenii-sudej-14130/ (accessed: 2020.09.20).

[32] https://www.belta.by/society/view/sovet-respubliki-dal-soglasie-na-naznachenie-andreja-kovalchuka-sudjej-verhovnogo-suda-212911-2016/ (accessed: 2020.09.20).

tions with members of the judiciary or the wider legal community in order to ascertain the most appropriate candidates. Another six judges are formally appointed by the Council of Republic. However, the exclusive right to propose candidates to these positions to the Parliament belongs to the Chair of the Constitutional Court. And who has the right to nominate all chairs of all courts and their deputies in Belarus? According to the Code on Judiciary and Status of Judges this power belongs to the president.[33] Thus, he has unlimited powers to determine the composition of the Constitutional Court and all other courts in Belarus.

Tenure of judges

One of the foundations of the independence of judges is their appointment for life. This principle was enshrined as early as in 1780 in the Constitution of Massachusetts,[34] and this is the gold standard accepted in national and international law. According to the recommendation of the Venice Commission, "judges should be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence."[35] In the early twenty-first century, the legal status of Belarusian judges in this respect deteriorated even in comparison to the previous Law on the Judicial System and the Legal Status of Judges in Belarus, according to which judges were appointed initially for five years and then indefinitely.[36] According to the current version of the Code on the Judiciary, "judges shall be appointed for a term of five years and *may* be reappointed for a new term or for life."[37] Thus, as long as a judge is not appointed for life, every five years he or she can either be reappointed for a new five-year term, or he or she can be dismissed at the expiration of his or her term in office. The appearance of this provision in the Code is likely due to Lukashenko's strongly held belief that the life appointment of judges is a bad idea. He openly expressed this opinion during his speech at the Second Congress of Judges in 2002.

> I would like to ask: is the principle of life-long appointments too relaxing for some judges? A judge who is appointed for the first time and serves five years, shows himself from his best side. This is good. But is it right to appoint him to this position indefinitely? In my opinion this is wrong. And do not feel offended. We have violated the conceptual principle of the functioning of the branches of government. Neither the deputies, nor the president, nor other leaders are appointed for life. You can argue with me: what about the practice in other

[33] Code on the Judiciary, art. 32(1), art. 33(1), art. 39(1), art. 40(1), art. 41(1), art. 42(1), art. 43(1), https://pravo.by/document/?guid=3871&p0=Hk0600139 (accessed: 2020.09.20).

[34] http://www.nhinet.org/ccs/docs/ma-1780.htm (accessed: 2020.09.20).

[35] Report on the independence of the judicial system. Part I: The independence of judges. Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010), p. 9, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e (accessed: 2020.09.20).

[36] Official Journal of the Supreme Council of the Republic of Belarus 1995, No. 1, art. 12.

[37] Code on the Judiciary, art. 81(3), https://pravo.by/document/?guid=3871&p0=Hk0600139 (accessed: 2020.09.20).

countries? But I can name examples of other practices. Firstly, this is not done in all countries. Secondly, do we have objective conditions for the application of such appointment principles? Maybe reappointment should be limited to a period of maximum ten years? Maybe it should be limited to five years[38]?

As of early 2009, of the total of 960 judges in general jurisdiction courts, 684 (or 70%) were appointed for life and 276 were appointed for the first time or reappointed.[39] In September 2015 this correlation worsened with only 55% of judges being appointed to positions indefinitely. According to Valery Kalenkovich, Deputy Chairman of the Supreme Court, "This figure can be explained by the fact that the lower-level judiciary is quite young, and not all employees have five years of work experience in their positions."[40] More recent data is not available, but it is highly probable that the number of judges appointed for life has decreased even further. This conclusion follows from the analysis of decrees on the appointment of judges adopted in 2019. On 31 May, only three judges were nominated for life and 49 were appointed for five-year terms.[41] On 3 October, 65 judges were nominated for five-year terms and only two for life.[42] Thus, taking into account the crucial role of the executive in the nomination process, the current practice is a real threat to the independence of judges and a violation of the principle of the non-removability of judges.

There is another problematic issue in the nomination procedure. According to the Code on the Judiciary, when judges of courts of general jurisdiction are on social leave, retired judges or other persons may be appointed to these positions, provided that they meet the requirements for candidates for the position of judges of courts of general jurisdiction.[43] These judges have the same rights and duties as regular judges with one exception: the return of colleagues from maternity leave is the legal basis for their release, unless they are appointed to other vacancies in the same or other courts. This is a clear violation of the principle of the non-removability of judges.

Remuneration, Benefits and Privileges

One of the most important tools that permits directly influencing judges is the right of the president to set the amount of their remuneration and to provide them with affordable or free housing. The remuneration of judges, like that of other civil

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38 *The Second Congress of Judges of the Republic of Belarus*, Minsk 2002, p. 29.

39 A. Vashkevich, "Judicial Independence in the Republic of Belarus" [in:] *Judicial Independence in Transition. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht)*, ed. A. Seibert-Fohr, vol. 233, Springer, Berlin, Heidelberg 2012.

40 https://www.spok.by/novosti/vsya-lenta/sudeiskii-korpus-belarusi-na-57-sostoit-_naaaa0002057-057 (accessed: 2020.09.20).

41 https://pravo.by/document/?guid=12551&p0=P31900209&p1=1 (accessed: 2020.09.20).

42 https://pravo.by/document/?guid=12551&p0=P31900366&p1=1 (accessed: 2020.09.20).

43 Art. 8 1(3), Code on the Judiciary, https://pravo.by/document/?guid=3871&p0=Hk0600139 (accessed: 2020.09.20).

servants, consists of position-based salary, bonuses for qualification rank and premiums and other payments in accordance with the law. The salaries of judges are set by the Head of the State as a percentage of the salary of the President of the Supreme Court in an unpublished special addendum to the Presidential Ordinance.[44]

In addition to monetary compensation for their work, judges are entitled to a variety of other benefits, including the right to improve their housing conditions before other persons who are registered in line (people who are officially registered as "in need of improving housing conditions" can get housing for half the price compared with the free market).[45] Moreover, judges are entitled to expedited subsidized loans for the construction (reconstruction) or purchase of housing. Judges requiring improvement of housing conditions are entitled to rent housing for the term of their office from the state housing fund. All these benefits are very important, as the most acute problem for young professionals is the lack of accessible housing. Since the presidential administration and organs of local executive power are responsible for the distribution of these benefits, there is always room to influence judges. In considering the fifth periodic report of Belarus, the UN Human Rights Committee expressed concern that the salaries of judges are determined by presidential decree rather than by law.[46] Additionally, it recommended to Belarus to take all measures necessary to safeguard, in law and in practice, the full independence of the judiciary, including by: (a) reviewing the role of the President in the selection, appointment, reappointment, promotion and dismissal of judges; (b) considering establishing an independent body to govern the judicial selection process; and (c) guaranteeing judges' security of tenure.[47]

Role of the presidents of the courts

The Chairman of the Belarusian court is definitely not the *primus inter pares*. He or she (and his or her deputy) is appointed by presidential decree, which also designates his or her remuneration and prospects for his or her professional career and promotion. In particular, decisions are taken monthly regarding the amounts of the so called "additional incentive payments" to judges, which make up a substantial part of the salaries. Moreover, one of the disciplinary actions that judges can be subject-

[44] Ordinance of the President of the Republic of Belarus No. 625 of 4 December 1997, Concerning the improvement of remuneration of judges and the improvement of assets, technical and staffing situations of the courts of the Republic of Belarus, Collection of Decrees and Ordinances of the President and Resolutions of the Government of the Republic of Belarus 1997, No. 34, art. 1070 with amendments.

[45] Par 1.11, Ordinance of the President of the Republic of Belarus No. 195 of 3 April 2008, Concerning some social and legal guarantees for military personnel, judges and prosecutors, National Registry of Legal Acts of the Republic of Belarus 2008, No. 83, 1/9603, No.248, 1/10104.

[46] Concluding observations on the fifth periodic report of Belarus, 22 November 2018, CCPR/C/BLR/CO/5, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/BLR/CO/5&Lang=En (accessed: 2020.09.20).

[47] *Ibidem*.

ed to is the "deprivation in whole or in part of additional incentive payments for up to 12 months".[48] The final decision on whether judges should be punished or not is also assigned to the head of the court. Discretion in these matters is a potential threat to judicial independence.

According to the Code on the Judiciary and the Status of Judges, the task of assigning incoming cases lies not with a computer program but with the president of the relevant court or with the deputy president of that court if the president is temporarily absent.[49]

Taking into account the role of the head of Belarusian courts to assign cases, to decide about remuneration for judges, their careers and tenures, it is safe to conclude that this is a tool used by the executive for ensuring that judges are obedient.

Disciplinary proceedings

Disciplinary proceedings against judges of general jurisdiction courts are handled by relevant Qualification Commissions of Judges. However, their decisions are only non-binding recommendations to the chairman of the court who has the last say in every case. The disciplinary sanctions that can be imposed on judges include issuing notices, reprimands, warnings regarding inadequate compatibility with the requirements of the position occupied, withholding in whole or in part additional incentive payments for up to 12 months, reducing qualification ranks for a period of up to six months, removal from the bench. It is worth noting that according to art. 102 of the Code on the Judiciary, on the grounds set out in this Code, the President of the Republic of Belarus may impose any disciplinary sanction on any judge without initiating disciplinary proceedings.[50] Although it has not been necessary to use this instrument in practice, this is just another example of the weapons the executive has at its disposal just in case the usual mechanisms to ensure obedience from judges fail.

It is also good to know that the chair, deputy chair and judges of the Constitutional Court appointed by the president must undergo "an annual, in-depth medical examination at the state-owned Republican Clinical Medical Centre managed by the presidential administration within the timeframe set by the President of the Republic of Belarus", whereas "those guilty of undergoing a medical check-up with delay are subject to disciplinary liability in accordance with established procedure."[51]

All judges are dismissed by the president.

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[48] Art. 92, Code on the Judiciary, https://pravo.by/document/?guid=3871&p0=Hk0600139 (accessed: 2020.09.20).

[49] Art. 32, art. 33, art. 39, art. 40, Code on the Judiciary, https://pravo.by/document/?guid=3871&p0=Hk0600139 (accessed: 2020.09.20).

[50] *Ibidem*.

[51] Decree of the President of the Republic of Belarus No. 32 of 18 January 1999, "On medical examination and certification of senior officials of state bodies whose positions are included in the personnel register of the Head of State of the Republic of Belarus" (amended and supplemented as of 18 January 2018).

Constitutional Court and its "independence"

Under the Constitution of 1997, the Constitutional Court is included in the system of the Belarusian judiciary. (Previously, the legal status of the court was enshrined in the chapter of the Constitution devoted to the organs of state control and supervision). Everything that has been written thus far in this article about the legal status of judges of general courts is applicable to the judges of the Constitutional Court. The only difference is that judges of the Constitutional Court hold office for 11 years and can be reappointed or re-elected to this position after the expiration of their previous terms. Some facts characterizing the role of the Constitutional Court and its "independence" speak for themselves.

Since 1997, not a single legal act adopted by the president has been recognized as fully or partially unconstitutional.

Since 2008, the Constitutional Court has reviewed over a thousand draft laws through the procedure of preliminary review. None of them has been found to be contrary to the Constitution.

At the same time, on 25 August 2020 the Constitutional Court adopted, on its own initiative, an act known as the "Constitutional Legal Position on the Protection of the Constitutional Order."[52] In this document the court expresses the opinion that the presidential election of the Republic of Belarus of 9 August 2020 was free, democratic, and legitimate, and that Lukashenko was legally elected President of Belarus. Moreover, it proclaimed that the Coordination Council, an organ created by Belarusian people for establishing a dialog with the authorities, is an unconstitutional body because it was allegedly established "in an way that is not provided for by the Constitution or electoral laws." This document is an extremely awkward, unconstitutional attempt to legitimize the actions of the law enforcement agencies for the criminal persecution of the members of the Coordination Council. The Constitution and Belarusian legislation do not foresee that a Constitutional Court act such as this is a "constitutionally legal position." Besides, this court lacks the legal power to even start any legal procedures on its own initiative. Finally, it has no power to make judgments on the legality of presidential elections.

Thus, the Constitutional Court is only a decorative body that masks the absence of a real separation of powers in Belarus and is fully dependent on the will of the president.

Conclusion

The independence of the judiciary is one of the most important features of a democratic state based on the rule of law and a basic element of the right to a fair trial. This

[52] http://www.kc.gov.by/document-67563 (accessed: 2020.09.20).

principle has been widely enshrined both in the national legislation of many states and in international law. Since the Republic of Belarus has gained independence, several attempts have been made to create an independent judiciary. A number of guarantees for the independence of judges were provided for in the Concept of Judicial and Legal Reform and in the 1994 Constitution. However, in 1995, the process of radically strengthening presidential power began that led to the creation of the super-presidential form of government and a consolidated authoritarian regime. Currently, the courts are not an independent branch of government and are totally dependent on the president, his administration and his secret services. The selection of judges, their appointment and dismissal from office, promotions and remuneration are entirely dependent on the will of one person. As long as Lukashenko remains in power, under no circumstances is it possible to create independent judiciary in Belarus.

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Summary

Alexander Vashkevich

Judicial "Independence" in Belarus: Theory and Practice

The aim of the article is to understand the reasons why the Belarusian judicial system is totally dependent and to show the legal mechanisms that were used by the executive to achieve this. The creation of a super-presidential form of government and authoritarian political regime gave the president of Belarus crucial influence on the judiciary through the processes of selecting, appointing and reappointing and dismissing judges, and determining their remuneration and social packages.

Keywords: Constitutional court, general jurisdiction courts, independence of judges, judicial system, president

Streszczenie

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„Niezależność" sądownictwa na Białorusi: teoria i praktyka

Celem artykułu jest ustalenie przyczyn całkowitej zależności białoruskiego wymiaru sprawiedliwości od władzy wykonawczej, jak również wskazanie mechanizmów prawnych, którymi posłużyła się władza wykonawcza, aby uzależnić od siebie sądy. Wprowadzenie prezydenckiej formy rządów i autorytarnego reżimu politycznego zagwarantowało prezydentowi Białorusi kluczowy wpływ na wymiar sprawiedliwości poprzez procedury wyboru, powoływania, ponownego mianowania i odwoływania sędziów, jak również ustalania ich wynagrodzeń i pakietów socjalnych.

Słowa kluczowe: sąd konstytucyjny, sądy powszechne, niezawisłość sędziów, system sądownictwa, prezydent

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Judicial Review: A Disputed Competence in the Romanian Legal System

The evolution of constitutional review in Europe in the final quarter of the twentieth century, especially after the expansion of *a posteriori* review, reveals an increase in the role and participation of the judge *a quo* in a field *ab initio* restricted to a special and specialized judge, namely the constitutional judge.

Romania is a good example in observing the relationship between the two categories of judges, having quite a tradition regarding constitutional review, which began more than a century ago. The involvement of the Romanian judge *a quo* in order to have their right to control laws recognized presents a double symmetry. It occurs at the beginning and at the end of the twentieth century, as well as at the dawn of the birth of a new Romania: in 1918, the Great Union occurs, and at the end of 1989, which marks Romania's break with totalitarian communism.

1. An arduous start

Affirmed, due to the praetorian input, as a natural competence of the judiciary, constitutional review in Romania has experienced quickly enough a reaction from the legislature, which, at first, limited judges' intervention, then eliminated it altogether and, finally, conferred it to another entity, an independent one, namely the constitutional court.[1]

Romanian law in general and Constitutional law in particular have been placed, in the past 150 years, under the strong influence of French law and, partly, of Belgian law, but the establishment of constitutional review in Romania shows a strong resemblance to what happened in the United States in the early nineteenth century. Then, the US Supreme Court, in a trial with a manifest political tint, *Marbury vs. Madison*,

[1] See M. Criste, "Constitutional Review in Romania – a Struggle Between Monologue and Dialogue" [in:] *Constitutional Courts and Ordinary Courts: Cooperation or Conflict?*, eds R. Arnold, H. Roth, International Conference Regensburg, 16–17 October 2015, Regensburg, Universitaetsverlag 2017.

asserted the right and duty of any judge, deducted from the Constitution's supremacy within the statutory system and from the separation of powers, to ignore the provisions of laws that would be inconsistent with constitutional norms.

The same political tint has made its mark on the *Tramways Trial* from 1912 since strictly legally speaking, art. 108 of the Romanian Criminal Code in force at the time, punishing those judges who refused to apply a law or who tried to suspend its enforcement, represented a serious obstacle to the judicial review of constitutionality.

Yet, the Romanian legal doctrine considered that, by carrying out a constitutional review, the courts did not infringe the principle of the separation of powers since they adjudicated specially and did not abolish the law generally.[2] For the High Court, since art. 77 of the Law on judicial organization forced judges, under oath, to apply the Constitution, the right of the judiciary to review the constitutionality of laws subsists even in the absence of express legal provisions. On the contrary, such provisions would have been necessary in order to deprive it of this right.

After the Revolution of December 1989, the Plenum of the Supreme Court of Justice,[3] asked at the end of 1990 to rule on the constitutionality of a 1950 decree, assigned itself this competence.[4] The Supreme Court concluded that the principle of the separation of powers results in the competence and duty of the courts of justice to review the constitutionality of the laws invoked before them and to refuse the enforcement of those which are contrary to the Constitution. Not only was it not necessary for this power to be solemnly proclaimed, but a mandatory statutory provision should have intervened in order to prohibit it.

Another argument justifying the judicial review of constitutionality was extracted from the courts' competence to interpret the laws. Bound to enforce both ordinary laws and constitutional provisions, the courts that would find themselves before a conflict between a law and the Constitution must remove the applicability of the ordinary law.

The Supreme Court also referred to the limits of the judicial review of statutes. The first concerns the effects of a decision pronounced following constitutional review, which can only be *inter partes*.

Another limitation was found in terms of the court's competence. After having asserted the right of the judiciary to review the acts of the legislature, the Supreme Court reached the solution adopted by the 1923 Constitution, namely that of a competence reserved uniquely to the Plenum of the Supreme Court of Justice. The argument was found in the position the latter occupied in the judiciary system, the importance this

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[2] C.G. Dissescu, *Curs de Drept public român*, Bucharest 1890, p. 533; P. Negulescu, *Curs de Drept constituțional*, Bucharest 1927, p. 486 ; G. Alexianu, *Studii de drept public*, Bucharest, Vremea 1930, p. 70; G. Jèze, "Pouvoir et devoir des tribunaux en général et des tribunaux roumains en particulier de vérifier la constitutionnalité des lois à l'occasion des procès portés devant eux" [in:] *Revue de Droit Public*, 1912, pp. 138–139.

[3] The present High Court of Cassation and Justice, following the constitutional revision of 2003.

[4] For a detailed presentation of this decision, see: M. Criste, "Un contrôle juridictionnel des lois en Roumanie?" [in:] *Revue française de Droit Constitutionnel*, 1992 no. 9, pp. 179 *et seq*.

body of the judiciary had in achieving the rule of law, and the need to ensure the uniform enforcement of the laws.

Regarding the referral to the Court with a view to exercising constitutional review, with the exception of one judge only, the Plenum of the Court ruled that this right lay solely with the attorney general, the holder at the time of the extraordinary appeal.

Although the exception of incompetency should have taken precedence over any other exception, preoccupied firstly with the matters of substance of the trial, the Court wanted to rule on a decision of principle regarding the judicial review of norms. Finally, its answer was a "yes" to the right of the Court to review the constitutionality of laws and a "however" to the citizens' right to refer such matters to the Court.

2. An exclusive competence

After the Revolution of December 1989, the issue of the judges' control over the legislature became one of the major themes that the 1991 Constituent had proposed itself to solve, and a judicial review inspired by Western models was considered to represent a guarantee of democracy and, for this reason, it imposed itself as a matter of course.

The powers of the Constitutional Court can be classified in predominantly judicial powers and predominantly political powers.

The first category includes the anterior review exercised on laws,[5] the Chambers' Regulations and treaties or other international agreements,[6] the posterior review that covers enacted laws and government ordinances, as well as the review of the citizens' legislative initiatives.

In the second category, one finds the control of the constitutionality of political parties, the role of electoral judges in presidential elections, the endorsement of the suspension and vacancy of the function of President, the settlement of legal conflicts of constitutional nature between public authorities, the control or monitoring of compliance with the procedure for organizing and conducting referendums, and the confirmation of results.

The referral to the Constitutional Court, with a view to an anterior review of the laws, has as holders: the President of Romania, the presidents of the two parliamen-

[5] In 1991, the Court's power was limited in this area: the law which, before promulgation, was declared contrary to the provisions of the Constitution, was referred back to Parliament and in case the latter adopted it in the same terms by a majority of two thirds of the members of each Chamber, the objection of unconstitutionality was overruled and the promulgation became mandatory. Such a procedure was not provided, however, for the Chambers' Regulations, the Court's decisions regarding them being binding. The solution was subject to several criticisms, and a constitutional revision in 2003 provided arguments in support of this approach, forcing Parliament to submit to the decision of the Constitutional Court.

[6] The review of treaties or other international agreements was introduced only following the revision of October 2003.

tary Chambers, the Government, a number of 50 deputies or 25 senators, the High Court of Cassation and Justice and, following the revision of 2003, the Ombudsman. The review of the Chambers' Regulations shall be exercised upon referral from one of the presidents of the two Chambers, a parliamentary group or a number of at least 50 deputies or at least 25 senators, and that of treaties or other international agreements, upon request of the presidents the two Chambers, a number of at least 50 deputies or at least 25 senators.

For posterior review, the Court receives the referral directly from the court before which the issue of unconstitutionality was raised or from the Ombudsman.

The original text of the Law on the organization of the Constitutional Court provided that throughout the period of the settlement of the exception of unconstitutionality, judicial proceedings shall be suspended. Law no. 177/2010 removed this provision in order to discourage attempts to delay the settlement of lawsuits in the ordinary courts and the procedural rules of reforming a criminal decision have been amended as well, so that, subsequently, the sentence can be abolished.

The judgment[7] is done in plenary, the presidents of the Chambers and the Government being allowed to present written opinions. In its activity, the Court pronounces *decisions*, when examining the constitutionality of a statutory provision or a political party, *advisory opinions*, in the case of proposals to suspend the President of Romania, and *judgments*, in all other cases. These acts shall be pronounced with a majority vote, except for those referring to initiatives to revise the Constitution, when the vote of two thirds is needed. The decisions are published in the *Official Journal* of Romania, are generally binding and effective only for the future.

The provisions of laws and ordinances in force, as well as those from regulations, found to be unconstitutional, cease their legal effects within 45 days from the publication of the Constitutional Court's decision if, in the meantime, the Parliament or the Government, as the case may be, fail to amend the unconstitutional provisions as to render them consistent with constitutional provisions. During this lapse of time, the provisions declared unconstitutional are suspended by law.[8]

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[7] Until the amendment of Law no. 47/1992 by means of Law no. 138/1997, when judging preliminary rulings, the president of the Court appointed a panel of three judges. Appeals were judged by a panel of five judges, other than those from the court of first instance. If the appeal was upheld, the section of five judges also decided in matters of unconstitutionality.

[8] The Constitutional Court attempted to promote such a solution on a case-law basis (Decision no. 38 of 7 July 1993, *Official Journal*, I, no. 176 of 26 July 1993, pp. 1–11), which, however, divided the judges of the Court and caused a debate that ended in the victory of those who had opposed it. For its analysis, see M. Criste, *Controlul constituționalității legilor în România – aspecte istorice și instituționale*, Bucharest, Lumina LEX, pp. 249 *et seq*.

3. Judges *a quo* assist the Constitutional Court

Judges *a quo* are required to assist the Constitutional Court in exercising the review of laws and in settling exceptions of unconstitutionality.[9]

In *a posteriori* reviews of the constitutionality of laws and Government ordinances, apart from the possibility of the Romanian Ombudsman to directly address the Constitutional Court, the latter can only be asked to pronounce itself by means of a decision of a judge *a quo*, given regarding an exception raised within a trial before the court by either party, including the prosecutor, or even by the judge, *ex officio* (art. 29 par. 2 of Law no. 47/1992, republished, on the Constitutional Court).

The manner in which judges *a quo* assist the Constitutional Court is expressed in their role in filtering the exceptions raised. Thus, judges refer to the Constitutional Court only those exceptions referring to the unconstitutionality of laws and ordinances that are in force, or any provision thereof, where such is related to adjudication of the case, regardless in which stage of trial proceedings or subject matter thereof (art. 29 par. 1 of Law no. 47/1992). A referral to the Constitutional Court can also be rejected if it concerns legal provisions that were declares unconstitutional in a prior Court decision (art. 29 par. 3 of Law no. 47/1992). The decision must contain the grounds for the exception, as well as the opinion of all the parties concerned, as well as of the court, regarding its admissibility.

Judges may deny referral to the Constitutional Court if the conditions provided in art. 29 par. 1–3 are not met by means of an interlocutory judgment, which is subject only to an appeal lodged to the superior court, within forty-eight hours of the pronouncement. The appeal shall be heard within three days. The filtration power conferred upon judges *a quo* can lead to their affirmation as competitors of the constitutional court in (rare) situations in which they might deny referrals based upon other reasons than those exhaustively laid down in art. 29 of Law no. 47/1992[10].

4. Judges *a quo* challenge the Constitutional Court

In recent years, we have witnessed a resurgence of ordinary judges' activism in implicitly challenging the monopoly of the Constitutional Court in the exercise of the constitutional review and in refusing to apply certain statutory provisions, even in competition with and contrary to the Constitutional Court's practice.[11] The "weapons"

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[9] Cf. art. 146 [Powers] of the Romanian Constitution: "The Constitutional Court has the following powers: (…) d) it rules upon objections as to the unconstitutionality of laws and ordinances which are raised before the courts of law or commercial arbitration; a plea of unconstitutionality may also be brought up directly by the Advocate of the People."

[10] See T. Toader, M. Safta, *Dialogul judecatorilor constitutionali*, Bucharest, Universul Juridic 2015, pp. 291–292.

[11] V. Constantin, "Cum a produs Înalta Curte de Casație și Justiție un eveniment judiciar" [in:] *Noua Revistă de Drepturile Omului* 2008, no. 4, p. 56 *et seq.*

used in this approach are the provisions of art. 20 of the Constitution,[12] the supremacy of European Union law, the European Convention on Human Rights, and the case-law of the Court in Strasbourg. In other words, the resurrection of the constitutional review *à l'américaine* seems to be occurring in Romania through the invocation of conventional review, which is very similar, in terms of the review technique and effects, to constitutional review.[13]

On the other hand, the Constitutional Court extends its judicial review over court decisions by verifying the mandatory interpretations given through them.

4.1. *A quo* judges double constitutional judges

Judges *a quo* can thus turn to two different solutions in order to review the compliance of a statute with the fundamental rights and freedoms, as regulated by the Constitution, international conventions, and treaties; they either refer the matter to the Constitutional Court for constitutional review or decide to directly apply international rules, by means of a conventional review. Thus, we can note that judges have a dual loyalty: to their Constitutional Court and to the ECJ at the same time.[14]

Romanian judges feel encouraged in exercising conventional review both by the case-law of the Court of Justice of the European Union (CJEU), which considers that national judges may ignore decisions of the constitutional courts or the effects of such decisions if necessary for ensuring that European Union law is observed,[15] as well as by its own Constitutional Court. As it happened in France, in 1975,[16] the constitutional court pushed judges *a quo* toward conventional review when it decided that it was up to the judges, and not to the court, to directly apply Community legislation found to be in conflict with national law.[17]

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[12] Cf. art. 20 of the International human rights treaties: "(1) The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party. (2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favorable provisions."

[13] O. Dutheillet de Lamothe, "Contrôle de conventionnalité et contrôle de constitutionnalité en France", http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/madrid_odutheillet_ avril_2009.pdf (accessed: 2020.08.01).

[14] G. Martinico, "Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order" [in:] *International Journal of Constitutional Law* 2010, vol. 10, no. 3, pp. 871–896.

[15] The *Winner Wetten* case, http://curia.europa.eu/juris/document/document.jsf?text=&docid=80771&pageIndex= 0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=68545 (accessed: 2020.08.01); the *Filipiak* case, http://curia.europa.eu/ juris/liste.jsf?language=en&num=C-314/08 (accessed: 2020.08.01).

[16] J.L. Debré, "Contrôle de constitutionnalité et contrôle de conventionnalité" http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_interventions/2008/pdt_debre_afdc_ 06062008.pdf (accessed: 2020.08.01); O. Dutheillet de Lamothe, *loc. cit.*

[17] Decision of the Constitutional Court no. 1344 of 9 December 2008, published in the *Official Journal* no. 866 of 22 December 2008.

The monopolistic position held by the Constitutional Court in matters of constitutional review is most seriously threatened by the High Court of Cassation and Justice and its exercise of a relatively new competence, which has been attributed to it through the procedural code: appeals in the interest of the law (or reviews for a uniform interpretation of the law). This competence is based on the constitutional text itself, which, in art. 126 par. 3 of the Constitution, provides that "The High Court of Cassation and Justice ensures the uniform interpretation and application of the laws by all other courts, according to its competence."[18]

Within such proceedings, the High Court does not judge individual cases, but, in the case of the pronouncement of several contradictory judgments, it decides which interpretation is to be given to a certain statutory provision, the interpretation of which is binding on all courts from the date of the decision's publication in the *Official Journal* of Romania. Or, given its effects, the decision rendered in an appeal in the interest of the law can contradict and annihilate the effects of a decision of the Constitutional Court.

Thus, when asked by the High Court of Cassation and Justice to assess the unconstitutionality of a provision from the Law regarding administrative litigation (Law no. 554/2004), the Constitutional Court did not internalize criticism regarding the violation of the principle of the non-retroactivity of law (art. 15 (2) of the Constitution) and declared the respective provision constitutional.[19]

Since, according to art. 147 (4) of the Constitution, the decisions of the Constitutional Court are generally binding from their publication in the *Official Journal* of Romania, the High Court should have accepted this decision and apply it. However, it considered that the time has come to impose its own interpretation, bypassing the Constitutional Court's jurisdiction. Thus, through the decision of 4 June 2008,[20] the High Court considered that said text, declared as being constitutional, is not, however, applicable in the Romanian law, against the provisions of art. 20 of the Constitution, art. 6 of the European Convention on Human Rights, and art. 47 of the Charter of Fundamental Rights of the European Union, called upon in the light of the case-law of the courts in Strasbourg and Luxembourg, qualified all together as "the conventional block." What appears as obvious in this case is the wish of the High Court of Cassation and Justice to exercise constitutional review, in parallel with that performed by the Constitutional Court, and even contrary to its case-law.

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[18] Decision of the Constitutional Court no. 221 of 9 March 2010, published in the *Official Journal* no. 270 of 26 April 2010.

[19] Decision of the Constitutional Court no. 425 and Decision of the Constitutional Court no. 426 of 10 April 2008, published in the *Official Journal* no. 354 of 8 May 2008.

[20] Decision of the High Court of Cassation and Justice no. 2307 of 4 June 2008.

4.2. Constitutional judges assume, by praetorian way, judicial review over court decisions

In the face of a not very encouraging perspective, which Michal Bobek defined as a true *capitis deminutio*,[21] the Romanian Constitutional Court uses each and every opportunity to emphasize that the High Court of Cassation and Justice has no constitutional competence to create, amend, or repeal statutory provisions or to constitutionally review them.[22]

Perhaps the delicate situation in which the Constitutional Court of Romania finds itself is also due to the choice made by the 1991 Constituent, and maintained in 2003, not to place it within the judiciary, but to reserve for this court a place outside the system of powers.

It is beyond any doubt that court decisions are not subject to the judicial review of constitutionality exercised by the Constitutional Court. Nevertheless, the latter has indirectly recognized itself such competence in those instances where the diversion of legal rules from their legitimate purpose, by means of a systematic misinterpretation and misapplication by the courts or by other subjects called upon to apply the provisions of the law, may determine the unconstitutionality of the respective regulation. In such cases, the Constitutional Court considered that it does have the competence to eliminate the unconstitutionality defect thus created, essential in situations like these being the guarantee of the observance of the rights and freedoms of the people, as well as of the supremacy of the Constitution.[23]

Moreover, we can see lately that the Constitutional Court has been acting more and more courageously in censoring the manner in which the High Court of Cassation and Justice (ICCJ) rules when deciding upon appeals in the interest of the law or for

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[21] M. Bobek, "Consecințele mandatului european al instanțelor de drept comun asupra statutului curților constituționale" [in:] *Romanian Journal of European Union Law*, no. 1, p. 202.

[22] Decision of the Constitutional Court no. 838 of 27 May 2009, published in the *Official Journal* no. 461 of 3 July 2009.

[23] Decision 224 of 13 March 2012, of the Constitutional Court, published in the *Official Journal* no. 256 of 18 April 2012 (the very constitutionality of one of the interpretations that the criticized text of law received in practice was questioned), Decision no. 448 of 29 October 2013, of the Constitutional Court, published in the *Official Journal* no. 5 of 7 January 2014. "Without denying the constitutional role of the Supreme Court, whose jurisdiction is limited to situations of non-unitary practice, the Constitutional Court notes that, if a legal text might generate different interpretations, it is forced to intervene whenever those interpretations generate violations of fundamental provisions. The Constitution represents the framework and the scope within which the legislator and other authorities can act; thus, the interpretations that can be brought to the legal rule must take into account this constitutional requirement contained in Article 1 paragraph (5) of the Fundamental Law, according to which, in Romania, the observance of the Constitution and its supremacy is obligatory. From the perspective of the relation towards the provisions of the Constitution, the Constitutional Court verifies the constitutionality of the applicable legal texts in the interpretations that may be generated by them. Admitting a contrary thesis contradicts the very reason for the existence of the Constitutional Court, which would deny its constitutional role by accepting that a legal text be applied within limits that might collide with the Basic Law" (Decision no. 1092 of 18 December 2012, of the Constitutional Court published in the *Official Journal* no. 67 of 31 January 2013).

resolving legal issues, especially when, in doing so, the supreme court departs from or even contradicts the decisions of the constitutional judges. And in order to overcome the constitutional obstacle that does not mandate it to censor court decisions, the Constitutional Court does it in disguise, in the form of judicial reviews by way of pleas of unconstitutionality concerning the article of the law whose application has been interpreted by the ICCJ.[24]

Thus, recently, constitutional judges were notified with a plea of unconstitutionality of the provisions of art. 27 of the Code of Civil Procedure, in the interpretation given through the Decision no. 52 of 18 June 2018, pronounced by the High Court of Cassation and Justice – the Panel for resolving legal issues, to the provisions of art. XVIII par. 2 of Law no. 2/2013 regarding some measures for the relief of the courts, as well as for the preparation of the implementation of Law no. 134/2010 regarding the Code of Civil Procedure, with reference to the phrase "as well as in other claims assessable in money, with a value amounting to 1,000,000 lei inclusive," as well as the provisions of art. 521 par. 3 of the Code of Civil Procedure.

By Decision no. 369 of 30 May 2017,[25] the Constitutional Court admitted the plea of unconstitutionality of the legal provision limiting the exercise of the appeal, depending upon a certain threshold, and found that the phrase "as well as in other claims assessable in money, with a value amounting to 1,000,000 lei inclusive," contained in art. XVIII par. 2 of Law no. 2/2013, is unconstitutional. Following this decision, from the date of its publication in the *Official Journal*, the provisions of art. XVIII par. 2 had to be applied in the sense of the interpretation given by the Constitutional Court, namely that are subject to the appeal all the decisions pronounced after the publication of Decision no. 369 of 30 May 2017, in the claims assessable in money, less those exempted according to the criterion of the matter, expressly provided in the thesis included by art. XVIII par. 2 of Law no. 2/2013. By this decision, the Constitutional Court made no distinction, regarding its effects of admission, between the pending trials or those started after the publication of the decision in the *Official Journal*, but, in accordance with the provisions of art. 147 par. 4 of the Constitution, it has expressly stated that all court decisions pronounced after the publication are subject to appeal, regulated by art. XVIII of Law no. 2/2013, in the configuration given by Decision no. 369 of 30 May 2017.

By Decision no. 52 of 18 June 2018, pronounced by the High Court of Cassation and Justice – Panel for resolving legal issues, following Decision no. 369 of 30 May 2017, of the Constitutional Court, the notifications formulated as regards the pronouncement of a preliminary ruling were admitted and it was established that, in the interpretation

[24] In the opinion expressed by the Court of Appeal of Craiova, in the case held by the Constitutional Court by means of Decision no. 874 of 18 December 2018, published in the *Official Journal* no. 2 of 3 January 2019, the court underlines the fact that "the reasons for unconstitutionality concern the interpretation given to the text of the law by Decision no. 52 of 18 June 2018, pronounced by the High Court of Cassation and Justice - Panel for resolving legal issues, and not the unconstitutionality of the criticized text of law, in relation to the constitutional texts."

[25] Published in the *Official Journal* no. 582 of 20 July 2017.

and application of the provisions of art. 27 of the Code of Civil Procedure, with reference to art. 147 par. 4 of the Romanian Constitution, the effects of Decision no. 369 of 30 May 2017, of the Constitutional Court occur regarding the court decisions pronounced after its publication in the *Official Journal* of Romania, in litigations assessable in money, with a value amounting to 1,000,000 lei inclusive, started after the publication of the decision (20 July 2017).

The Constitutional Court found that, according to the interpretation given by the Supreme Court through the preliminary ruling, although the legal provision that expressly suppressed the appeal regarding court decisions pronounced over claims assessable in money, with a value amounting to 1,000,000 lei inclusive, was found unconstitutional, it continues to be applicable to all pending litigations, registered with the courts prior to the date of publication of the decision of unconstitutionality. Or, such an interpretative solution has the significance of prolonging, in time, the effects of a rule found to be unconstitutional, with the consequence of its application within pending litigations, which leads to the violation of the provisions of art. 147 par. 4 of the Constitution, which enshrines the immediate and generally binding effect of the decisions held by the Constitutional Court.[26]

The Court thus held that the interpretation given by the Supreme Court, by means of its preliminary ruling, contrary to those ruled by a decision of the Constitutional Court, interpretation which invalidates the constitutional effects of a decision of the Constitutional Court, violates the Fundamental Law.

In this way, by means of the preliminary ruling, the High Court proceeds in a manner contrary to loyal constitutional conduct that it must prove toward the case-law of the constitutional court since its observance represents one of the core values that characterize the rule of law. Moreover, in the exercise of the attribution provided by art. 126 par. 3 of the Constitution, the High Court of Cassation and Justice has the obligation to ensure the unitary interpretation and application of the law by all courts, upon observing the fundamental principle of checks and balances, enshrined in art. 1 par. 4 of the Romanian Constitution and does not have the constitutional competence to establish, modify or repeal legal rules with the force of law or to carry out their judicial review of constitutionality.[27]

Instead of a conclusion, I will use a clarifying example.

When asked to pronounce itself on the exception of unconstitutionality of the provisions of Law no. 278/2006 amending and supplementing the former Criminal Code, which decriminalized the offenses of libel and slander, the Constitutional Court[28] found that there was no incompatibility between the principle of the freedom of expression and the criminalization of libel and slander that might have led to the

[26] Decision no. 874 of 18 December 2018, of the Constitutional Court (previously cited).

[27] *Ibidem*.

[28] Decision of the Constitutional Court no. 62 of 18 January 2007, published in the *Official Journal* no. 104 of 12 February 2007.

decriminalization of such offenses and declared the law repealing the articles on their criminalization as being unconstitutional.

It was a powerful move on the part of the Constitutional Court, which turned itself into a legislator of positive law.

However, since the subject matter was the pronouncement of the unconstitutionality of a repealing rule, the jurisprudence and the doctrine were not unanimous in considering that the old regulation, the one incriminating the two offenses, was rightfully brought back into force. Taking advantage of this hesitation, the High Court of Cassation and Justice also chose to make its own powerful move and, mixing up repeal and unconstitutionality, ignored the decision of the constitutional judges, admitting the appeal in the interest of the law filed by the Attorney General and assessing that the provisions of the Criminal Code regarding libel and slender were no longer in force.[29]

It is hard to explain in what way a decision of the Constitutional Court is observed when the court declares as unconstitutional a repealing rule, as long as the dispositions of the repealed rule are still producing effects. On the other hand, the High Court decision implicitly recognized the possibility of the Parliament to force the application of an unconstitutional rule, in case it should refuse to reintroduce the old regulation in the objective law.

Yet, the "game" did not end here, since the Constitutional Court wanted to have the last word, even if it had to wait three years for the proper occasion to emerge. Apparently, it was almost impossible for it to have any more reactions since it has no powers over the constitutional review of judicial decisions. And yet...

When asked to pronounce itself on the exception of the unconstitutionality of the provisions of art. 414^5 par. 4 of the Code of Criminal Procedure (regarding the appeal in the interest of the law in criminal matters), with special reference to Decision no. 8/2010 of the High Court of Cassation and Justice pronounced through an appeal in the interest of the law, the Constitutional Court exceeded its powers once again. Under the pretext of reviewing the constitutionality of a legal provision art. 414^5 par. 4 of the Code of Criminal Procedure), the Court was, in fact, censoring the decision of the High Court since it did not pronounce itself regarding the constitutionality or unconstitutionality of the rule, but regarding the fact that the solution given to the legal problems analysed by way of Decision no. 8/2010 was unconstitutional[30].

It seems obvious that both courts have acted out of pride by exceeding their powers.

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[29] Decision of the High Court of Cassation and Justice, United Section, no. 8 of 18 October 2010.

[30] Decision of the Constitutional Court no. 206 of 29 April 2013, published in the *Official Journal* no. 350 of 13 June 2013.

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G. Jèze, "Pouvoir et devoir des tribunaux en général et des tribunaux roumains en particulier de vérifier la constitutionnalité des lois à l'occasion des procès portés devant eux" [in:] *Revue de Droit Public* 1912, pp. 138–139.

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Summary

Mircea Criste

Judicial Review: A Disputed Competence in the Romanian Legal System

The evolution of constitutional review, especially in Europe in the final quarter of the twentieth century, reveals an increase in the role and participation of the ordinary judge in a field restricted to the constitutional judge. The involvement of the Romanian judge *a quo* presents a double symmetry. It occurs at the beginning and at the end of the twentieth century, as well as at the dawn of the birth of a new Romania: in 1918, the Great Union occurs, and at the end of 1989, which marks Romania's break with totalitarian communism.

Romanian law in general and Constitutional law in particular have been placed, in the past 150 years, under the strong influence of French law and, partly, of Belgian law, but the establishment of constitutional review in Romania shows a strong resemblance to what happened in the United States in the early nineteenth century.

After the Revolution of December 1989, a judicial review inspired by Western models was considered to represent a guarantee of democracy and, for this reason, it imposed itself as a matter of course. The powers of the Constitutional Court can be classified in predominantly judicial powers and predominantly political powers. Judges are required to assist the Constitutional Court in exercising the review of laws and in settling exceptions of unconstitutionality. But, in recent years, we have witnessed a resurgence of ordinary judges' activism in implicitly challenging the monopoly of the Constitutional Court in the exercise of the constitutional review. In the face of a not very encouraging perspective of a true *capitis deminutio*, the Romanian Constitutional Court uses each and every opportunity to emphasize that the High Court of Cas-

sation and Justice has no constitutional competence to create, amend, or repeal statutory provisions or to constitutionally review them.

Keywords: judicial review, constitutional courts, juge *a quo*, exception of unconstitutionality, political constitutional review

Streszczenie

Mircea Criste

Sądowa kontrola konstytucyjności prawa: kompetencja sporna w rumuńskim systemie prawnym

Ewolucja kontroli konstytucyjności prawa, zwłaszcza w Europie w ostatnim ćwierćwieczu XX w., spowodowała wzrost roli i udziału sędziego sądu powszechnego w zakresie spraw co do zasady zastrzeżonych do właściwości sędziego konstytucyjnego. Zaangażowanie rumuńskiego sędziego *a quo* przedstawia podwójną symetrię, gdyż zjawisko to występowało na początku i pod koniec XX w., a jednocześnie u zarania narodzin nowej Rumunii w 1918 r., kiedy doszło do powstania Wielkiej Unii, oraz pod koniec 1989 r., kiedy miejsce miało zerwanie Rumunii z totalitarnym systemem komunistycznym.

Prawo rumuńskie, a w szczególności prawo konstytucyjne, w ciągu ostatnich 150 lat znajdowało się pod silnym wpływem prawa francuskiego i częściowo prawa belgijskiego, jednakże wprowadzenie w Rumunii kontroli konstytucyjności prawa wykazuje silne podobieństwo do tego, co wydarzyło się w Stanach Zjednoczonych na początku XIX w.

Po rewolucji grudniowej w 1989 r. rozważano wprowadzenie w Rumunii sądowej kontroli konstytucyjności prawa inspirowanej wzorcami zachodnimi. Kontrola ta była postrzegana jako gwarancja demokracji i z tego powodu wydawała się wręcz koniecznością. Kompetencje rumuńskiego Sądu Konstytucyjnego podzielić można na uprawnienia o typowo sądowym charakterze oraz uprawnienia o charakterze politycznym. Sędziowie sądów powszechnych są zobowiązani pomagać Sądowi Konstytucyjnemu w dokonywaniu kontroli konstytucyjności prawa oraz rozstrzyganiu o niezgodności badanych norm z konstytucją. Jednak w ostatnich latach byliśmy świadkami odrodzenia się aktywizmu sędziów sądów powszechnych w sposób pośredni kwestionujących monopol Sądu Konstytucyjnego w zakresie kontroli konstytucyjności prawa. W obliczu niezbyt zachęcającej perspektywy prawdziwego *capitis deminutio*, rumuński Sąd Konstytucyjny wykorzystuje każdą okazję, aby podkreślić, że Wysoki Trybunał Kasacyjny i Sprawiedliwości nie ma konstytucyjnych kompetencji do tworzenia, zmieniania lub uchylania przepisów ustawowych jak również dokonywania kontroli ich zgodności z Konstytucją.

Słowa kluczowe: kontrola sądowa, sądy konstytucyjne, sędzia *a quo*, wyjątek niekonstytucyjności, polityczna kontrola konstytucyjności

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Contemporary Challenges Facing the Judicial Independence in Georgia

Introduction

Judicial independence is the cornerstone principle of the rule of law. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.[1] Independence means that the judiciary is free from external pressure and is not subjected to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.[2] The requirement of an independent judiciary is included in all rule of law definitions in the western liberal tradition. This excludes from the rule of law list those states whose organisation is not based on the *trias politica*.[3] The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor.[4]

As scholars argue, the modern conception of judicial independence is not confined to the independence of an individual judge and to his or her personal and substantive independence. It must include the collective independence of the judiciary as an institution. Likewise, judicial independence should not be perceived only in terms of shielding the judge from executive pressures or legislative interferences. It must also encompass internal independence, namely, the independence of the judge from his

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[1] Rule of Law Indicators, the United Nations, Implementation Guide and Project Tools, United Nations 2011, p. 70, https://bit.ly/2T582Kf (accessed: 2020.05.10).

[2] J. Moller, "The Advantages of a Thin View" [in:] European Commission For Democracy Through Law (Venice Commission) Rule Of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), p. 20, https://bit.ly/35WlchU (accessed: 2020.05.10).

[3] *Handbook on the Rule of Law*, eds C. May, A. Winchester, Edward Elgar Publishing 2018, p. 40.

[4] M. Sellers, "An Introduction to the Rule of Law in Comparative Perspective" [in:] *The Rule of Law in Comparative Perspective*, eds M. Sellers and T. Tomaszewski, Springer Science+Business Media B.V. 2010, p. 5.

or her judicial colleagues or superiors.[5] Individual judges must enjoy both personal and substantive independence. Characteristics of personal independence include security of office, life tenure, and adequate remuneration and pensions. Substantive independence refers to the freedom of judges to perform their judicial functions independently.[6]

The independence of the judiciary also includes institutional or collective independence, internal judicial independence, and administrative independence. Scholars argue that interference with the collective independence of the judiciary also has an adverse impact on individual judges as they discharge their official duties. This stems from the fact that the traditional sense of social responsibility that the judiciary imparts on individual judges is a strong instrument for ensuring its independence. Judges must be free from directives or pressures from peers or those who have administrative responsibilities in the court, such as the chief judge of the court or the head of the division in the court. It is generally accepted that judges cannot claim independence from required and necessary guidance and supervision in administrative aspects of adjudication.[7]

Georgia, like other post-Soviet countries, has faced many common challenges in reforming the judiciary since the restoration of independence. Scholars argue that what is generally deplored in post-Soviet countries is the dependence of the judiciary on the presidential administration as well as the existence of hierarchical structures within the judiciary that so not leave enough room for the independent adjudication of individual cases.[8] I agree with scholars that the factors that impeded judicial reform came not only from outside, but also from inside the judiciary. Generally, judges remained in their posts. Personal continuity would translate into the persistence of perceptions and ideas inherited from the past. Furthermore, it was also a challenge to abolish privileges such as the material goods provided to judges. Such changes were difficult to implement, and these problems have not been overcome even 20 years after initiating reforms.[9] One of the greatest challenges for countries in transition regarding an independent judiciary is considered to be the establishment of a system of judicial administration that balances judicial independence and judicial accountability and ensures transparency. Two key organs of judicial administration are judicial councils and court presidents.[10]

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[5] S. Shetreet, "Judicial independence and accountability: Core Values in Liberal Democracies" [in:] *Judiciaries in Comparative Perspective*, ed. H.P. Lee, Cambridge University Press 2011, p. 3.

[6] *Ibidem*, p. 15.

[7] *Ibidem*, pp. 16–17.

[8] A. Nußberger, "Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?" [in:] *Judicial Independence in Transition*, ed. A. Seibert-Fohr, Springer, Heidelberg, New York, Dordrecht, London 2012, p. 892.

[9] *Ibidem*, p. 894.

[10] L.F. Müller, "Judicial Administration in Transitional Eastern Countries" [in:] *Judicial Independence in Transition*, ed. A. Seibert-Fohr, Springer, Heidelberg, New York, Dordrecht, London 2012, p. 937.

The establishment of the judiciary in Georgia began after the adoption of the 1995 Constitution and was based on the first Organic Law on common courts,[11] which was changed in 2009 by a new law.[12] According to the Constitution of Georgia, judicial power shall be independent and exercised by the Constitutional Court of Georgia and the common courts of Georgia.[13] After the Soviet era, establishing an independent judiciary in Georgia was one of the main challenges, and judicial reform was initiated shortly after the constitution was adopted. The reformers were faced with two choices: either dismiss all Soviet judges or gradually renew the judiciary with qualified judges, of which there was a shortage at the time. The authorities at the time passed a law requiring former judges to resign early and leave the judiciary. This decision became the subject of constitutional control in the newly created Constitutional Court. The court declared the law unconstitutional and said that the universal dismissal of judges should not be done for political reasons, the arbitrariness of the government, or for the reason of changes in the government.[14]

The judicial reform that started in 1997 had no real consequences, and the court remained one of the most corrupted systems. A new phase of reform for the judiciary began in 2005, when a new concept of reform was developed, new priorities were identified, and the judiciary advanced materially, technically, and organizationally, although judicial independence remained a major challenge. Thorough changes were made to the Constitution of Georgia on 27 December 2006, and the appointment and dismissal of judges was removed from the powers of the President of Georgia. This authority was transferred to the High Council of Justice of Georgia.[15] The 2010 constitutional amendments introduced the appointment of judges for life, but at the same time the law provided that judges were to be appointed for a probationary period of not more than three years.[16] Finally, in 2019, the High Council of Justice of Georgia appointed several dozen judges for life in the common courts of Georgia, including the Parliament of Georgia, which appointed judges for life to the Supreme Court of Georgia. The main challenge remains the independence of the judiciary, and I will discuss specific challenges in the following paragraphs.

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[11] Organic Law of Georgia on General Courts of 13 June 1997, the Parliamentary Gazette, 31 July 1997, no. 33, p. 75, https://matsne.gov.ge/ka/document/view/31684?publication=41 (accessed: 2020.05.10).

[12] Organic law of Georgia on General Courts, Legislative Herald of Georgia, 41, 08/12/2009, 04/12/2009, https://matsne.gov.ge/en/document/view/90676?publication=34 (accessed: 2020.05.10).

[13] Constitution of Georgia of 24 August 1995, https://matsne.gov.ge/ka/document/view/30346?publication=35 (accessed: 2020.05.10).

[14] Avtandil Chachua v. the Parliament of Georgia, Judgment of the Constitutional Court of Georgia, N2/80-9, 03/11/1998, https://www.constcourt.ge/ka/judicial-acts?legal=80 (accessed: 2020.05.10).

[15] The Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 27 December 2006, https://matsne.gov.ge/ka/document/view/25852?publication=0 (accessed: 2020.05.10).

[16] The Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 15 October 2010, https://matsne.gov.ge/ka/document/view/1080890?publication=2 (accessed: 2020.05.10).

1. Main Challenges in Common Courts of Georgia

Prior to the change of government in Georgia in 2012, a major problem was the strong influence on the court of the executive branch, especially the prosecutor's office. During this period, systemic deficiencies were observed in the review of criminal and administrative law cases. One of the main promises of the Georgian Dream coalition during the 2012 parliamentary elections was to free the judiciary from the influence of political authorities and to achieve an independent, impartial judiciary.[17] As soon as the Georgian Dream coalition won the election, Bidzina Ivanishvili, the leader of the party, said he planned to start legal proceedings against the judge who made an illegal decision against Georgian Dream during the pre-election period.[18] After the election, he said that the court was still being influenced during this period and was trying to obstruct the new government.[19] However, later Bidzina Ivanishvili met with the chairman of the Supreme Court, Kote Kublashvili,[20] and reported that they agreed that the court should be free of politics.[21]

The issue of the independence of the Georgian judiciary was not only related to the political influence of the government from outside. One of the challenges was also to create guarantees of independence within the court. During the legislative changes, the Venice Commission noted that the general principle that "judges are only subject to law" enshrined in several constitutions, protects the judges against undue external influence but is also applicable within the judiciary (internal independence): subordination of judges, for instance, to court presidents in their judicial decision making activity is a clear violation of this principle.[22] Observers also confirmed that there was a group of judges in the judiciary who had the leverage to influence important decisions of the judiciary, including the High Council of Justice, where decisions were made on the basis of certain covert transactions among council members. Consequently, the High Council of Justice itself could not maintain its independence from the dominant group of the judiciary.[23]

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[17] Founding Declaration of the Political Coalition "Georgian Dream", Tbilisi, 21 February 2012, p. 8–10. https://bit.ly/2zva7YX (accessed: 2020.05.10).

[18] Bidzina Ivanishvili calls on the government to replace the prison staff with a patrol and release Tamazashvili, 2 October 2012, https://bit.ly/2yLgjvX (accessed: 2020.05.10).

[19] Bidzina Ivanishvili, the government should not interfere in the administration of the court, 30 December 2015, https://bit.ly/3dAOhlR (accessed: 2020.05.10).

[20] The Prime Minister visits the court, 6 March 2013, http://www.supremecourt.ge/news/id/334 (accessed: 2020.05.10).

[21] The term of office of Kote Kublashvili, the Chairman of the Supreme Court expired on 23 February 2015. He headed the judiciary from 23 February 2005.

[22] *Joint Opinion of the Venice Commission and the Directorate of Human Rights (Dhr) of the Directorate General of Human Rights and Rule Of Law (Dgi) of the Council Of Europe*, Strasbourg, 14 October 2014, Opinion No. 773/2014 CDL-AD(2014)031, https://bit.ly/360OgVP (accessed: 2020.05.10).

[23] *The State of the Judicial System (2012–2016)*, Transparency International Georgia 2016, p. 17, https://bit.ly/2WGuBGh (accessed: 2020.05.10).

In this situation, it was a great challenge to make legislative changes. The first major legislative reform of the justice system happened in several stages beginning on 1 May 2013.[24] During the so-called first wave of reform, changes were made to depoliticize the High Council of Justice by redistributing power between the High Council of Justice and the President of the Supreme Court and increasing the transparency of the system and the role of judges' self-government. Therefore, this reform was considered an important step forward.[25] When the second wave of changes were adopted,[26] the general rule for appointing judges for life was introduced; however, it was decided to appoint all judges for a three-year probation period, which was assessed negatively[27] and critically.[28] Despite the criticism, more than a hundred judges were appointed to the courts for probation.[29] On 15 February 2017, the Constitutional Court of Georgia declared unconstitutional appointing a person to the position of judge of the Court of Appeals and District (City) for a term of three years, who is a current or former judge and has at least three years of experience in judicial activity.[30] However, then parliament amended the constitution on 13 October 2017, and determined that with first appointments before 31 December 2024, a judge may be appointed for a term of three years before being appointed for life.[31]

After a long delay, the third wave of reform was adopted in February 2017.[32] The council delayed the prospect of dozens of judges with a non-transparent appointment process and postponed the distribution of electronic rules. There were possible political deals, and the election of court presidents by judges was no longer under consideration. The proposal also contained negative changes[33] regarding the election of the High Council of Justice.[34] Experts called on the government to implement rapid reforms to ensure the independence of the judiciary.[35]

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[24] "Organic Law of Georgia" in *Amendments to the Organic Law of Georgia on Common Courts*, 1 May 2013, https://matsne.gov.ge/ka/document/view/1924526?publication=0 (accessed: 2020.05.10).

[25] *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi 2017, p. 10.

[26] Organic Law of Georgia on Amendments to the Organic Law of Georgia on Common Courts, 1 August 2014, https://matsne.gov.ge/ka/document/view/2455845?publication=0 (accessed: 2020.05.10).

[27] Coalition position regarding the appointment of judges for probation 2013, http://www.coalition.org.ge (accessed: 2020.05.10).

[28] Report on the independence of the judiciary (Part I), Venice Commission, (DHR), (DGI) joint report N774/2014, Strasbourg 2014, http://bit.ly/2b7cVzP (accessed: 2020.05.10).

[29] *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi 2017, p. 11.

[30] Judgment of the Constitutional Court of Georgia, No. 3/1/659, 15 February 2017, https://matsne.gov.ge/ka/document/view/3584518?publication=0 (accessed: 2020.05.10).

[31] Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 13 October 2017, https://matsne.gov.ge/ka/document/view/3811818?publication=1 (accessed: 2020.05.10).

[32] Organic Law of Georgia on Amendments to the Organic Law of Georgia on Common Courts, 8 February 2017, https://matsne.gov.ge/ka/document/view/3536739?publication=0 (accessed: 2020.05.10).

[33] *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi 2017, p. 11 https://bit.ly/3cl8fRj (accessed: 2020.05.10).

[34] "Coalition calls on parliament to take note of President's remarks on 'Third Wave' Justice Reform" 2017, http://www.coalition.ge/index.php?article_id=144&clang=0 (accessed: 2020.05.10).

[35] *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi, 2017, p. 11.

In 2017, the Supreme Court of Georgia published the strategy for the judiciary for 2017–21. According this strategy, changes in the court must be made in four strategic directions: independence and impartiality, accountability, quality and efficiency, and accessibility, transparency, and credibility.[36]

The most recent fourth wave of judicial reform was adopted by the Parliament of Georgia on 13 December 2019. These changes concerned the status of judges' promotion, disciplinary responsibility, court overcrowding, the institution of an independent inspector, and the status of the High School of Justice.[37] The ruling party had high hopes for these changes, but observers have argued that the reform is not in the interests of the judiciary but in the interests of politics; the government is trying to maintain a friendly judiciary.[38] Ensuring the independence of the judiciary is also an international obligation of Georgia, and international partners have been monitoring and advising on reforms from the Georgian government for years.

2. The Temporary State Commission on Miscarriages of Justice

One of the first things the government did after the 2012 elections was to adopt a resolution on 5 December 2012, on political prisoners and people in political exile.[39] The government used the resolution of the Parliamentary Assembly of the Council of Europe (PACE) as the criteria for determining political prisoners,[40] and acknowledged the existence of political prisoners and people in political exile in Georgia.[41] The bill stated that after the election there were thousands of complaints that various individuals were convicted illegally and/or unjustifiably in 2004–12, the verdicts came into force and there was no legal mechanism to appeal them, and the state wanted to restore justice, which required creating additional, temporary mechanisms of appeal.[42]

In this regard it was important for Georgia to share international experience and the involvement of international experts in the process of establishing this new institution. The resolution itself was based on the conclusion of the Venice Commission

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36 Judicial System Strategy for 2017–2021, https://bit.ly/2Wm8C8v (accessed: 2020.05.10).

37 Parliament adopted the Fourth Wave Legislative Package of Judicial Reform, 13 December 2019, https://bit.ly/2LhCQmG (accessed: 2020.05.10).

38 G. Mshvenieradze, "We are very principled, but we are not destructive, as the government is trying to show" 10 April 2019, https://csogeorgia.org/ge/post/giorgi-mshvenieradze (accessed: 2020.05.10).

39 Law of Georgia (draft) on The Temporary State Commission on Miscarriages of Justice, 20 May 2013, https://matsne.gov.ge/ka/document/view/1924705?publication=0 (accessed: 2020.05.10).

40 PACE reaffirms its support for criteria defining the notion of political prisoners, 3 October 2012, http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=4137&lang=2 (accessed: 2020.05.10).

41 Explanatory Note to the Resolution of the Parliament of Georgia on Political Prisoners and People in Political Exile, 5 December 2012, https://info.parliament.ge/file/1/BillReviewContent/24676? (accessed: 2020.05.10).

42 Resolution of the Parliament of Georgia Political Prisoners and People in Political Exile, 5 December 2012, https://info.parliament.ge/#law-drafting/436 (accessed: 2020.05.10).

N 710/2012.[43] At the same time, Thomas Hammarberg, the EU's special adviser to Georgia, was actively involved in the process. It is true that the purpose of the commission was to restore justice, but there was a great risk that this mechanism could have been used for political retribution. This was especially so because one of the main political promises of the new government from the very beginning was to restore justice. This is why achieving impartiality was the main task. Hamburger's recommendation, for example, would ensure the restoration of justice for victims of injustice, although it was also inadmissible to create a parallel justice system, and the final decision was to be made by the courts.[44] In Hammarberg's view, the members of the commission should not be politicians or representatives of any party, and it was necessary for the commission to be staffed with professionals who would serve the truth and not political goals. If justice is afforded them, people should be given the opportunity to reconsider their actions in order to restore justice.[45] In addition, according to international recommendations, the High Council of Justice, which is authorized under the Constitution to appoint judges and assign duties, is not seen as scrupulously independent, so it should not be tasked for this function.[46] The Venice Commission's recommendation was focused on the division of powers, judicial independence, and international standards, and the commission should only report on the "reasonable suspicion" of the existence of judicial deficiencies, and only the court should determine the existence of deficiencies.[47]

From the very beginning, Konstantine Kublashvili, the chairman of the Supreme Court at the time, viewed the creation of a commission to determine the shortcomings of the judiciary with suspicion. He also shared the views of the Venice Commission on the separation of powers, judicial independence, and international standards.[48] In his view, such commissions are rarely set up in Europe and only work on newly discovered and newly identified circumstances and do not imply a revision of all directions in the case as set out in the draft law of the Ministry of Justice.[49] He also expressed fears

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[43] European commission for democracy through law (Venice Commission), *Opinion on the provisions relating to political prisoners in the amnesty law of Georgia*, Strasbourg, 11 March 2013, Opinion no. 710/2012, CDL-AD(2013)009 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)009-e (accessed: 2020.05.10).

[44] T. Hammarberg, *Georgia in the Transition Period, Report on Human Rights: Past Period, Steps and Challenges*, 25 September 2013, http://myrights.gov.ge/uploads/files/docs/8987288_38635_607369_Hammarbergreport-getm.pdf (accessed: 2020.05.10).

[45] Hammarberg: Justice Commission should not serve political purposes, Tabula, 20 May 2013, https://bit.ly/3fzrit2 (accessed: 2020.05.10).

[46] H. Verne, Perspectives of Transitional Justice in Georgia, February 2017, p. 40, https://www.ictj.org/publication/transitional-justice-georgia (accessed: 2020.05.10).

[47] European commission for democracy through law (Venice Commission), joint opinion of the Venice Commission, (DGI) Strasbourg, 17 June 2013, Opinion no. 728/2013, CDL-AD(2013)013\ https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)013-e (accessed: 2020.05.10).

[48] The Supreme Court responds to the conclusion of the Venice Commission, 19 June 2013, http://www.supremecourt.ge/news/id/421 (accessed: 2020.05.10).

[49] A commission is set up to investigate the shortcomings of the judiciary, 16 March 2013, https://www.radiotavisupleba.ge/a/justice-commission/24930501.html (accessed: 2020.05.10).

that the commission's conclusion and subsequent hearing in court would not reflect disciplinary or other decisions against judges.[50] Opposition groups called for the beleaguered PM to resign, saying that this was a clear violation of the right to freedom of expression. They also did not recognize and protested the so-called resolution of the Parliament of Georgia on political prisoners and people in political exile, in which persons convicted of crimes against states were also listed.

Although the government was keen to set up a commission to investigate the shortcomings of the judiciary, it finally failed. In November 2013, the Minister of Justice announced that the issue of establishing a commission had been suspended, the only reason being that the country was not ready to make the expected compensations.[51] This decision by the government came as a surprise and was criticized by those who expected their cases to be reconsidered, as well as by human rights organizations. The Public Defender stated that postponing the establishment of the Commission was unfounded because of financial reasons.[52] NGOs also believed that the creation of the commission should not be delayed because it was the only way to restore justice.[53] Opposition parties stated that the commission was set up to influence the court, and its creation was reconsidered after it had an impact on the court.[54] If we look at the developments in the judiciary, this position should be shared.

3. The High Council of Justice of Georgia

The Council of Justice is a particularly important body in post-Soviet countries in the reform process to achieve judicial independence. The powers of the council of justice differ in different countries, but in recent times its power in Georgia has been significantly strengthened. Scholars argue that in countries with strong justice councils, there is a potential risk of facing the same deficiency in the long run by failing to perform a balancing act between guaranteeing judicial independence on the one hand, and ensuring that judges are to be held accountable on the other.[55] Judicial councils in these states do not just wield considerable influence over who is going to fill a judicial post but currently also have the power to dismiss the very same judges, or at least rec-

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[50] Kublashvili: There are remarks on the points that endanger legal security, 16 March 2013, https://netgazeti.ge/news/20206/ (accessed: 2020.05.10).

[51] According to Tsulukiani, the establishment of a commission to determine the shortcomings of the judiciary has been suspended, Civil Georgia, 28 November 2013, https://old.civil.ge/geo/article.php?id=27613 (accessed: 2020.05.10).

[52] Ombudsman: Lack of Finance Argument is not Friday, Tabula, 29 November 2013, https://bit.ly/3fBRL9q (accessed: 2020.05.10).

[53] Statement on the postponement of the establishment of a commission to determine the shortcomings of the judiciary, 29 November 2013, https://bit.ly/3dxQRJ6 (accessed: 2020.05.10).

[54] Restoration of Justice..., details of the unfulfilled promise Ketevan Ghvedashvili, 27 March 2014, Liberali, https://bit.ly/2LeJREO (accessed: 2020.05.10).

[55] L.F. Müller, "Judicial Administration in Transitional Eastern Countries" [in:] *Judicial Independence in Transition*, ed. A. Seibert-Fohr, Springer, Heidelberg, New York, Dordrecht, London 2012, p. 938.

ommend their dismissal. In this regard, strong councils simultaneously perform tasks of initiation, prosecution, and judgment on disciplinary offenses allegedly committed by judges.[56]

One suggested option to solve this problem is to distribute competences concentrated in strong judicial councils among different organs, such as sub-organs to the council.[57] This is also suggested by the so-called Kyiv Recommendations on Judicial Independence in Eastern Europe, in which the consensus is that the power of judicial councils need to be divided and exercised by different bodies rather than having a concentration of powers in one organ.[58] Scholars suggest that the councils could concentrate on just one aspect, e.g., judges' careers, namely their selection, appointment, and promotion, and that administrative tasks are distributed to different organs. Countries like Georgia have to work on two important aspects: the functions of the key administrative organs and their composition. Balancing independence and accountability and increased transparency should be at the heart of future reform steps with regard to the functions and composition of judicial councils.[59]

The Justice Council of Georgia was established on 13 June 1997, based on the organic law on common courts. The status of the council has changed many times and the final status was completed in 2013 after the constitutional amendment. Since then, the High Council of Justice of Georgia consists of 15 members. Eight members of the High Council of Justice of Georgia are elected by a self-governing body of judges of the general courts of Georgia according to the procedure determined by this Law; five members are elected by the Parliament of Georgia, and one member is appointed by the President of Georgia. The chairperson of the Supreme Court is, by virtue of his/her position, a member of the High Council of Justice of Georgia. More than half of the members of the High Council of Justice of Georgia are elected by the self-governing body of Georgian general court judges according to this Law. The Parliament of Georgia elects five members of the High Council of Justice of Georgia in a competition by secret ballot and by a majority of three-fifths of the total number of members under the procedures established by the Rules of Procedure of the Parliament of Georgia. Candidates for membership of the High Council of Justice of Georgia are selected from among the professors and scholars working in higher education institutions of Georgia, members of the Bar Association of Georgia and/or persons nominated by non-entrepreneurial (non-commercial) legal entities of Georgia, upon recommendations of collegial management bodies of the organizations concerned.[60]

One of the important roles of the Council of Justice is to complete the judiciary, which has a great impact on its independence. For the first time on 28 October 2016,

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[56] *Ibidem*, p. 944.

[57] *Ibidem*, p. 945.

[58] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, in this volume, Annex 1, par. 2.

[59] L.F. Müller, p. 968.

[60] Organic Law of Georgia on General Courts, https://matsne.gov.ge/en/document/view/90676?publication=34 (accessed: 2020.05.10).

the High Council of Justice appointed 12 judges for life after they had passed the three-year probationary period.[61] From the very beginning, the problem was that the Council of Justice evaluated the judges appointed for a probationary period in such a way that a detailed evaluation procedure was not established.[62] This is why there was a demand for the council to stop the process of selecting judges, because the decisions were unjustified, the problem was to make decisions by secret ballot,[63] not to check the minimum criteria, and not to have the right to appeal.[64] This shortcoming was partially rectified by the adoption of the Law but not until January 2017. Consequently, judges with shortcomings were selected during this period. The reappointment of current and former judges raised doubts about the Council's selective approach.[65] According to various estimates, the reform has not yielded real results, and 141 judges have been reappointed on the basis of unsubstantiated and opaque decisions (including 67 for life).[66] This rule ensures the appointment of candidates acceptable to the ruling party and loyal to them, so that there was little opportunity to influence the process from the outside.

During 2017, the composition of the High Council of Justice was substantially renewed and 11 of its 15 members were replaced. Prior to that, the Fourth High Council of Justice had failed to elect a fifteenth member of parliament elected by a qualified majority in parliament with the participation of opposition political forces. According to observers, there was no will to reach a consensus and the authorities did not provide for the inclusion of even one member with a different opinion in the council. A change in the law later reduced the quorum, and parliament elected all non-judicial members of the council by a simple majority without the participation of opposition parties.[67] This strengthened the position of the ruling party in the Council of Justice.

In this situation, the only mechanism for influencing the process of appointment of judges could be to submit a constitutional claim to the Constitutional Court. Although a bit late, the Public Defender of Georgia has appealed to the Constitutional Court against the rules for selecting candidates to be elected to the Supreme Court. This claim argues that the Council's lack of any obligation to substantiate and appeal the decision does not ensure the selection of candidates solely on the basis of good faith and competence, and that such a court cannot be construed as constitution-

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61 Judges appointed for life for first time, 28 October 2016, https://civil.ge/ka/archives/155465 (accessed: 2020.05.10).

62 Monitoring Report of the High Council of Justice, N 5, Tbilisi 2017, p. 43, https://bit.ly/3fH6jor (accessed: 2020.05.10).

63 Monitoring Report of the High Council of Justice, #7, 2019, p. 14, https://transparency.ge/sites/default/files/geo.pdf (accessed: 2020.05.10).

64 Public Initiative – Stop! 9 February 2016, https://bit.ly/35Kerji (accessed: 2020.05.10).

65 Monitoring Report of the High Council of Justice, N 5, Tbilisi 2017, p. 27, https://bit.ly/2yJTpFd (accessed: 2020.05.10).

66 Monitoring Report of the High Council of Justice, N 6, Tbilisi 2018, p. 6, https://bit.ly/3dvwdt3 (accessed: 2020.05.10).

67 "Judicial System: Reforms and Prospects" [in:] *Coalition for Independent and Transparent Justice*, ed. G. Burjanadze, Tbilisi 2017, p. 12.

al.[68] On 30 July 2020, the Constitutional Court rejected the constitutional claim. The Court clarified that the existence of several stages in the selection of candidates and the individual assessment of the good faith and competence of the candidates at all stages ensure proper decision-making and the decisions of the High Council of Justice are not substantiated because it is a collegial body.[69] In this case, four of nine judges of the Constitutional Court expressed the dissent opinion and said that the procedure for selecting judges in the High Council of Justice does not provide the council members with the necessary mechanisms for the proper selection of candidates and does not guarantee arbitrariness and impartiality.[70]

This decision of the Constitutional Court was influenced by the change in the composition of the court. Two months before the decision, two new judges were appointed[71] by the Supreme Court of Georgia to the Constitutional Court. A month earlier, the vote of these judges had become crucial to the election of the President of the Constitutional Court, and then the vote of the President was crucial to the rejection of the Supreme Court's dismissal claim. The fact that the Supreme Court appointed a judge to the Constitutional Court in an expedited manner, including during a state of emergency, which was highly criticized,[72] indicates that the Supreme Court could be interested in this outcome.

Following the court ruling, the ruling party initiated amendments to the law selecting members of the Supreme Court by open ballot,[73] which included a standard for substantiating the decision at all stages of the Supreme Court's selection process, appealing the High Council of Justice decision to the Supreme Court Qualification Chamber.[74] The changes have been criticized by NGOs monitoring reforms in the judiciary, who said the changes were fragmentary and would not change the proposed situation in the judiciary, it is necessary to reform the High Council of Justice itself to improve the procedures for the selection of Supreme Judges, including the selection

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[68] Public Defender of Georgia v. Parliament of Georgia, Constitutional Claim, N1459, 11 November 2019, https://constcourt.ge/ka/judicial-acts?legal=1904 (accessed: 2020.05.10).

[69] Public Defender of Georgia v. Parliament of Georgia, Decision of the Constitutional Court of Georgia, No 3/1/1459,1491 of 30 July 2020, https://constcourt.ge/constc/public/ka/judicial-acts?legal=9956 (accessed: 2020.09.24).

[70] Dissenting opinion of the judges of the Constitutional Court of Georgia on the decision of the Constitutional Court of Georgia No. 3/1/1459,1491 30 of July 2020, https://bit.ly/2EuCDwX (accessed: 2020.09.24).

[71] Top Court Picks Vasil Roinishvili as Constitutional Court Justice, 29 May 2020, https://civil.ge/archives/354277 (accessed: 2020.09.24).

[72] Top Court Picks Khvicha Kikilashvili as Constitutional Court Justice, 3 April 2020, https://civil.ge/archives/345485 (accessed: 2020.09.24).

[73] Irakli Kobakhidze – Voting will be open when electing members of the Supreme Court, council members will know who gave what points to whom, 18 September 2020, https://bit.ly/2G2SHX1 (accessed: 2020.09.24).

[74] Explanatory Card on the Draft Law on Amendments to the Organic Law of Georgia on Common Courts, Parliament of Georgia, September 2020, https://info.parliament.ge/file/1/BillReviewContent/261832? (accessed: 2020.09.24).

of candidates by the High Council of Justice, as well as the voting process in the Parliament of Georgiaz.[75]

4. High School of Justice

The High School of Justice, as a legal entity under public law, is established on the basis of this law. The purpose of the school is the professional training of persons to be appointed judges in the system of common courts of Georgia. The school's governing bodies are the school's independent board and the school's management. Three members of the Council are judges, one judge member and one non-judge are elected by the High Council of Justice from among its members, two members are elected by the High Council of Justice from the academic faculties of universities. A student of Justice is a person who, as a result of winning a competition, is enrolled in the school by the decision of the High Council of Justice of Georgia.

In addition to meeting other requirements, a person who has completed a full training course of the High School of Justice and is on the Justice Trainee Qualifications List may be appointed (elected) as a judge. At the same time, the law provides for exemptions from studying in the High School of Justice. Persons nominated for the position of Supreme Court judge, as well as former judges who have passed the judge qualification exam, who were appointed to the position of judge on the Supreme Court or in a district (city) or through competitions to the court of appeals and has at least 18 months of experience as a judge, are exempted from studying at the High School of Justice.[76]

In recent years, the main focus has been on the High Council of Justice, although the High School of Justice is no less important. With few exceptions, the school is a key part of preparing new staff and updating the judiciary. However, in 2013–18, the competition for judges was held only nine times and 243 judges were appointed, including 83 current judges, 88 former judges, two reserve judges, five Supreme Court judges, constitutional Court judges, and only 65 students from the High School of Justice. According to these statistics, from June 2013 to 20 August 2018, about 26.7% of the judges appointed to positions based on the results of competitions were students of the High School of Justice.[77] As we can see, the majority of candidates appointed are current or former judges.

During this period, the role of the school was very important because the term of office of large number of the judges expired, and this provided a great opportunity to

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[75] Draft Law on Common Courts is Fragmentary and Cannot Meet Challenges – Coalition, 8 September 2020, https://bit.ly/360UN4I (accessed: 2020.09.24).

[76] Organic Law of Georgia on General Courts, 4 December 2009, LHG, 41, 08/12/2009, https://matsne.gov.ge/ka/document/view/90676?publication=37 (accessed: 2020.05.10).

[77] K. Kukava, M. Orzhonia, G. Beraia, A. Chiabrishvili, S. Buadze, Professional Training of Judges System in Georgia, 2019, p. 65, https://bit.ly/2YXjb3B (accessed: 2020.05.10).

update the system. However, in the end, a number of former judges were re-appointed as judges, whose honesty and professionalism were critical. This is why the independence of the High School of Justice from the High Council of Justice is important, and the High Council of Justice should not be given a decisive role in the selection process. Such a mechanism would block the way for more than one professional who wants to work in the courts. This is why it is necessary for the High School of Justice to be authorized to appoint, conduct, and qualify students for the school qualification exam.

5. Independent Inspector's Office

The Independent Inspector's office was established on 8 February 2017, in the High Council of Justice to conduct objective, impartial, thorough investigations of the alleged disciplinary misconduct of judges and to conduct preliminary investigations. An independent inspector is elected by the High Council of Justice for a term of five years by a majority of the full members of the council. The inspector initiates disciplinary proceedings against judges, conducts investigations and submits substantiated conclusions to the High Council of Justice. If a judge faces a disciplinary charge, the High Council of Justice of Georgia makes a decision on the disciplinary action of the judge and sends the disciplinary case to the Disciplinary Board of Judges of the Common Courts, consisting of five members, three of whom are judges of the General Courts of Georgia, and two of whom are not judges. The final decision is made by the Disciplinary Board.[78]

The creation of an independent inspector was important, although the legislation failed to ensure its independence. The appointment and dismissal rules mean that the inspector is fully dependent on the High Council of Justice. Instead of a law, the procedure for selecting an inspector is determined entirely by the High Council of Justice and the election of the inspector is made only with the consent of the judge members of the Council and not with the support of a qualified majority of the members. During the third wave of judicial reform, there was a proposal to elect the independent inspector not by the Council of Justice, but by Parliament upon a nomination from the President of Georgia, but this initiative was not adopted.

In addition to the legislative gap, the competition did not ensure the election of an independent inspector. The first competition announced in 2017 was canceled. A new competition was announced in October 2017, and an independent inspector was selected. In December 2019, parliament elected an independent inspector as a permanent judge of the Supreme Court, replacing him with a new head of the Department of Political Finance Monitoring of the State Audit Office in 2013–18 and a Deputy Director of the High School of Justice from August 2019. He was also a candidate for a Supreme

[78] Organic Law of Georgia on "Amendments to the Organic Law of Georgia on Common Courts", 8 February 2017, https://matsne.gov.ge/ka/document/view/3536739?publication=0#DOCUMENT:1 (accessed: 2020.05.10).

Court judge in 2019, although the Council of Justice did not nominate him for parliament. The Council of Justice conducted closed-door interviews with independent inspectors and did not publish the selection or interview processes on its website.

6. Election of the Supreme Court of Georgia

The election of Supreme Court judges is important to ensure the independence of the judiciary in Georgia. This process started on 20 March 2015, with the election of Nino Gvenetadze as the Chairman of the Supreme Court. He was selected by the President of Georgia from 28 candidates and presented to the Parliament. Gvenetadze has been working in the judiciary since the 1990s, was a judge of the Supreme Court, and in 2005 was dismissed by the Disciplinary Board of the High Council of Justice. Gvenetadze had high hopes for the reform of the judiciary. Although suddenly in 2018, the chairman of the Supreme Court resigned.[79] Gvenetadze cited his health as the reason for leaving the post; however, this reason was unbelievable. In fact, there was controversy and pressure on him from members of the Council of Justice and certain groups of judges.[80] After his resignation, the President of Georgia began extensive consultations to select a new chairman of the court.[81] However, the parliamentary majority did not participate in the discussion, no consensus was reached, and no candidate was named.[82] The president's decision was criticized strongly by the NGO coalition.[83]

The constitutional reform implemented in 2017–18 affected the structure and powers of the Supreme Court of Georgia. As a result of the changes, the number of Supreme Court judges increased from 16 to 28, appointment for life was introduced, and the High Council of Justice was given the power to nominate candidates submitted to parliament. Prior to the constitutional amendments, the Speaker of the Supreme Court of Georgia and the judges of the Supreme Court were elected by parliament for a term of at least ten years upon the recommendation of the President of Georgia.[84] Under the new process, the High Council of Justice openly selects candidates for the first time, determines the applicants' compliance with the minimum requirements, establishes a short list of candidates by secret ballot, verifies the accuracy of the data provided, and conducts individual public interviews with candidates. Board members

[79] The resignation letter of the Supreme Court of Georgia and the Chairman of the High Council of Justice Nino Gvenetadze, 2 August 2018, http://www.supremecourt.ge/news/id/1769 (accessed: 2020.05.10).

[80] Illness or Coercion: Why did Nino Gvenetadze resign? RFE/RL, 2 August 2018, https://bit.ly/35liGBP (accessed: 2020.05.10).

[81] President of Georgia on the Supreme Court chairperson's resignation, 2 August 2018, http://web2.rustavi2.ge/ka/news/110488 (accessed: 2020.05.10).

[82] The president will no longer nominate a candidate for the Supreme Court, 24 August 2018, https://netgazeti.ge/news/300017/ (accessed: 2020.05.10).

[83] The Coalition Calls on President to Change the Decision to Refuse Chairperson of the Supreme Court Decision 31 August 2018, https://bit.ly/2xUjmSk (accessed: 2020.05.10).

[84] The Constitution of Georgia of 24 August 1995…

then evaluate the candidates and rank them by secret ballot. Each candidate with the highest scores is re-elected by secret ballot. The list of candidates who receive at least two-thirds of the total number of votes are submitted to parliament. After this process, a public interview with each candidate takes place in the Parliamentary Committee. Candidates who receive the majority of votes in parliament are appointed as judges.[85]

This rule gave special power to the High Council of Justice. In 2018, the High Council of Justice came to the attention of the public. On 24 December 2018, the Council chose ten candidates as lifetime judges on the Supreme Court. The decision was not accompanied by any documents, including brief information about the candidates. All ten candidates were current judges, and two of them were also members of the High Council of Justice. The decision was particularly condemned by non-judge members Anna Dolidze and Nazi Janezashvili,[86] who asked to the Parliament to make changes so that a candidate for Supreme Court justice must be selected by consensus in the Council of Justice. At the same time, NGO coalition[87] and the Ombudsman[88] were against the decision. The nomination was made under conditions in which there was no legislation that defined the criteria and procedures for selecting candidates and without consulting the relevant stakeholders.[89] After the protest, the Chairman of the Parliament stated that the selection of the judges would be conducted in accordance with the pre-set procedure and criteria.[90] The ten judges of the Supreme Court rejected their candidacy.[91] It was announced that in 2019 that the law would set up judge selection criteria for the list of judges.[92]

Although some changes were made in the legislation, in 2019 this process did not go smoothly. On 10 May 2019, the High Council of Justice started the process of selecting candidates for the Georgian Parliament, which lasted almost four months. It ended on 4 September 2019, with the publication of a list of 20 candidates who had to be submitted to parliament for approval. This was controversial in the parliamentary majority itself. Eka Beselia, chairwoman of the legal committee, protested against the list and the non-transparency of the procedure for approving judges citing that there

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85 *Ibidem*.

86 Nazi Janezashvili and Ana Dolidze demand to change the rule of nominating a judge, 29 December 2018, https://bit.ly/3iZZHTh (accessed: 2020.05.10).

87 Coalition for "Independent and Transparent Judiciary" responds to the developments in the court and initiates the campaign "I want Wendo Court", 1 March 2018, https://bit.ly/2VECZXw (accessed: 2020.05.10).

88 Ombudsman demands to stop the process of reviewing judges of the supreme judiciary, 26 December 2018, http://pirveliradio.ge/index.php?newsid=119158 (accessed: 2020.05.10).

89 Report of the First Stage of Presentation and Appointment of Judges of the Supreme Court of Georgia, June-September 2019, ODIHR, p. 7, https://www.osce.org/ka/odihr/429491?download=true (accessed: 2020.05.10).

90 Parliament will discuss at the spring session of the Supreme Court Judges, 26 December 2018, https://civil.ge/ka/archives/272474 (accessed: 2020.05.10).

91 The 10th Supreme Court Judge addresses the Parliament and does not consider their candidates, 21 January 2019, https://bit.ly/2KEnybr (accessed: 2020.05.10).

92 The new criteria will be submitted to the Parliament by the renewed list of judges, 12 January 2019.

were candidates on the list who had been doing political work during the previous government. She then resigned from the post of chairman of the legal committee[93] and then the ruling party.

Public hearings of candidates in parliament revealed many shortcomings and showed that the majority of them did not even meet the minimum criteria of qualification and professional integrity. Nevertheless, the Georgian Parliament appointed 14 candidates to the Supreme Court of Georgia for life. These appointments were made without the participation of the opposition and in the wake of protests by civil society organizations. In fact, the ruling party completed the Supreme Court of Georgia in a one-party manner, which can be described as an attempt to influence the court.[94]

The process of selecting judges was flawed by the legislation, which was criticized by the Organization for Democracy and Human Rights (OSCE/ODIHR)[95] and the Venice Commission.[96] Among other issues, it was very important to substantiate the decision of the High Council of Justice, the right to appeal to the court, the conflict of interest between the members of the Council and the candidates for judges.[97] The selection of candidates by the Council by secret ballot undermined the merit-based selection system.[98] Under these conditions, significant irregularities were observed during the selection process. For example, five candidates did not have master's degrees. The Council of ten members acted in a coordinated fashion, and the secrecy of the ballot, evaluation did not achieve the goal of transparency and impartiality of the selection process. There was manipulation of voting points due to unreasonableness, conflicts of interest among members and candidates based on ties of relationship, and more.[99] The Venice Commission criticized the lack of justification and appeal.[100] The ombudsman

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93 Eka Beselia resigns as chair of the legal committee, 27 December 2018, https://bit.ly/2KJu5S5 (accessed: 2020.05.10).

94 M. Nakashidze, "Georgia – The State of Liberal Democracy" [in:] *2019 Global Review of Constitutional Law*, eds R. Albert, D. Landau, P. Faraguna and S. Drugda, *Blog of the International Journal of Constitutional Law*, the Clough Center for the Study of Constitutional Democracy at Boston College 2020.

95 Conclusion on the appointment of judges of the Supreme Court of Georgia on the draft amendments, Warsaw, 17 April 2019, Conclusion # JUD-GEO/346/2019, https://bit.ly/2oUYqWf (accessed: 2020.05.10).

96 Urgent Opinion on the Selection and Appointment of Supreme Court Judges, The Venice Commission, Strasbourg, 24 June 2019, Opinion No. 949/2019, CDL-AD(2019)009, https://bit.ly/30qSvpE (accessed: 2020.05.10).

97 Urgent Opinion on the Selection and Appointment of Supreme Court Judges, The Venice Commission, Strasbourg, 24 June 2019, Opinion No. 949/2019, CDL-AD(2019)009, https://bit.ly/30qSvpE (accessed: 2020.05.10).

98 Conclusion on the appointment of judges of the Supreme Court of Georgia on the draft amendments, Warsaw, 17 April 2019, Conclusion # JUD-GEO/346/2019 https://bit.ly/2oUYqWf (accessed: 2020.05.10).

99 Monitoring Report on Selection of Candidates for Judges of the Supreme Court of Georgia by the High Council of Justice, Public Defender of Georgia, 2019 https://bit.ly/3bUmaNK (accessed: 2020.05.10).

100 Urgent Opinion on the Selection and Appointment of Supreme Court Judges, The Venice Commission, Strasbourg, 24 June 2019, Opinion No. 949/2019, CDL-AD(2019)009, https://bit.ly/30qSvpE (accessed: 2020.05.10).

also considered that the decisions of the council were biased in terms of integrity and the evaluation of competency.[101]

In addition to the appointment of judges, the issue of electing the leadership of the Supreme Court is important. As I have mentioned, after the resignation of Nino Gvenetadze, the new candidate for the post of the Chairman of the Supreme Court was not nominated and from 2 August 2018, to 17 March 2020, the Deputy Chairperson Mzia Todua was acting chairman of the court. Before the Supreme Court, she was a judge of one of the district courts from the Soviet period 1985–98, and chairman of the Chamber of the Court of Appeals in 1999–2005. In 2006–12, she was the head of the legal department of Bidzina Ivanishvili's Kartu Group, the chairman of the ruling party. After the Georgian Dream came to power, she was elected a member of the Supreme Court of Georgia in 2015.

Shalva Tadumadze, former Chief Prosecutor of Georgia, became the second Deputy Chairman of the Supreme Court and held this position in 2018–19 until his appointment for life to the Supreme Court. Prior to that, he was an independent lawyer at various times and, in 2008–12 he had his own law firm and was also the lawyer of Bidzina Ivanishvili, the leader of Georgian Dream. After Georgian Dream came to power, he was the Parliamentary Secretary of the Government of Georgia in 2012–18. Tadumadze has been criticized for accusing the former mayor of Tbilsi and then as a Supreme Court judge, he sentenced him and sent him back to prison. This was considered to be a violation of the right to a fair trial guaranteed by the Constitution. He was also involved in a scandal regarding a diploma proving his education. NGOs claimed that Tadumadze had no relevant education. Higher legal education is necessary not only for judges on the Supreme Court, but also for prosecutors, and the lack of appropriate education renders the Attorney General an unauthorized person and a thorough investigation is necessary.[102]

Initially, it was known that Tadumadze would be elected chairman of the Supreme Court, which sparked protests. Eventually, Nino Kadagidze was elected chairman of the Supreme Court. Kadagidze was a judge of the Court of Appeals in 2000–02, and a Supreme Court judge in 2002–12. After the expiration of his ten-year term, he was reappointed, and in 2013–19 he was a judge on the Court of Appeals. In December 2019 he was elected a judge of the Supreme Court for life, and on 17 March 2020, he became the chairman of the Supreme Court for a ten-year term. However, at the same time, the former General Prosecutor has become the deputy chairman of the Supreme Court and chairman of the Criminal Cassation Chamber, and the second deputy chairman, Mzia Todua, is the chairman of the Chamber of Civil Cases.

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[101] Monitoring Report on Selection of Candidates for Judges of the Supreme Court of Georgia by the High Council of Justice, Public Defender of Georgia 2019, p. 41 https://bit.ly/3bUmaNK (accessed: 2020.05.10).

[102] Coalition for Independent and Transparent Justice – It is necessary to investigate the authenticity of Shalva Tadumadze's diploma, 18 October 2019, https://bit.ly/35NSPm4 (accessed: 2020.05.10).

7. Prospects of Independence of the Judiciary in Georgia

According to a 2020 report by Freedom House in, Georgia's Democracy Index is slightly worse than last year at 3.25 out of 3.29 points, and this deterioration is due to the independence of the judiciary. Freedom House reports that despite ongoing judicial reforms, executive and legislative interference in the courts remains a substantial problem, as does a lack of transparency and professionalism surrounding judicial proceedings. Oligarchic influence affects the country's political affairs, policy decisions, and media environment, and the rule of law is undermined by politicization.[103] The ruling majority in parliament granted lifelong tenure to 14 judges on the country's Supreme Court following a "highly dysfunctional and unprofessional" appointment process.[104]

All the opposition parties and non-governmental organizations that observe the independence of the judiciary agree that the current government has gained political influence over the judiciary and has done nothing for its independence. A large number of opposition parties are in favor of radical changes in the courts after the change of government, and hopes are pinned on the 2020 parliamentary elections. They hope that the ruling party will lose the election and that the parties are planning joint judicial reform. About 20 opposition parties have signed a memorandum on judicial reform. The signatory political parties agree that after the defeat of Georgian Dream in the parliamentary elections of 2020, they will carry out reforms to achieve real judicial independence and to build confidence in the judiciary quickly.

According to the text of the memorandum, the parties agree to: 1) introduce juries for grave and particularly grave crimes during the first year of the reform and for all offenses involving imprisonment within the subsequent four years; 2) introduce of the election of judges in the first instance before the end of 2021; 3) through constitutional amendments, terminate the powers of the current members of the High Council of Justice, unify the Supreme and Constitutional Courts, and repeal all acts of appointment of judges from 2017; 4) appoint judges from the United States and the United Kingdom to the Supreme Court and Court of Appeal for long periods, which should be the majority of all possible panels; 5) recognize US Supreme Court decisions as case law in cases relating to freedom of speech, as well as disputes between the state and businesses or citizens (civil or administrative).[105]

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[103] Freedom House in the World 2020, Georgia, F Rule of Law, https://freedomhouse.org/country/georgia/freedom-world/2020#PR (accessed: 2020.05.10).

[104] Nations in Transit 2020, Dropping the Democratic Façade, p. 7, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf (accessed: 2020.05.10).

[105] Opposition parties sign memorandum on judicial reform, 13 March 2020, Interpressnews, https://bit.ly/2SSbLeb (accessed: 2020.05.10).

Conclusions

To summarize, without some fundamental changes, it will be impossible to achieve effective results for ensuring the independence of the judiciary. It is true that the opposition parties have agreed on the main issues of the changes, but there is considerable resistance to these proposals, and there are differences of opinion among the opposition parties themselves.

One of the most important issues will be the election of 14 members of the Supreme Court of Georgia. If we recall the process of election of the Supreme Court in 2019, it will be crucial for judicial independence to fill the court with professional, conscientious judges through a transparent procedure.

In order to ensure the independence of the judiciary, it is necessary to redistribute the powers of the High Council of Justice in such a way that it ensures independence from the government while retaining internal independence and accountability.

It will be important to implement legislative changes that will allow the judiciary to be updated with new judges. Primarily, this concerns the selection of judges from among graduates of the High School of Justice, which today, as we have seen, is limited. It is important to note that according to recent changes, students will be admitted to the school by the High School of Justice and not by the High Council of Justice.

It is important to ensure the real Independence of the independence inspector from the High Council of Justice. An official who initiates disciplinary proceedings against judges and conducts inspections and investigations cannot be under the full control of the High Council of Justice.

The Constitutional Court of Georgia rejected a claim of the constitutionality of the rule of selecting judges for the High Council of Justice, which provides for making decisions using secret ballots, does not require reasoned decisions, and does not allow decisions to be appealed. After rejecting this claim, the process of the fair selection of judges will be much more dependent on legislative changes that will be adopted after the new parliamentary elections to be held on 31 October 2020.

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Summary

Malkhaz Nakashidze

Contemporary Challenges Facing Judicial Independence in Georgia

This article analyses the ongoing processes in the judicial system of Georgia and the main challenges facing the country in ensuring the independence of the judiciary. In the article, the author reviews the legislative changes made in the system of common courts, as well as the legal and political aspects of the renewal of the composition of the courts. The article focuses on how the decisions made by government affected the independence of the judiciary. From this point of view, the results of several so-called waves of judicial reform and the peculiarities of the creation of new mechanisms, such as the temporary state commission on miscarriages of justice, are analyzed. The article also discusses the status of the High Council of Justice and the rules of formation and their roles in ensuring the independence of the judiciary and the problems related to the appointment of judges for life. Finally, appropriate proposals and recommendations are presented to ensure the independence of the judiciary in Georgia.

Keywords: Georgia, judicial independence, courts, the High Council of Justice

Streszczenie

Malkhaz Nakashidze

Współczesne wyzwania stojące przed niezależnością sądownictwa w Gruzji

Artykuł został poświęcony analizie procesów zachodzących w sądownictwie Gruzji oraz głównym wyzwaniom, które stoją przed tym krajem w zakresie zapewnienia niezawisłości wymiaru sprawiedliwości. Autor analizuje zmiany legislacyjne dotyczące ustroju sądów powszechnych, a także prawnych i politycznych aspektów odnawiania składu, koncentrując się na wpływie podjętych przez rząd decyzji na niezawisłość sądownictwa. Z tego punktu widzenia analizowane są wyniki kilku tzw. fal reform wymiaru sprawiedliwości oraz specyfika tworzenia nowych mechanizmów, takich jak tymczasowa państwowa komisja ds. pomyłek sądowych. W artykule omówiono również status Naczelnej Rady Sądownictwa oraz zasady jej powoływania, jak również rolę tego organu w zapewnieniu niezawisłości wymiaru sprawiedliwości. Autor odniósł się również do problemów związanych z dożywotnim powoływaniem sędziów. W konkluzjach przedstawione zostały propozycje i zalecenia zmierzające do zapewnienia niezależności sądownictwa w Gruzji.

Słowa kluczowe: Gruzja, niezależność sądownictwa, sądy, Naczelna Rada Sądownictwa

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Contemporary Problems of the Judicial Power in Poland

Introduction

Since 2015, the political situation in Poland has changed significantly. This is strictly due to the fact that for the first time in independent Poland as a result of the presidential and parliamentary elections held in 2015 the executive and legislative powers were concentrated in the hands of the same political party. In subsequent years, the ruling party introduced a number of constitutional reforms which aroused much controversy from the point of view of their compliance with the provisions of the Polish Constitution of 1997.[1] The reforms implemented concerned many aspects of public life (public media, freedom of assembly, etc.); however, the most essential ones affected judicial power. In fact, successive elements of the third power were "reformed" one by one in subsequent years. This process began as early as in 2015 with regard to the Constitutional Tribunal. The reforms implemented two years later focused on the common courts, the Supreme Court and the National Council of the Judiciary. The problems of the "third power", which have specific consequences for citizens, have been one of the leading topics in public discussion in Poland. Debate on these issues, especially in the context of the violation of the rule of law in Poland, has also spread beyond Polish borders. Given the international character of this issue of *Gdańsk Legal Studies* and the fact that it is also addressed to foreign readers, it is important to discuss the main problems that the judiciary in Poland has been struggling with for almost five years.

One of the fundamental principles of the Polish constitutional system is that of the division and balance of powers. Article 10 par. 1 of the Constitution *expressis verbis* provides that "The system of government of the Republic of Poland shall be based on the division of and balance between legislative, executive and judicial powers" and then in par. 2 of this article indicates that judicial power shall be vested in courts and tribunals. The Constitutional Tribunal has several times pointed out that the constitutional requirement of the division of powers should be treated more strictly in regard to the judiciary than in case of other powers.[2] The "separateness" of the judiciary is strength-

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483).

[2] This is justified by the particular connection between the judiciary and the protection of human rights and freedoms.

ened by art. 173 of the Constitution, which states that courts and tribunals shall be separate and independent from other authorities. At the same time, it emphasizes that the principle of the independence of courts and the principle of their separation allow for interference by other authorities only in the non-judicial sphere of court activities and also require certain procedural guarantees, e.g., in regard to the free assessment of evidence.

Constitutional Tribunal

Constitutional regulation of the Constitutional Tribunal is provided for in chapter VIII (art. 188–197) of the current Constitution. In addition to its primary function that is the constitutional review of law, the Polish Constitutional Tribunal also performs several other functions such as deciding on the conformity to the Constitution of the purposes or activities of political parties, considering constitutional complaints, settling competence disputes between central constitutional organs of the state and stating the President's temporal inability to hold the office.[3] Its judgements are universally binding and final (art. 190 par. 1) and they are subject to immediate publication in the official journal of laws in which the original normative act was promulgated (art. 190 par. 2). The Constitutional Tribunal consists of fifteen judges elected individually by the Sejm for nine years. The President and the Deputy President of the Tribunal are appointed by the President of the Republic from among candidates presented to him/her by the General Assembly of Judges of the Constitutional Tribunal. The judges of the Tribunal are also independent in the exercise of their office and are subject only to the Constitution. The organization of the Tribunal and proceedings before the Tribunal are determined by statue.

This constitutional background is essential to understanding the constitutional crises surrounding the Tribunal that happened in several steps. The first one concerned its composition. On 25 November 2015, just after parliamentary elections, the new parliamentary majority stated the lack of the legal force of five resolutions of the Sejm of the previous term of office on the choice of judges to the Constitutional Tribunal and appointed five new judges for these seats. In any case, none of the judges elected by the previous Parliament prior to this could perform their duties as they were blocked by the President of the Republic who refused to take oaths from them. At the same time, the President immediately took oaths from the newly appointed judges. This aroused much controversy as on the very next day the Constitutional Tribunal ruled[4] that the appointment of two of the five judges by the previous Sejm was based on law that was inconsistent with the Constitution therefore the newly elected parliament was entitled to choose only two judges for these vacancies. As the other three

[3] See more: A. Rytel-Warzocha, "The role and scope of powers of the Constitutional Tribunal in Poland" [in:] *Proceedings of The International Conference, European Union's History, Culture and Citizenship* 2018, vol. 11, p. 335 *et seq*.

[4] Judgment of the Constitutional Tribunal of 3 December 2015, K 34/15.

"judges" appointed by the Sejm of the new term were *de facto* appointed to already legally occupied seats, the President of the Constitutional Tribunal did not allow them to adjudicate. Their problem was "resolved" when Justice Andrzej Rzepliński ended his term of office on 20 December 2016 and Justice Julia Przyłębska (appointed to the Tribunal in December 2015) was elected as the President of the Tribunal. In subsequent years when seats in the Tribunal were vacated, the Sejm of the 8th term successively appointed new judges with the omission of the three judges legally appointed by the Sejm of the 7th term. As the President of the Republic of Poland still had not taken their oaths, they were in a kind of "suspended" state. On the other hand, the presence of three judges appointed to seats that were already occupied provoked a discussion over the correct formation of adjudication panels and, consequently, the legality of judgements passed by the Constitutional Tribunal. At present (September 2020), fourteen of the fifteen active adjudicating judges of the Constitutional Tribunal were appointed by the Sejm of the 8th term elected in 2015.

Serious doubts were also raised in regard to the appointment of the new President of the Constitutional Tribunal as the presentation of the candidates for that office to the President, which took place on 20 December 2016, was based on non-binding regulations that came into force on 3 January 2017. Additionally, the presentation of candidates for this office to the President was not preceded by the resolution of the General Assembly of Judges of the Constitutional Tribunal that is required by law.

Another aspect of the constitutional crises regarding the Constitutional Tribunal concerned a series of so-called "recovery laws". Between December 2015 and November 2016 the parliament adopted six laws amending or introducing entirely new regulations concerning the Constitutional Tribunal. The amendment adopted on 22 December 2015[5] introduced a set of procedural rules that were considered unconstitutional by the Constitutional Tribunal[6] mainly because their implementation would block the possibility of adjudication by the Tribunal (e.g., it obliged the Tribunal to consider most cases by a full bench of at least 13 judges, extended time limits, introduced the rule that cases should be adjudicated in the order of their receipt without taking into account their importance). Because of the lack of the relevant *vacatio legis*, the Tribunal was forced to adjudicate mainly on the basis of directly applicable provisions of the Constitution and applied the law on the Constitutional Tribunal in the wording before the amendment. In response to this judgement, the government refused to publish it in the official journal of laws assuming that the ruling issued by the Tribunal was not "a judgment" because it was not issued on the basis of the newly adopted provisions. The government consistently refused to publish the Tribunal's judgements issued between March and July 2016.[7] In the face of the critical assessment both of

[5] The Act of 22 December 2015 on the amendment of the Act on the Constitutional Tribunal, Official Journal of Laws, item 2217.

[6] Judgement of the Constitutional Tribunal of 9 March 2016, not published.

[7] About the problems that resulted from the government's refusal to publish the judgements of the Constitutional Tribunal issued between March and July 2016 see: A. Rytel-Warzocha, "The dispute over the Constitutional Tribunal in Poland and its impact on the protection of constitutional rights and freedoms" [in:] *International Comparative Jurisprudence* 2017, vol. 3, no. 2, p. 153 *et seq*.

the new solutions and the manner of their implementation (among others by the Venice Commission[8] and the European Parliament[9]), in July 2016 a new Act on the Constitutional Tribunal was adopted[10]. The problem of not publishing the judgements of the Constitutional Tribunal was partly solved by this law as it obliged the government to publish them with the exception of those referring to acts that had already ceased to apply. Therefore, three important judgements[11] concerning the unconstitutionality of the amendments to the Act on the Constitutional Tribunal have not been published to date. In November 2016 the act of July was replaced by two new acts concerning the status of the judges of the Constitutional Tribunal, its organization and the mode of proceedings before the Tribunal[12] which are still in force. At present, there are serious doubts as to whether the Constitutional Tribunal is performing its basic function of conducting the constitutional review of law. It is also very disturbing that the current situation has generated a very significant decrease in the public's trust in institutions and in the status and role of the Constitutional Tribunal as such.[13]

The Supreme Court

The Supreme Court exercises supervision over common and military courts regarding judgments in order to ensure the legal compliance and uniformity of court rulings. It also examines cassations and other appeals against decisions of these courts in

[8] In its two opinions about the new regulations considering the Constitutional Tribunal, the Venice Commission referred to them as "legislative obstruction". In the conclusions it indicated that the Polish legislator did not meet two basic standards of the balance of power – the independence of the judiciary and the position of the Constitutional Tribunal as a final arbitrator in constitutional matters. See: Opinion 833/2016 for Poland on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal adopted by the European Commission for Democracy Through Law (Venice Commission) on 11 March 2016; Opinion 860/2016 for Poland on the Act on the Constitutional Tribunal adopted by the European Commission for Democracy Through Law (Venice Commission) on 14 October 2016, CDL-AD(2016)026.

[9] European Parliament resolution of 13 April 2016 on the situation in Poland (2016/3031(RSP)), European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)).

[10] The Act of 22 July 2016 on the Constitutional Tribunal (Journal of Laws, item 1157).

[11] Judgements of the Constitutional Tribunal issued in cases K 47/15, K 39/16 and K 44/46.

[12] The act of 30 November 2016 on the status of the judges of the Constitutional Tribunal (Journal of Laws, item 2073); the Act of 30 November 2016 on the organisation and the mode of proceedings before the Constitutional Tribunal (Journal of Laws, item 2072).

[13] These problems have been noticed both at home and abroad. At the beginning of 2020, the European Commission spokesman Christian Wigand stated that the independence and legitimacy of the Constitutional Tribunal in Poland has been "seriously undermined" and that it can no longer issue an "effective constitutional judgment", while Prof. Wojciech Sadurski bluntly pointed out that "There is no longer any Constitutional Tribunal in Poland. There is a dummy, a façade. There is only a building with the inscription: Constitutional Tribunal," https://polskatimes.pl/siedem-grzechow-glownych-polskiego-wymiaru-sprawiedliwosci/ar/c1-14759822 (accessed 2020.09.23).

accordance with the provisions of procedural law (complaints about the resumption of proceedings, the length of proceedings, the non-compliance of the final rulings with law and other complaints). The Supreme Court also performs other duties specified in the Constitution and statutes, in particular those concerning elections and referendums. It recognizes electoral protests and confirms the validity of parliamentary elections, the elections to the European Parliament and the election of the President of the Republic, and it also recognizes protests against referendums and confirms their validity. Additionally, the Supreme Court provides opinions on the drafts of statutes and other normative acts concerning the adjudication and operation of courts and settles discrepancies in the interpretation of law revealed in the case law of common courts, military courts and its own. The Supreme Court is composed of the First President, Presidents and judges. The First President of the Supreme Court is appointed by the President of the Republic for a six-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court (art. 183 para. 3 of the Constitution). The First President of the Supreme Court is *ex officio* the Chairman of the Tribunal of State and a member of the National Council of the Judiciary.

Currently, a detailed regulation concerning the Supreme Court is provided for in the act of 8 December 2017 on the Supreme Court.[14] The circumstances of its adoption were quite controversial. The draft of the new act on the Supreme Court submitted to the parliament on 12 July 2017[15] as a "necessary element of wider judicial reform" was proceeded by the parliament for only eight days and was adopted on 20 July 2017. However, on 31 July 2017 the President of the Republic refused to promulgate the act and returned it to the Sejm for reconsideration (according to the constitutional right of the President to veto acts before their promulgation provided for in art. 122 of the Constitution). It should be emphasized that the President mainly pointed out that the adoption of the act on the Supreme Court had not been preceded by consultations or a comprehensive discussion. He also had doubts whether the functioning of the Supreme Court should be dependent on the discretionary powers of the Minister of Justice who, since 2016,[16] has also been the General Prosecutor. The new regulations increased enormously the influence of the Minister of Justice – General Prosecutor on the activities of the Supreme Court. It must be remembered that the Minister of Justice, who is a member of the government, as the General Prosecutor became a party to a series of proceedings before the Supreme Court and also obtained the right to interfere in other court proceedings by giving written instructions to all public prosecutors concerning the content of any individual case they are dealing with. The Minister of Justice – General Prosecutor also obtained discretionary power (there were no criteria

[14] The Act of 8 December 2017 on the Supreme Court (unified text: Journal of Laws 2019, item 825, with amendments).

[15] Document no. 1789 of the Sejm/VIII term of office.

[16] In January 2016 an Act on the Public Prosecutor's Office was adopted which strengthened the competences of the Minister of Justice whose office was merged with the Prosecutor General. The amendment entered into force on 4 March 2016; the Act of 28 January 2016 – Law on the Public Prosecutor's Office (Journal of Laws, item 177).

specified) to indicate which of the Supreme Court's judges appointed on the basis of the existing provisions should not retire at the age of 65. The participation of the President in making such decisions was only illusory as he could only approve or refuse the extension of the term of office in regard to judges indicated by the Minister, without the right to decide on other judges. Because the President's veto was not rejected by the Sejm (in fact no vote was taken on this matter), on 26 September 2017 the President submitted to the parliament a new draft of the Act on the Supreme Court. It was adopted on 20 December 2017 and entered into force in March 2018.

The new law introduced essential changes both to the status of judges and the organization of the Supreme Court. Among others, it lowered the retirement age from 70 to 65 years, which resulted in the forced retirement of 27 judges of the Supreme Court. The new law also established two new Chambers of the Supreme Court: the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber.[17] The first one was set up to discipline Polish judges, in particular to punish those who were critical of controversial court reforms. Its jurisdiction included disciplinary cases concerning Supreme Court judges, lawyers, notaries, legal advisors, military and common court judges, prosecutors, as well as labor and social security cases concerning Supreme Court judges including those related to their retirement. The Extraordinary Control and Public Affairs Chamber was to consider extraordinary complaints, consider protests against the validity of elections and nationwide referendums, confirm the validity of elections and referendums, consider other public law matters, including matters concerning the protection of competition, the regulations of energy, telecommunications and rail transport, cases in which an appeal is lodged against the decision of the Chairman of the National Broadcasting Council, as well as complaints regarding the length of proceedings before common and military courts and the Supreme Court.

Controversies regarding the establishment of these chambers, in particular the scope of jurisdiction granted to the Disciplinary Chamber, were reinforced by the fact that the judges for the new Chambers were appointed by the National Council of the Judiciary composed according to new rules introduced in 2017, which made that authority dependent on the governing party. Ten new judges of the Disciplinary Chamber were appointed by the President of the Republic in September 2018, and in February 2019 the President appointed the heads of the two new chambers.

The new law on the Supreme Court sparked much controversy, and not only in Poland. On 16 January 2018, the General Assembly of the Supreme Court passed a resolution in which it stated that the new Act on the Supreme Court (similarly to the Act on common courts and the Act on the National Council of the Judiciary) were proceeded and adopted in violation of the basic rules of a legislative procedure, without due consultations, disregarding submitted legal opinions. The Court pointed out that the new regulations were in many aspects inconsistent with the current Constitution of the Republic of Poland, in particular they violated the fundamental principles of the divi-

[17] Before that the Supreme Court was composed of three chambers: the Civil Chamber, the Criminal Chamber and the Labor Law and Social Security Chamber.

sion of powers and the independence of courts and judges. It also pointed out that the new law on the Supreme Court could not shorten the constitutionally determined six-year term of the First President of the Supreme Court (which was to expire at the end of April 2020).

As early as in the stage of legislative work, the First President of the Supreme Court presented an opinion on the presidential draft of the Act on the Supreme Court, in which she pointed out the dangers resulting from the implementation of the proposed regulation.[18] The Court noticed that the real purpose of the new regulations were to conduct the "de-communization" of the part of its composition and at the same time to introduce the disciplinary liability of judges which would result in the termination of their terms of office. Additionally, the Supreme Court stated that the new law was also supposed to verify the previous case law of the Supreme Court by means of an "extraordinary complaint" (the law allowed challenging decisions adopted after 1997), to exclude the possibility of conducting a dispersed constitutional review of law by the common courts and the Supreme Court and to remove, both in future and retroactively, decisions related to electoral matters, including the confirmation of the validity of elections. It should be noted that the possibility to verify legally valid court decisions made before the entry into force of the act would open the possibility of bringing disciplinary liability against judges who participated in issuing such judgments. The Supreme Court stated that the new Chambers of the Supreme Court are Chamber "only by name" and *de facto* "they constitute two separate and independent courts – unknown to the Constitution – that will exercise control over common courts and the Supreme Court."

Referring to the Act on the Supreme Court, the Venice Commission in its opinion of 11 December 2017[19] formulated the following critical remarks:

> The creation of two new chambers within the Supreme Court (Disciplinary Chamber and Extraordinary Chamber), composed of newly appointed judges, and entrusted with special powers, puts theses chambers above all others and is ill-advised. The compliance of this model with the Constitution must be checked; in any event, lay members should not participate in the proceedings before the Supreme Court;
> The proposed system of the extraordinary review of final judgments is dangerous for the stability of the Polish legal order. It is in addition problematic that this mechanism is retroactive and permits the reopening of cases decided long before its enactment (as from 1997);

[18] Opinion on the draft of the Act on the Supreme Court submitted by the President of the Republic of Poland presented by the First President of the Supreme Court Prof. dr hab. Małgorzata Gersdorf on 16 October 2017. As the draft submitted by the President was not substantially changed during the legislative work, the remarks formulated in this opinion can be also referred to the Act on the Supreme Court adopted on 8 December 2017.

[19] Opinion no. 904/2017 concerning Poland of the European Commission for Democracy Through Law (Venice Commission) on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organisation of ordinary courts adopted by the Venice Commission at its 113th Plenary Session on 11 December 2017; CDL-AD(2017)031.

The competency for the electoral disputes should not be entrusted to the newly created Extraordinary Chamber;
The early removal of a large number of justices of the Supreme Court (including the First President) by applying to them, with immediate effect, a lower retirement age violates their individual rights and jeopardises the independence of the judiciary as a whole; they should be allowed to serve until the currently existing retirement age;
The President of the Republic as an elected politician should not have the discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age;
The five candidates to the positions of the First President of the Supreme Court, presented to the President of the Republic, should all have a significant support of the General Assembly of judges;
The Act should limit the discretion of the First President in the matters related to the distribution of cases and assigning judges of the Supreme Court to the panels.

In 2018 the European Commission brought proceedings against Poland to the Court of Justice of the European Union. The case was about the consistency with European law of the rule adopted in December 2017 that judges of the Polish Supreme Court shall enter retirement upon reaching 65. However, if their health allowed they could continue active service in the Court upon the consent of the President of Poland. This rule was also to be applied immediately to judges already in office. In the meantime, the regulation concerning the retirement age of the judges that was being challenged was amended.[20] According to the new wording of art. 37 par. 1 of the Act on the Supreme Court, "a judge of the Supreme Court retires on the day he/she turns 65." However, it was clearly indicated that this provision applies only to the Supreme Court judges who took office after 1 January 2019 when the amendment entered into force. Supreme Court judges who took office before that date are subject to the earlier provisions establishing the retirement age of 70. Additionally, the new law allowed for the return of judges who had been subject to the provisions on lowering the retirement age with immediate effect to the position held on the date of entry into force of that law. Their terms as judges of the Supreme Court shall be deemed uninterrupted. Although the provisions challenged by the Commission were repealed, the Commission maintained its complaint, and the case was considered by the Court of Justice of the European Union, which issued a judgement on 24 June 2019.[21] The Court formulated the requirements of judicial independence and pointed out that "the principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term".

[20] The Act of 21 November 2018 on the amendment of the Act on the Supreme Court (Journal of Laws, item 2507). It entered into force on 1 January 2019.

[21] Judgement of the Court of Justice of the European Union of 24 June 2019, European Commission v Republic of Poland, case C-619/18.

Common courts

Common courts in Poland are established and closed by the Minister of Justice pursuant to opinions from the National Council of the Judiciary. The detailed regulation of common courts is covered in the act of 27 July 2001 – Law on the system of common courts.[22] According to the Constitution (art. 178–180), judges of common courts, are appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary, for an unspecified period of time. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. They cannot belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of courts and judges. Judges shall not be removable. The recall of judges from office, suspension from office, transfer to another adjudication panel or position against their will, can occur only by virtue of a court judgment and only in those instances prescribed in the statute. Judges can be retired as a result of illness or infirmity which prevents them from discharging the duties of their office according to the procedure determined by the statute.

On 12 April 2017, a group of deputies from the ruling party submitted a draft amendment to the Law on the system of common courts,[23] which was adopted by the Sejm three months later. The legislative proceedings were accompanied by extremely sharp legal arguments. The proposed solutions were assessed critically by the Supreme Court, the Supreme Bar Council, the National Council of the Judiciary, the Institute of Legal Sciences of the Polish Academy of Sciences, the State Treasury Solicitor's Office and the National Chamber of Legal Advisors,[24] as well as several experts who submitted their opinions to the Analysis Office of the Chancellery of the Sejm.[25] The entry into force of the new law in August 2017 resulted in the strengthening of the administrative supervision of the Minister of Justice over the activities of common courts. In particular, the Minister obtained the arbitrary right to appoint and dismiss presidents and deputy presidents of courts – within six months from the date of the entry into force of the act – without a statutory determination of that conditions which should be taken into account by the Minister of Justice. The new law also established a new office of the Disciplinary Prosecutor for Common Courts, who is appointed (along with his/her deputies) by the Minister of Justice. The main task of this office is to investigate possible offences of judges pursuant to requests of the Minister of Justice, presidents

[22] Law of 27 July 2001 – Law on the system of common courts (unified text: Journal of Laws 2020, item 365, with amendments).

[23] Law of 12 June 2017 on the amendment of the Act – Law on the system of common courts and some other acts, Journal of Laws, item 1452).

[24] All these opinions are available at: http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1491 (accessed: 2020.09.23).

[25] Critical opinions were submitted by the following experts on constitutional law: Prof. Marek Chmaj, Prof. Mariusz Jabłoński, Prof. Krzysztof Skotnicki, Prof. Andrzej Szmyt. The full texts of these opinions (in Polish) are available at: http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=1491 (accessed: 2020.09.23).

of appeal or district courts, colleges of appeal or district courts, the National Council of the Judiciary or on their own initiative.

In the opinion of the Venice Commission issued on 11 December 2017, mentioned previously, the Commission called on the Polish parliament to "reconsider" changes introduced to the Act on the common courts. The Commission agreed that judges should be subject to supervision, however it cannot lead to a violation of the constitutional principles of the independence of courts and judges. The Commission pointed out that:

> The decision of the Minister of Justice to appoint/dismiss a court president should be subject to the approval of the NCJ [National Council of the Judiciary] or by the general assembly of judges of the respective court, taken by a simple majority of votes. Ideally, general assemblies of judges should submit candidates to positions of presidents to the MoJ [Minister of Justice] for approval;
> The MoJ also should not have the discretionary power to extend the mandate of a judge beyond the retirement age;
> The MoJ should not have "disciplinary" powers vis-à-vis court presidents.

According to the Commission, the Act should also "limit the discretion of court presidents in matters related to the distribution of cases and assignment of judges to the panels; exceptions from the general principle of random allocation of cases should be narrowly and clearly defined in the law".

The National Council of the Judiciary

The constitutional body of fundamental meaning to the judiciary is the National Council of the Judiciary. According to the Constitution, it "shall safeguard the independence of the courts and judges" (art. 186 par. 1). In order to perform this task, the Council can make applications to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges.[26]

After the reforms of the Constitutional Tribunal (2015–16), the Public Prosecutor's Office (2016), the Supreme Court (2017) and the common courts (2017), the National

[26] On the genesis of the National Council of the Judiciary in Poland, as well as its constitutional position and performing its powers see: A. Rytel-Warzocha, P. Uziębło, "National Council of the Judiciary as the guardian of the independence of judges and courts in Poland in the light of recent legislative amendment's" [in:] *The International Conference European Union's History, Culture and Citizenship* 2017, vol. 10, p. 231 *et seq.*; A. Szmyt, "Some remarks on the amendment to the act on the National Council of the Judiciary in Poland" [in:] *The International Conference European Union's History, Culture and Citizenship* 2018, vol. 11, p. 115 *et seq.*; P. Sarnecki, "Krajowa Rada Sądownictwa" [in:] *Trzecia władza. Sądy i Trybunały w Polsce*, ed. A. Szmyt, Gdańsk 2008; P. Tuleja, "Konstytucyjne kompetencje Krajowej Rady Sądownictwa" [in:] *Trzecia…*; A. Bałaban, "Krajowa Rada Sądownictwa - regulacja konstytucyjna i rola w systemie władzy sądowniczej" [in:] *Sądy i Trybunały w konstytucji i w praktyce*, ed. W. Skrzydło, Warszawa 2005.

Council of the Judiciary underwent profound reform in regard to the manner of the appointment of its members. In this context, it is important to emphasise that the Constitution directly specifies the composition of the National Council of the Judiciary which, according to art. 187, consists of:

> 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic,
> 2) fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts,
> 3) 4 members chosen by the Sejm from amongst its deputies and 2 members chosen by the Senate from amongst its senators.
> (…)
> 3. The term of office of those chosen as members of the National Council of the Judiciary is 4 years.
> 4. The organizational structure, the scope of activity and procedure for work of the National Council of the Judiciary, as well as the manner of choosing its members shall be specified by statute.

The statutory regulation of the National Council of the Judiciary is included in the Act of 12 May 2011,[27] which was significantly amended on 8 December 2017.[28] The new regulation provides that fifteen members of the National Council of the Judiciary chosen from amongst judges shall be chosen by the Sejm. This solution was contrary to the rule that member-judges are appointed by judges themselves, which is well-established in the doctrine of constitutional law and the jurisprudence of the Constitutional Tribunal.[29] Such constitutional practice complies with the constitutional assumption of the "mixed" character of the National Council of the Judiciary which serves as a kind of self-government of judges. It should be also emphasized that although the Constitution does not explicitly provide that the choice of fifteen judges to the Council shall be made by judges themselves, it expressly refers the creative powers of the Sejm in this regard permitting it to elect four deputies to the Council (art. 187 par. 1 point 3). The new provisions are not only contrary to art. 187 par. 1 of the Constitution but also the constitutional principle of the division and balance of powers (art. 10) and the principle of the independence and separateness of the judicial power (art. 173 and art. 186 par. 1.[30] As the Venice Commission pointed out in the opinion of 11 December 2017, "the election of the 15 judicial members of the National Council of the Judiciary

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[27] The Act of 12 May 2011 on the National Council of the Judiciary (unified text: Journal of Laws 2019, item 84, with amendments).

[28] The Act of 8 December 2017 on the amendment of the Act on the National Council of the Judiciary and some other acts (Journal of Laws 2018, item 3).

[29] See also: Judgement of the Constitutional Tribunal of 18 July 2007, K 25/07, *OTK-A* 2007, no. 7, item 80, and the Judgement of the Constitutional Tribunal of 16 April 2008, K 40/07, *OTK-A* 2008, no. 3, item 44.

[30] See more: K. Grajewski, "Zmiany statusu prawnego Krajowej Rady Sądownictwa" [in:] *Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej*, ed. Z. Witkowski *et al.*, Toruń 2017, p. 91 *et seq.*

by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far reaching politicisation of this body". It also recommended that judicial members of the Council should be elected by their peers, as it was before.

A serious problem that arose against this background concerned the legitimacy of the National Council of the Judiciary, which was composed according to the new rules in March 2018, to appoint judges both to common courts and the Supreme Court. Because of numerous doubts related to the new method of appointing the National Council of the Judiciary, many voices questioned the independence of judges appointed by this body.

Based on cases under the new regulations concerning the retirement of three judges of the Supreme Court who were 65, in 2018 the Supreme Court referred questions to the Court of Justice of the European Union for a preliminary ruling. The Supreme Court asked, *inter alia*, whether the newly established Disciplinary Chamber that is composed of judges appointed by the National Council of the Judiciary, which due to the current model of its formation and the manner of operation that does not guarantee independence from the legislative and executive authorities, is an independent court within the meaning of European law. In its judgement of 19 November 2019,[31] the Court of Justice did not give a direct answer about the nature of the National Council of the Judiciary or the status of judges appointed by its new composition but it indicated that judges of common courts and the Supreme Court have the full right to verify the legality of the new National Council of the Judiciary and the Disciplinary Chamber of the Supreme Court. The Court of Justice pointed out that, according to settled case-law, the said requirement of independence has two aspects. The first one, of an external nature, requires that "the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever" thus remaining protected against interference and pressure from outside, which may threaten the independence of its members and could affect their decisions. The second aspect, which is internal in nature, is in turn linked to the concept of impartiality which "requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law."

According to the rulings of the Court of Justice of the European Union, the Supreme Court issued a judgement on 5 December 2019[32] in which it concluded that the National Council of the Judiciary in its current formation is neither impartial nor independent of the legislature or the executive; consequently, the resolution passed by the Council must be annulled. It shall also refer to resolutions concerning the appointment of the new judges to the Supreme Court (including all the judges of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber) as well

[31] Judgement of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, cases C-624/18, C-625/19 A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy.

[32] Judgment of the Supreme Court of 5 December 2019, III PO 7/18; available in English at: http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=331-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach (accessed: 2020.09.23).

as resolutions appointing judges to other courts. Consequently, in this concrete case the Supreme Court expressly stated that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of EU law.

In regard to this problem, an important resolution of the Supreme Court was adopted on 23 January 2020[33] by the formation of the combined Civil Chamber, Criminal Chamber, and Labor Law and Social Security Chamber. The Supreme Court stated that the Disciplinary Chamber, due to the circumstances of its creation, scope of powers, composition and participation in its appointment of the National Council of the Judiciary in the new composition, cannot be regarded as a court under European or Polish law. The Supreme Court also ruled that all judges from the Chamber of Extraordinary Control and seven judges from the Civil Chamber should refrain from adjudicating, and if they fail to do so, their judgments may be challenged due to the premise of improper composition of the adjudicating panel. At the same time, the Supreme Court appealed to all judges appointed by the "new" National Council of the Judiciary to refrain from adjudicating in cases concerning citizens from 24 January 2020. At the same time, the Supreme Court stated that the judgments that were handed down up to 24 January, in which judges elected by the "new" National Council of the Judiciary were ruling, remain valid, justifying this by the responsibility for citizens' affairs and their safety.[34] The Minister of Justice decided, however, that the Supreme Court's resolution was invalid, which introduced even more legal chaos. On the one hand, the Disciplinary Chamber of the Supreme Court and the National Council of the Judiciary is acting as if nothing has happened. On the other hand, some judges appointed by the "new" National Council of the Judiciary are refraining from adjudicating. Some commentators are already talking about two legal orders being in force in Poland at the moment.[35]

As a consequence of Polish authorities ignoring this judgment and the resolution of the Supreme Court, on 8 April 2020 the Court of Justice of the European Union issued an order,[36] on the request of the European Commission, in which it obliged Poland to immediately suspend the application of national provisions regarding the competence of the Disciplinary Chamber of the Supreme Court in disciplinary matters concerning judges. Nevertheless, the Disciplinary Council is still working and issuing decisions concerning particular judges.[37]

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[33] Resolution of the joint composition of the Chambers: Civil, Criminal and Labour and Social Security of the Supreme Court of 23 January 2020, BSA I-4110-1/20; available in English at: http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=602-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia (accessed: 2020.09.23).

[34] Data show that the judges recommended by the "new" National Council of the Judiciary have already managed to issue an estimated 100,000 judgments.

[35] See: https://polskatimes.pl/siedem-grzechow-glownych-polskiego-wymiaru-sprawiedliwosci/ar/c1-14759822 (accessed: 2020.09.23).

[36] Order of the Court of Justice of the European Union of 8 April 2020 in Case C-791/19 R Commission v Poland,

[37] See: https://www.rp.pl/Sedziowie-i-sady/307079921-Izba-Dyscyplinarna-SN-sedziowie-i-prokuratorzy-traca-immunitety-urzedy-i-pieniadze.html (accessed: 2020.09.23).

Conclusions

The need for changes in the functioning of the Polish judiciary has been discussed for years and probably nobody questions that changes in this regard are necessary. The changes introduced under the rule of Law and Justice concerning virtually all elements of the judiciary not only raise serious doubts as to their constitutionality, but also do not solve the actual problems faced by the Polish judiciary, such as lengthy proceedings. According to the government, backed by the parliamentary majority, the reforms concerning the judiciary implemented after 2015 were needed to curb inefficiency, corruption and the influence of the former communist elite. According to the government, the reform of the justice system was supposed to improve democratic control over the Polish judiciary. However, the new laws on the judiciary, both when it comes to their substantive content and the circumstances of their adoption, triggered widespread public discussion and criticism which resulted in social protests and demonstrations in the defense of courts in subsequent years.[38] Moreover, the government's actions against the judiciary led to a very negative and dangerous social phenomenon, namely the discrediting of judges and thus the weakening of the authority of the third power.

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[38] The first "wave" of demonstrations took place in July 2017 just after the adoption of the two bills concerning the judiciary. Then, thousands of people protested in July 2018 against the changes in the Supreme Court. In January 2020 a march organised in Warsaw in defence of human rights, an independent judiciary and the rule of law in Poland was joined by judges and lawyers from at least fourteen countries.

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Summary

Anna Rytel-Warzocha

Contemporary Problems of the Judicial Power in Poland

Since 2015, when most of the seats in the Parliament, as well as the office of the President of Republic, were taken over by the current ruling party, a number of constitutional reforms have been implemented, the most important of which concern the judiciary. As early as in 2015, provisions relating to the Constitutional Tribunal were significantly amendment and in November 2016 entirely new laws in this respect were adopted. In subsequent years, reforms were implemented concerning the common courts, the Supreme Court and the National Council of the Judiciary. Since then, the problems of the "third power", which have specific consequences for citizens, have become one of the leading topics in public debate in Poland. The debate on these

issues, especially in the context of the fear of violating the rule of law in Poland, has also spread beyond Polish borders. The Venice Commission, the European Commission, the European Parliament and finally the Court of Justice of the European Union have all expressed concerns about the negative influence of these reforms on the independence of courts and judges in Poland.

Keywords: independent judiciary, division of powers, National Council of the Judiciary, Supreme Court, common courts

Streszczenie

Anna Rytel-Warzocha

Aktualne problemy władzy sądowniczej w Polsce

Od 2015 r., kiedy większość miejsc w parlamencie, a także urząd Prezydenta RP zdobyło obecne ugrupowanie rządzące, przeprowadzono szereg reform konstytucyjnych, z których najważniejsze dotyczą wymiaru sprawiedliwości. Już w 2015 r. istotnej zmianie uległy przepisy dotyczące Trybunału Konstytucyjnego, a w 2016 r. uchwalone zostały zupełnie nowe ustawy w tym zakresie. W kolejnych latach reformy dotyczyły sądów powszechnych, Sądu Najwyższego i Krajowej Rady Sądownictwa. Od tego czasu problemy „trzeciej władzy", które mają określone konsekwencje dla obywateli, stały się jednym z wiodących tematów debaty publicznej w Polsce. Debata na ten temat, zwłaszcza w kontekście obawy przed naruszeniem praworządności w Polsce, wykroczyła również poza granice Polski. Obawy o negatywny wpływ przeprowadzonych reform sądownictwa na niezawisłość sędziów i niezależność sądów w Polsce wyraziły Komisja Wenecka, Komisja Europejska, Parlament Europejski, a wreszcie Trybunał Sprawiedliwości Unii Europejskiej.

Słowa kluczowe: niezależne sądownictwo, podział władzy, Krajowa Rada Sądownictwa, Sąd Najwyższy, sądy powszechne

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Patrimonial Liability of Romanian Magistrates

Introduction

Within a democratic country, nobody can be exonerated from liability for deeds committed during the performance of a public office. Magistrates are no exception to this fundamental principle of the rule of law according to art. 16 of the Romanian Constitution, "No one is above the law". Therefore, magistrates are also held liable when they break the law in the performance of their duties. Nevertheless, the legal liability of magistrates may only be applied in compliance with the conditions and forms provided by the Constitution and those special laws involving the overall principles regarding law enforcement and the exercise magistracy: the independence and the impartiality of magistrates, non-removability of judges, and the appointment of prosecutors. In other words, any regulation concerning the liability of magistrates must observe the principle of proportionality, aiming at keeping a right balance between liability and independence.

The magistrate that settles a case must be independent; otherwise the desideratum of reaching a "fair" sentence will not be reached. The litigants must also be convinced that, on one hand, the magistrate that examines their case is protected against potential forbidden pressure and that, on the other hand, the litigants themselves are protected in the event that the magistrate abuses his/her position. But the non-removability of judges and the appointment of prosecutors do not mean that they enjoy impunity. Non-removability, although indispensable according to law, is not absolute and it is not established only for the judge's benefit, but also for the benefit of justice and, in the last resort, for the benefit of society. Consequently, the magistrate's independence is a right of every citizen, and this independence cannot serve as an escape of the magistrate when he/she violates his/her professional duties in gross negligence or bad faith.[1] The Constitutional Court of Romania has also ruled to this end, emphasizing that the constitutional principle of the independence of the judici-

[1] A. Bodnar, "Civil Liability of Magistrates in the Context of the New Legislative Proposals", p. 2, www.juridice.ro/549626/rapunderea-civila-a-magistratilor-in-contextul-noilor-propuneri-legislative.html (accessed: 2020.05.25).

ary cannot be interpreted as exonerating judges from liability for the judicial errors they commit, given the consequences of these errors for both the litigants and the Romanian state.[2]

Thus, in compliance with the Romanian Constitution[3] and Law no. 303/2004, on the status of judges and prosecutors,[4] Romanian magistrates can be held responsible for deeds committed in the exercise of their professional duties. Three forms of their liability are regulated, namely: criminal liability, disciplinary liability, and civil (patrimonial) liability.

The criminal liability of magistrates is applied for those categories of offenses that can only be committed within the process of the administration of justice. Civil or patrimonial liability is mainly that which leads to a state obligation to compensate, to repair damage caused by judicial errors, without excluding the state's right to recourse against the persons who, by their actions have led to the payment of the compensation. While the disciplinary liability specific to the functioning of judicial authority crystallizes around the concepts of offense and sanction, it is manifested through their very specific content and through the procedures of investigating the offense and enforcing the sanction, as well.[5] Disciplinary liability may coexist with civil liability or it may be completed by it.[6]

Regarding actions or inactions that have no connection with the exercise of professional duties, magistrates, just like the other Romanian citizens, may face criminal or civil liability, in compliance with common law. Their professional position has no relevance in this matter.

Furthermore, we analyze the civil liability of magistrates in light of the latest amendments to this institution, disciplinary liability and civil liability being mentioned only when they are relevant to civil liability.

1. Domestic regulations concerning the civil liability of magistrates

The judges' civil liability was regulated for the first time in Romania by the Code of Civil Procedure (art. 305), which came into force in 1865. The first specific mention of magistrates' civil liability in a law on judicial organisation is found in art. 127 of the Law on judicial organisation of 1890. The Law on judicial organisation of 1938 established in art. 184–186, as another innovation, the right of the "persecuted parties" to take le-

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[2] Constitutional Court of Romania, decision no. 799 from 17 June 2011, published in the Official Gazette no. 440 from 23 June 2011.

[3] Constitution of Romania, republished in the Official Gazette no. 767/2003.

[4] Law no. 303/ 2004, on the status of judges and prosecutors, republished in the Official Gazette no. 1024/2019.

[5] E. Barbu, Silviu Gabriel Barbu,"The constitutional dimension of the liability of magistrates-short considerations" [in:] *Liability in the Constitutional Law*, C.H. Beck Publishing House, Bucharest 2007, p. 78.

[6] I. Deleanu, *Constitutional Institutions and Procedures – in Roman Law and in Comparative Law*, C.H. Beck Publishing House, Bucharest 2006, p. 798.

gal action not just against judges, but also against "all members of the body of judges," including the prosecutors, by "recursive action."[7]

At present, the institution analyzed by us is regulated by provisions that are mainly contained, in the following legislative acts:

1.1. The Constitution of Romania of 1991, revised

The constitutional lawmaker regulates a patrimonial liability of the state for every type of judicial error as well as, alternatively, a liability of magistrates, through 52 par. 3 of Constitution of Romania: "The State is financially liable for any damages caused by judicial errors. The State liability is established under the terms defined by the law and does not exclude the liability of those judges who have acted in bad faith or were grossly negligent."

Accordingly, the Constitution of Romania establishes the principle of the state's direct liability for judicial errors and, by way of exception, establishes the subsidiary liability of magistrates regarding the facts and deeds committed in the performance of their duties. The state's liability is engaged in order to protect the rights of the party injured by a public authority, but also in order to protect the magistrate, as long as the source of an error results from the behavior of other participants in the trial (witnesses, experts, interpreters) or from other objective reasons.[8] On the other hand, if the judge performs his duty in bad faith or by being grossly negligent, the State has the possibility of bringing proceedings for recourse with the aim of retrieving the damage caused to the injured party by assuming the patrimonial liability for the judicial errors.

Thereby, in the light of the Constitution, a magistrate guilty of committing a judicial error is liable only to the state, and it is not possible to engage his/her liability directly to the parties injured by a judicial error.[9]

1.2. Law no. 303/2004, on the statute of judges and prosecutors

The provisions of par. 3 of art. 52 of Constitution are summed up and detailed by art. 96 of Law no. 303/2004, which represents the legal basis for the patrimonial liability of magistrates.

The above-mentioned provisions have recently been the subject of some legislative amendments, intensely debated in the legal world and in Romanian society. They were eventually censured because of their their unconstitutionality by the Romanian Constitutional Court. These provisions establish the principle of indirect liability, namely the right of an injured party, with a view to repair any damage, to only proceed

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[7] I. Popa, *Laws of Justice. Amendments, Necessity, Boycott*, Universul Juridic Publishing House, Bucharest 2019, p. 98.

[8] Constitutional Court of Romania, decision no. 633 from 24 November 2005, published in the Official Gazette no. 1138/2005 and decision no. 263 from 2 April 2015, published in the Official Gazette no. 415/2015.

[9] I. Muraru, E.S. Tănăsescu, *Romanian Constitution*. *Comment by articles*, C.H. Beck Publishing House, Bucharest 2008, p. 522.

against the Romanian State, represented by the Ministry of Public Finance. But at the same time, they widely regulate the terms of seeking proceedings for recourse against the judge or prosecutor who performed his/her professional requirements in bad faith or in a manner exhibiting gross negligence, as we shall show at length in chapter 3.

1.3. Code of Criminal Procedure

In art. 538–542, the Code of Criminal Procedure regulates proceedings regarding compensation for property damage or emotional distress in the event of judicial error or in the event of of unlawful deprivation of liberty, referring to the state's proceedings for recourse against a person who, in bad faith or gross negligence, by ordinance (made by the prosecutor) or by final judgment, has caused the loss-generating situation.[10]

1.4. Government Ordinance No. 94/1999 on the participation of Romania in proceedings before the European Court of Human Rights and the Committee of Ministers of the Council of Europe and the State's recourse following judgments and friendly settlement conventions.

In the light of the provisions of Government Ordinance No. 94/1999, the Romanian State may exercise the right of recourse against persons who, by their activity, are guilty of having caused the State's obligation to paying the amounts established by the judgement of the European Court or a friendly settlement convention.

In such a case, the civil liability of magistrates is also established under the conditions laid down in Law no. 303/2004, on the status of judges and prosecutors, which has been mentioned above.

2. The notion of judicial error

An examination of patrimonial liability of a magistrate is subject to the existence of a judicial error, an autonomous notion, which raises the question of the defective nature of the functioning of the justice system, and which must be interpreted according to the letter and spirit of art. 52 par. 3 of the Romanian Constitution. In compliance with this constitutional text, a judicial error entails misconduct of a certain seriousness in the application and interpretation of legal regulations, whether they are procedural or substantive, but which have severe consequences for fundamental rights and liberties. Therefore, not just any insignificant mistake may be characterized as a judicial error, but only those unusual deviations from the usual way of conducting judicial proceedings or of applying substantive law regulations, evidenced in manifest errors, unequivocal errors, incontrovertible errors, crass errors, gross errors, absurd errors, or errors that have caused factual or judicial conclusions that are illogical or irrational. Non-unitary case-law, a change of previous case-law, or what are simple wrong

[10] Art. 542 of Code of Criminal Procedure, published in the Official Gazette no. 486/2010.

judicial interpretations, likely to be corrected by ordinary or extraordinary remedies, are not designated as judicial errors within the meaning of art. 52 par. 3 of the Romanian Constitution.[11]

We must also mention that it is not required that a judicial error result from the ruling of a wrong court order, contrary to factual or judicial reality, but it may be also regarded from the perspective of the manner of conducting proceedings (lack of expediency, unjustified postponements, a court decision given with undue delay). A crass breach of the judicial proceedings may have as a consequence damage to fundamental rights as serious as disobeying substantive law regulations.

Considering these guidelines drawn by the Romanian constitutional court and after a first failed attempt,[12] the legislator, by amendments to art. 96 par. 3 of Law no. 303/2004, republished in 2019, stops with the following definition of judicial error:

A judicial error occurs when:

a) the performance of procedural acts is ordered in obvious breach of substantive or procedural law, whereby a person's rights, freedoms, and legitimate interests are seriously violated, thus causing damage that cannot be remedied by ordinary or extraordinary avenues of appeal;
b) a final court decision is pronounced that is obviously contrary to the law or the factual situation resulting from the evidence produced in the case, severely affecting a person's rights, freedoms, and legitimate interests, and such damage cannot be remedied by ordinary or extraordinary avenues of appeal.

Based on the above-mentioned legal text, it is apparent that the legislator was interested in applying the concept of judicial error on both the levels of the functioning of justice, namely the activity of judges, which is evident in some judgements, and the activity of prosecutors, which is evident in the issuance of ordinances or indictments. The manner of drafting of the provisions of art. 96 par. 3 section a) is unitary, meaning that it concerns both the activity of the judge, in terms of the way the judge has heard the case and the activity of the prosecutor. On the other hand, section b) of the same paragraph only focuses on the activity of the judge, evidenced in a ruling of some final judgements. It should be noted that section b) does not exclude the application of section a) regarding the activity of the judge, as, it has been emphasized by the decision of Constitutional Court no. 45/2018, the flaws in the functioning of justice also involve manifest irregularity concerning the carrying-out of procedure, which means that ruling a correct judgement does not automatically lead to a "cover-up" of any procedural errors committed during the proceedings, which were of sufficient magnitude and caused serious damage to a person's rights, liberties, and legitimate interests.

Let us also note that, regarding the new text of par. 3 of art. 96, that it removes the previous distinction between judicial errors committed within criminal trials and

[11] Constitutional Court of Romania, by decision no. 45 from 30 January 2018, published in the Official Gazette no. 199/2018.

[12] The first form of the amendment of Law no. 303/2004 was declared partially unconstitutional, including the part regarding the liability of magistrates, by decision no. 45/2018 (cited above), and decision no. 252 from 19 April 2018, published in the Official Gazette no. 399/2018.

errors committed within other trials than criminal ones, basically unifying their general legal regime. But, on the other hand, par. 4 of art. 96 provides that, by the Code of Civil Procedure and Code of Criminal Procedure, as well as by other special laws, in which specific hypotheses exist, must be regulated. In this respect, as we have stated before, art. 538–542 of the Code of Criminal Procedure regulates the procedure of repairing property damage or emotional distress in the event of a judicial error or unlawful deprivation of liberty. According to this special procedure, in criminal matters, judicial error exists also in the event of a previous final conviction for which, subsequently, following a retrial, a final acquittal decision was ordered.[13]

3. The conditions when the liability of the state may be incurred for judicial errors

According to the same art. 96 par. 1 of the Law on the statusof judges and prosecutor, "the state shall be held liable with its assets for the damages caused by judicial errors". Consequently, a judicial error represents the only source of state liability for any dysfunctionalities of the justice system and the state has this general obligation of objective liability, without imputation of guilt, for judicial errors, as opposed to magistrates, who are only liable for judicial errors committed in bad faith or out of gross negligence.

Within the new text of art. 96, the civil liability of the state for judicial error is no longer to be connected with incurring criminal liability or disciplinary liability on the part of the magistrate, but strictly with the idea of judicial error. In other words, the compensation owed by the state for judicial error is conditional on the commission of a deed by a judge or prosecutor for which he/she has been criminally or in disciplinary terms held liable. The state pays compensation to the injured parties, if a judicial error has taken place, regardless of the conduct of the magistrate in question; basically, the civil liability of the state is far away from the area of the criminal or disciplinary liability of a judge or prosecutor. As a consequence, the liability of the state becomes a direct and objective liability, not being conditional on the subjective position that the judge or prosecutor held during the trial. This mechanism, *per se*, is not contrary to art. 52 par. 3 of the Romanian Constitution, as republished, but is broadly speaking an expression of it, at the hands of the lawmaker.[14]

As we have clarified the scope of the two sections of par. 3 of art. 96 of Law no. 303/2004 on juridical error, we notice that within the content of section a) there are certain conditions of admissibility of an action brought for finding judicial error. These are as follows: the existence of a civil or criminal trial during which the alleged judicial error took place; the existence of some procedural acts performed kept by the judge or prosecutor; the infringement or breach of the legal provisions of substantive law or

[13] Art. 538 of the Criminal Procedure Code, published in the Official Gazette no. 486/2010.
[14] Constitutional Court of Romania, decision no. 45/2018.

procedural law by making these procedural acts; the breach has an obvious character; the breach so committed has affected or severely breached a person's rights, liberties, and legitimate interests; the generating of a damage which, of course, may only be of the same degree of intensity as the breach caused to the person's rights, liberties, and legitimate interests, that is severe damage; and the damage caused cannot be corrected by an ordinary or extraordinary remedy.

As far as section b) of the paragraph indicated above is concerned, the following conditions of admissibility obtain: the existence of a civil or criminal trial during which the alleged judicial error took place; the existence of a final judgement; the final judgment is contradictory to law or the factual situation, which emerges from the evidence provided in the case; the breach is obvious; the breach committed this way has affected or has severely breached a person's rights, liberties, and legitimate interests; the generating of a damage which, of course, may only be of the same degree of intensity as the breach caused to the person's rights, liberties, and legitimate interests, that is severe damage; the damage caused cannot be corrected by an ordinary or extraordinary remedy.

Therefore, there are at least seven conditions of admissibility of bringing an action to acknowledge judicial error for the two legally distinct hypotheses, which reflects the existence of a very strict filter, so that it does not concern any mistake committed during the criminal investigation or during the trial, but strictly only those individualized within the analyzed text.

Hence, an action claiming the liability of the state for judicial errors has the legal nature of a deed in tort liability where judicial error is established (namely the committed deed, except for the hypotheses of art. 538 and art. 539 of the Code of Criminal Procedure, where the error has already been established), the actual loss (the damage produced which is to be repaired by the compensation that is to be given to the injured party), and the causal relationship between the tort and the damage.

With the purpose of repairing the damage, the injured person may only take action against the state, represented by the Ministry of Public Finance, and does not have any possibility of bringing an action against the magistrate who is supposed to have committed the judicial error. The competence of solving the civil action shall lie with the court within the jurisdiction of which the complainant-injured party resides. If the court finds that the above-mentioned conditions are met and, as a consequence, the action is admitted, in terms of the damage caused by judicial error, the payment of the amounts owed by the state by way of compensation will be made within a maximum period of one year from the date of communicating the final judgement.

Eventually, the state has possibility of bringing proceedings for recourse against a magistrate, if the state considers that the judicial error has been caused by the magistrate as a result of performing his/her duty in bad faith or with gross negligence.

4. State regress against the magistrate

According to the provisions of art. 52 par. 3 of the Romanian Constitution and art. 96 par. 8 of Law no. 303/2004, as republished, state liability shall not remove the liability of magistrates and prosecutors who have performed their job in bad faith or with gross negligence. In this way, the Romanian State has the possibility of bringing proceedings for recourse against the magistrate who is supposed to be guilty of causing the damage.

It is important to stress that, despite some repeated attempts at lawmaking aiming at making it obligatory for the state to proceed against the magistrate, this action continues to have a facultative character. The repeated proposals, although adopted in the legislative body, have not entered into force due to the Constitutional Court,[15] which by numerous decisions has declared the amendments brought in this respect unconstitutional.

Among the arguments advanced by the Court in order to support its point of view, let us mention:

- no matter how clear the text of a legal provision is, there is, inevitably, an element of legal interpretation and the complexity of some cases may sometimes lead to a different application of the law in the practice of courts. Some interpretations may lead to a breach of the rights of some persons, but, to the extent that the interpretation should correspond in a reasonable manner to the reasoning of the regulation, the magistrate must not be held liable, since case-law differences are inherent in a legal system;[16]
- the obligation of the state to exercise the right of regress may lead to unacceptable situations where it automatically undertakes such an action every time it discovers damage caused by judicial error, having no longer a right of assessment as to whether the magistrate performed his/her duty in bad faith or with gross negligence; this would require, in a mechanical manner, the intervention of the court;[17]
- in the event of the obligation of introducing proceedings of recourse, the magistrate would be summoned to court every time the state "lost" a trial based on objective civil liability. But, although the proceedings of recourse aim at subjective civil liability, the compulsory character of the state action would not leave any margin of discretion, so that it can distinguish whether the criteria required for the engagement of the subjective civil liability of the judges or prosecutors are met. Once the state has been held liable for the damage caused, that does not preclude the presumption that the magistrate acted in good faith and according to the highest professional requirements. Only if there are serious doubts regarding this, may

[15] See, Constitutional Court of Romania, decision no. 80 from 16 February 2014, published in the Official Gazette no. 246/2014 and decision no. 45/2018.

[16] Constitutional Court of Romania, decision no. 1014 from 8 November 2007, published in the Official Gazette no. 816/2007.

[17] Constitutional Court of Romania, decision no. 80/2014.

> the state exercise the proceedings of recourse. As a consequence, the state has the obligation to institute a filtering procedure with a view to bringing a proceeding for recourse, and to present its evidence regarding the personal and subjective position the magistrate had while ruling on the merits of the case in question. Therefore, the burden of evidence falls on the state, and the previous presumptions can be overturned only as the result of an intervention of a court decision resolving the action in recourse.[18]

Despite these legal arguments, within Romanian society there is a strong trend supporting the idea of the necessity of the competent state bodies' starting proceedings for recourse against magistrates, in order to avoid the situation that the damage caused to litigants permanently remains to the charge of the Romanian taxpayer. The idea has also been suggested[19] that, if left to the discretion of some political bodies of the state, the possibility of starting proceedings for recourse might be influenced by a series of subjective factors, such as: political power and the magistrate's relationship with it, the position of the magistrate in the professional hierarchy or his/her position within the legal system, and the personal and group relationships between the decision maker and the person possibly held liable, etc.

Compared to the arguments put forward, I consider that only a law text that provides the possibility of proceedings for recourse, and not the introduction of some proceedings for recourse, complies with the constitutional provisions in force, namely art. 52 par. 3 in conjunction with art. 124 par. 3.[20] On the one hand, these provisions aim at avoiding the introduction of some proceedings for recourse capable of affecting the independence of justice and, on the other hand, at guaranteeing the possibility of holding a magistrate liable whenever there has been bad faith or gross negligence.

But, by contrast, under no circumstances, can we praise the attitude of the Romanian State which, up to this moment, has never addressed the proceedings for recourse against magistrates for the mistakes committed by them, and who have caused serious damage to the national budget. This aspect has also led to the the multiple convictions Romania has suffered before the European Court of Human Rights due to judgements ruled that repeatedly breached the Convention terms. Taking this fact into consideration, we may say with certainty that not only legislation has caused a total lack of patrimonial liability of magistrates, but also the "decisional impotence" of the authorities of the Romanian State with competence in this field, which have not succeeded to even up the balance between the independence of judicial power and the liability of those ones performing acts of justice.

As far as the actual procedure of the proceedings for recourse against a magistrate is concerned, as is provided by art. 96 par. 7–10, it requires the following stages:

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[18] Constitutional Court of Romania, decision no. 45/2018.

[19] I. Popa, *Laws of Justice*…, p. 103.

[20] Art. 124 par. 3 of Constitution of Romania, as republished: "Judges are independent and subject only to the law".

a) In the first stage, the Ministry of Public Finance, within two months from the notification of the final judgement by which it was bound to pay compensation to the victim of a judicial error, must notify the Judicial Inspectorate of the Superior Council of Magistracy to find out, in an advisory capacity, if a magistrate has caused a judicial error as a result of carrying out his/her job in bad faith or with gross negligence;
b) In the second stage, the Judicial Inspectorate of the Superior Council of Magistracy must verify if the judicial error caused by the magistrate was committed as a result of performing his/her job in bad faith or with gross negligence, according to a procedure provided for by art. 317[1] of Law no. 317/ 2004[21]. The verification is performed by a commission made up, depending on the quality of the verified person, of three judges, as legal inspectors, or three prosecutors, as legal inspectors. In the event that, in the same case, both judges and prosecutors are verified, two commissions shall be made up which shall verify the acts distinctively, depending on the quality of the verified persons. The procedure, which guarantees to the investigated person the right of defence and to offer evidence, etc., must be completed within a period of a maximum of 120 days, by drawing up a report that is submitted to the Ministry of Public Finance and to the investigated judge or prosecutor.
The report is a consultative one, as provided for in art. 96 of Law no. 303/2004 in par. 8. It is compulsory for the Ministry of Public Finance to require it during the procedure, but it is not compulsory for the Ministry of Public Finance to obey it, to the effect that its conclusions are not necessarily binding in respect of starting proceedings for recourse against a magistrate. But this consultative report does offer a landmark for the specialists at the Ministry of Public Finance, as well as arguments regarding the guilt of the magistrate in committing a judicial error.
c) In the third stage, the holder of the right to action, that is the state via the agency of the Ministry of Public Finance initiates the proceedings for recourse against the judge or prosecutor if, in the wake of the above-mentioned consultative report and on its own assessment, it considers that the judicial error was caused by the magistrate's or prosecutor's carrying out his/her job in bad faith or with gross negligence. Therefore, the proceedings for recourse are left at the discretion of the Ministry of Finance, without the possibility that the eventual decision not to initiate the action be attacked by interested persons or the Prosecutor's Office in court.
As regards the term of initiating proceedings for recourse, it is six months from the date of notification of the report to the Judicial Inspectorate. The jurisdiction of the action lies, in first instance, in the civil section of the Court of Appeal in the defendant's place of residence. In the event that the judge or the prosector against whom the proceedings for recourse have been initiated, carries out his/her duties within that court or the Prosecutor's Office attached to that court, the proceedings for recourse are held at a nearby court of appeal, chosen by the applicant.

[21] Law no. 317/2004 on Superior Council of Magistrates, republished in the Official Gazette no. 185/2019.

d) Within the proceedings for recourse, the state must prove the fact that the magistrate is personally at fault in causing the judicial error and that this fault may be qualified as resulting from bad faith or gross negligence. Thus, the representatives of the state shall have the obligation to present the evidence or proof regarding the personal and subjective position held by that magistrate while judging the case. Therefore, the burden of evidence lies with the state and the previous presumptions, simple in nature, may be overthrown only as the result a verdict solving the proceedings for recourse.

The assessment on the existence of bad faith or gross negligence must be made in compliance with the conditions provided for in art. 99^1 of Law no. 303/2004. In the light of par. 1 of this article, there exists bad faith when the judge or the prosecutor breaches knowingly the rules of substantive law or procedural law, seeking or accepting injury to a person. Within the meaning of par. 2 of this article, there exists gross negligence when the judge or prosecutor is guilty of disobeying, in a serious, unmistakable, and inexcusable manner, the rules of substantive law or procedural law.

These circumstances determine, in my opinion, the ineffectiveness of the rules concerning the patrimonial liability of magistrates, because both gross negligence and bad faith are subjective notions, impossible to prove. It is then obvious that the state will almost never manage to prove that a judicial error was the result of the gross negligence or bad faith of the magistrate. If, however, the state succeeds in doing so, the patrimonial liability of the magistrate is engaged within the limit of the compensation the state was forced to provide by a judgement in favor of the person whose rights, liberties, or legitimate interests were seriously breached by the judicial error.

Every judge and prosecutor is bound to professionally insure himself/herself by concluding an insurance contract of professional civil liability, regarding the risks resulting from judicial errors, so that they shall not run the potential risk of losing their material goods. But, magistrates should be able to use this professional insurance for malpraxis only if the judicial error results from an action of gross negligence and not from bad faith.[22]

Against a judgement ordered by the Court of Appeal, one may exercise the right of appeal within the corresponding department within the High Court of Cassation and Justice.

Conclusions

In recent years, the topic of the magistrates' liability has become a matter for extreme concern in Romanian society because of the specificity of judicial work in the

[22] Art. 2 of Rules regarding the compulsory professional civil liability insurance for judges and prosecutors, published in the Official Gazette no. 482/2019.

the post-communist period (the return of the properties that had been nationalized, the struggle against corruption, etc.) and the impossibility of implementing in practice the institution of magistrates' material liability. In spite of finding some judicial errors, of the countless convictions ordered by the European Court of Human Rights, and of the significant compensation paid to injured persons, the Romanian State has not taken any regress action against allegedly guilty magistrates, claiming the impossibility of putting into practice the mechanism of engaging patrimonial liability. Given the circumstances, the amendment of internal regulations concerning the institution analyzed in this article has become a necessity.

The new provisions keep, in a correct manner, the principle of a magistrate's indirect liability and and injured person's right to address him/herself, in order to repair the damage, only to the Romanian State, ensuring, thus, magistrates' independence in their work. In return, as an innovation, there has been established a reasonable moment of starting the limitation period for the State's regress action against a magistrate allegedly guilty of causing the damage, as well as the requirement of compulsory insurance on the part of magistrates.

After a failed attempt, there has been noted a constitutionally accepted definition of judicial error and gross negligence, a basis for a magistrate's civil liability, but its efficiency and appropriateness can only be attested by case law, the only way that can emphasize the pros and cons of the new regulation.

A question mark may also be placed against the State's obligation, prior to taking a regress action, which, after all, remains optional, to address the Judicial Inspectorate of the Superior Council of Magistracy in order to find out, for informational purposes, if a magistrate is guilty or not. The provision is somewhat odd, because the Inspectorate is not the body that establishes a magistrate's guilt, but a court of law is. A potential favorable report for a magistrate, be it with an advisory status, given by his/her peers, could easily discourage even more the Romanian State's desire to hold liable, from a civil point of view, magistrates that have performed their duty in bad faith or with gross negligence and, for which, only the Romanian taxpayer has so far paid.

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Summary

Mihaela Simion

Patrimonial Liability of Romanian Magistrates

In this article, the author analyzes the institution of magistrates' material and civil liability, dealing only in a tangential manner with aspects of criminal or disciplinary liability.

The author reviews the internal regulations that make up the regulatory framework of the institution, by underlining the recent amendments brought to the mechanism of engaging magistrates' patrimonial liability through the provisions of the law on the status of judges and prosecutors. More specifically, we analyze some aspects regarding the engaging of civil liability – only in the event of judicial error, conditions of admissibility, and the proceedings of actions in finding judicial error aimed against the Romanian state, as well as in the event of the state's recourse against a magistrate suspected of having committed a judicial error.

Keywords: damage, judicial error, liability, magistrates, state recourse

Streszczenie

Mihaela Simion

Odpowiedzialność majątkowa rumuńskich sędziów

Artykuł został poświęcony analizie odpowiedzialności materialnej i cywilnej sędziów, odnosząc się w ograniczonym zakresie również do kwestii odpowiedzialności karnej i dyscyplinarnej sędziów. Autorka dokonała przeglądu aktów tworzących ramy regulacyjne tych instytucji, zwracając uwagę na niedawne zmiany dotyczące mechanizmu odpowiedzialności majątkowej sędziów wprowadzone na mocy przepisów ustawy o statusie sędziów i prokuratorów. Dokładnej analizie poddane zostały niektóre aspekty dotyczące wszczęcia postępowania w przedmiocie odpowiedzialności cywilnej sędziego w przypadku błędu sądowego, przesłanek dopuszczalności takiego postępowania, wszczęcia postępowania przeciwko państwu rumuńskiemu o stwierdzenie błędu sądowego, a także roszczeń regresowych państwa wobec sędziego podejrzanego o popełnienie takiego błędu.

Słowa kluczowe: szkoda, błąd sądowy, odpowiedzialność, sędziowie, regres

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Circumstances of the Application of Article 7 par. 1 of the Treaty on European Union with Regard to the Rule of Law in Poland[1]

1. Pursuant to art. 2 of the Treaty on European Union[2] "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." The construction of the European integration has to functionally assume the existence of a protective system for shared base values. It should be primarily motivated by general objectives to persuade the Member State breaching shared values to return thereto and limit the negative impact of such a state on the action of the Union. It may be favoured by diverse measures and procedures. The linking brackets are provided by the procedure under art. 7 of the Treaty.

First of all, in compliance with art. 7 par. 1 of the Treaty, on "a reasoned proposal" by 1/3 of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of 4/5 of its members after obtaining the consent of the European Parliament, may "determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2" of the Treaty. Before making such a determination, the Council hears the Member State in question and, acting in accordance with the same procedure, may address recommendations to it. The Council also regularly verifies that the grounds on which such a determination was made continue to apply.

Secondly, in compliance with art. 7 par. 2 of the Treaty, the European Council, acting by unanimity on a proposal by 1/3 of the Member States or by the Commission

[1] The theses of the article were prepared for the XXVI Biennal Congress of the World Jurist Association "Constitution, Democracy & Freedom. The Rule of Law, Guarantor of Freedom", which took place in Madrid on 19–20 February 2019.

[2] OJ C 326 of 2012, p. 3. As underlined by M. Rulka [in:] *idem*, "Unijna kontrola praworządności – uwagi *de lege ferenda*", *Studia Europejskie* 2016, no. 2, p. 53, the catalogue of values from art. 2 of the Treaty reminds catalogues adopted in the Statute of the Council of Europe and the preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

and after obtaining the consent of the European Parliament, may determine (after inviting the Member State in question to submit its observations) "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2" of the Treaty.

In consequence, (art. 7 par. 3 of the Treaty) where a determination under par. 2 has been made, the Council, acting by a qualified majority, may decide to "suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council;" the Council takes into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties in any case continue to be binding on that State. However, the Council, (art. 7 part. 4 of the Treaty) acting by a qualified majority, may decide subsequently to vary or revoke measures taken under art. 7 par. 3 of the Treaty in response to changes in the situation which led to their being imposed.

The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of the referred art. 7 are laid down in art. 354 of the Treaty on the Functioning of the European Union (art. 7 par. 5).

As has been noticed in the doctrine, the mechanism under art. 7 of the Treaty is flexible and takes into consideration various stages of the development of the situation. It can apply even in situations when a breach of the Treaty's values is of a systemic character despite the fact that the genesis of this provision intended it to be rather a preventive mechanism. The Procedure under art. 7 is sometimes criticised as tardy and potentially, due to the intergovernmental character, ineffective. Nevertheless, it should be taken into consideration that it exposes the conduct of the Member State breaching shared values, helps other Member States realise the state of threat, has a degrading political impact on the position of the State infringing art. 2 of the Treaty and marginalises such a State. Relations among various Union procedures are also of legal importance. The next step of the dialogue is aimed at clarifying the issue and pressuring the Member State.[3]

In the discussion it is especially indicated that art. 7 of the Treaty *de facto* vested the Union with competences "basically in each subject matter, also those formally governed by the exclusive competences of Member States."[4] As explained in the Communication from the Commission (on art. 7 of the Treaty): "if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by art. 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs."[5] The Union mechanisms in areas of

[3] It is underlined by J. Barcz: "Unia Europejska wobec niepraworządnego państwa członkowskiego", *Państwo i Prawo* 2019, no. 1, pp. 4–9.

[4] M. Rulka, "Unijna kontrola…," p. 54.

[5] Communication from the Commission of 15 October 2003: Respect for and promotion of the values on which the Union is based, COM (2003) 606 final, p. 6.

essential significance were specified in the judicial decisions issued by the Court of Justice of the European Union.[6]

In the debate on art. 7 of the Treaty the political nature of this procedure and entrusting the final decision with the European Council and not the Court of Justice of the European Union, as an independent and competent body, are also underlined. This disharmony in the practice of institutions enumerated in art. 7 of the Treaty is mitigated by "referring to the opinion of the Venice Commission, the advisory body of the Council of Europe, in majority composed of prominent representatives of the doctrine of law, as well as former and present judges of international courts and national constitutional courts."[7] It has also been underlined in the doctrine that the proposal of enhancing, in the procedure under art. 7 of the Treaty, the role of the Court of Justice of the European Union deserves particular attention. Currently, the CJEU supervises only adherence to the procedural requirements in the actions of the Council of the European Union (relatively the European Council). As has been noticed, the procedure under art. 7 of the Treaty would be much more effective, if the CJEU made decisions on stating "the existence of a clear risk of a serious breach" (par. 1) and "a serious and persistent breach" (par. 3) of Treaty values under art. 2; whereas, the "monitoring" activity (in the first case) and specification of "sanctions" (in the second case) could remain within the competences of the Council of the European Union (in the second case, perhaps it would be even better if these activities were included in the competences of the European Council).[8]

2. In the case of Poland, the issue of the procedure under art. 7 of the Treaty was updated in the area of the rule of law (in the terminology used in art. 2 of the Treaty – respect for the rule of law). It concerns "reasoned proposal in accordance with Article 7 par. 1 of the Treaty on European Union regarding the rule of law in Poland[9]" submitted by the European Commission. It is a proposal for a Council Decision preceded with the Explanatory Memorandum "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law." In the introduction to the Explanatory Memorandum the non-exclusive list of principles comprising the rule of law and hence defining the core meaning of the rule of law was presented. As indicated on the basis of the case law of the Court of Justice of the European Union and the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law ("the Venice Commission") – "those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; sepa-

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[6] See: J. Barcz, "Unia Europejska…," pp. 7–8; as has been indicated, the CJEU, among others, covered with its jurisdiction assessment of the rule of law in Member States assuming that this concept is included in the concept of "branches" of the EU law (art. 19 par. 1 of the Treaty).

[7] M. Rulka, "Unijna kontrola…," pp. 66–67.

[8] As J. Barcz, "Unia Europejska…," pp. 20–21.

[9] Brussels, 20 December 2017, COM (2017) 835 final; 2017/0360/NLE. See: comprehensively *Wniosek Komisji Europejskiej w sprawie wszczęcia w stosunku do Polski procedury art. 7 TUE*, eds J. Barcz, A. Zawidzka-Łojek, *Ramy prawno-polityczne*, Warsaw 2018.

ration of powers; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law."[10] In addition to upholding those principles and values, State institutions, as has been indicated, also have the duty of loyal cooperation.[11]

As was stated in the introduction to the Explanatory Memorandum "the present reasoned proposal sets out, in accordance with Article 7(1) TUE, the concerns of the Commission with regard to the rule of law in Poland. It invites the Council to determine, on the basis of the same provision, that there is a clear risk of a serious breach by the Republic of Poland of the rule of law which is one of the values referred to in Article 2 TUE." The concerns of the Commission relate to the following issues: 1) the lack of an independent and legitimate constitutional review; 2) the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland.[12]

In section 2 of the Explanatory Memorandum the "Factual and Procedural Background" was presented in details.[13] In section 3 "The lack of an independent and legitimate constitutional review" was presented (the issue of the composition of the Constitutional Tribunal, the publication of judgments of the Constitutional Tribunal, the appointment of the President of the Tribunal and the subsequent developments, the combined effect on the independence and legitimacy of the Tribunal).[14] Section 4 of the Explanatory Memorandum covered "The threats to the independence of the Ordinary Judiciary" (the law on the Supreme Court – including the dismissal and compulsory retirement of current Supreme Court judges, the power to prolong the mandate of Supreme Court judges, the extraordinary appeal, other provisions; the law on the National Council for Judiciary; the law on Ordinary Courts Organisation – including retirement age and the power to prolong the mandate of judges, the court presidents, other concerns; other legislation – including the law on the National School for Judiciary, other laws).[15] Section 5 of the Explanatory Memorandum covered "Finding of a clear risk of a serious breach of the values referred to in art. 2 of the Treaty on European Union" – conclusions on the character of the synthesis of facts and assessment.[16]

The reasoned proposal ends with the attached proposal for a "Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law."[17] It comprises a preamble (points 1–15), art. 1 – stating the existence of

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[10] Reference to section 2, appendix no. I to the Communication from the Commission to the European Parliament and the Council of 11 March 2014 "A new EU Framework to strengthen the Rule of Law", COM (2014) 158 final.

[11] Points 1–3 of the Explanatory Memorandum (section 1).

[12] Points 4–5 of the Explanatory Memorandum, where questioned acts were enumerated *in fine* (section 1).

[13] Points 6–90 of the Explanatory Memorandum (pp. 2–16 of the document).

[14] Points 91–113 of the Explanatory Memorandum (pp. 16–22 of the document).

[15] Points 114–170 of the Explanatory Memorandum (pp. 22–37 of the document).

[16] Points 171–186 of the Explanatory Memorandum (pp. 37–42 of the document).

[17] 2017/0360 (NLE), pp. 43–45 of the document.

clear risk in question, art. 2 – including recommendations (points a–e) of taking by the Republic of Poland the indicated (enumerated) actions within 3 months after notification of this Decision.

The "Reasoned Proposal" implies that the European Commission observes that within a period of over two years more than 13 consecutive laws have been adopted affecting the entire structure of the justice system in Poland: the Constitutional Tribunal, the Supreme Court, the ordinary courts, the National Council for the Judiciary, the prosecution service and the National School of Judiciary. The Commission accurately adopted that the common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland, which are key components of the rule of law. What is important is that the Commission also observes that such intense legislative activity has been conducted without proper consultation of all the stakeholders concerned, without a spirit of loyal cooperation required between state authorities and constituting, as underlined by the Venice Commission, the prerequisite for the existence of the democratic state based on the rule of law. Nevertheless, the depicted processes were accompanied by actions and public statements against judges and courts in Poland made by the Polish Government and by members of Parliament from the ruling majority, which have also damaged the trust in the justice system as a whole. Due to the fact that the independence of courts and impartiality of judges constitute one of the basic elements of the rule of law, new acts and especially joint consequences thereof significantly increase the systemic threat to the rule of law. Respect for the rule of law is not only a prerequisite for the protection of all of the fundamental values listed in art. 2 of the Treaty. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens and national authorities in the legal systems of all other Member States of the EU. In particular, the Commission underlined that the proper functioning of the rule of law is also essential for the trust in the area of justice and home affairs, in particular for effective judicial cooperation in civil and criminal matters which is based on mutual recognition. As was underlined, this cannot be assured without an independent judiciary in each Member State.

Furthermore, the Commission drew the attention that the discussed legislative changes in Poland were carried out without consideration for the opinions from a wide range of European and international organisations. The contents of the "Reasoned Proposal" imply that it especially refers to the entities, such as: the Venice Commission, the Commissioner for Human Rights of the Council of Europe, the Consultative Council of European Judges, the United Nations Human Rights Committee, the United Nations Special Rapporteur on the independence of judges and lawyers, the Network of Presidents of the Supreme Judicial Courts of the European Union, the European Network of Councils for the Judiciary, the Council of Bars and Law Societies of Europe. Also numer-

ous civil society organisations, such as, in particular: Amnesty International and the Human Rights and Democracy Network should be added.

As results from the observations made by the Commission, since January 2016 the Commission has carried out an extensive dialogue with the Polish authorities in order to find solutions to the concerns raised. Throughout this process the Commission has always substantiated its concerns in an objective and thorough manner. In line with the "Rule of Law Framework of the European Union", the Commission issued an Opinion followed by 3 Recommendations regarding the rule of law in Poland. The Commission has exchanged numerous letters and held meetings with the Polish authorities, as well as it has always made clear that it stood ready to pursue a constructive dialogue and has repeatedly invited the Polish authorities for further meetings to that end. However, in spite of these efforts, as stated by the Commission in the "Reasoned Proposal", the dialogue has not removed the Commission's concerns. Despite the issuing of 3 Recommendations by the Commission,[18] the situation in Poland has deteriorated continuously. The fact that the Polish authorities have not used these occasions to take into account the concerns expressed by the Commission (especially in its third Recommendation) as well as by other actors (in particular the Venice Commission), clearly shows, in the Commission's opinion, a lack of willingness on the side of the Polish authorities to address the concerns. After two years of dialogue with the Polish authorities which has not led to results and has not prevented further deterioration of the situation, the Commission stated that it is necessary and proportionate to enter into a new phase of dialogue formally involving the European Parliament and the Council. On 15 November 2017, the European Parliament adopted a resolution stating that the current situation in Poland represents a clear risk of a serious breach of the values referred to in art. 2 TEU. It constitutes a premise of the "Reasoned Proposal" under art. 7 par. 1 of the Treaty. This proposal was issued at the same time as the Commission's Recommendation of 20 December 2017 regarding the rule of law in Poland.

3. It is also worth briefly recapitulating herein the substance of the Commission's concerns consisting in noticing the clear risk of a serious breach of the rule of law by Poland. The Commission underlined that Member States decide on the form of their justice system. However, irrespective of the selected model, the independence of the judiciary and impartiality of judges must be safeguarded as a matter of EU law. It is up to the Member States to decide on e.g. possible establishment of a body such as the Council for the Judiciary the role of which is to safeguard judicial independence. However, where such a Council has been established by a Member State, as it is the case in Poland, where the Polish Constitution has entrusted explicitly the National Council for the Judiciary with the task of safeguarding judicial independence and impartiality

[18] Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland – OJ L 217 of 12 August 2016, p. 53; Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 – OJ L 22 of 27.1.2017, p. 65; Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146 – OJ L 228 of 2 September 2017, p. 19.

of judges, the independence of such Council must be guaranteed in line with European Standards.[19] In particular, the Commission indicated the elements of the continuously deteriorating situation in Poland, despite the issuing of three Recommendations by the Commission, especially with regard to Constitutional Tribunal, the Supreme Court, ordinary courts and the National Council for the Judiciary.[20] These areas were previously subjected to a detailed analysis carried out by the Commission.

With regard to the Constitutional Tribunal the following have been indicated: a) the unlawful appointment of the President of the Constitutional Tribunal, b) the admission of the three judges nominated by the 8th term of the Sejm without a valid legal basis, c) the fact that three judges that were lawfully nominated in October 2015 by the previous legislature have not been able to take up their functions of judge in the Tribunal, d) as well as the subsequent developments within the Tribunal described above have *de facto* led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges. For this reason, the Commission considers that the independence and legitimacy of the Constitutional Tribunal are seriously undermined and, consequently, the constitutionality of Polish laws can no longer be guaranteed. According to the Commission, judgements rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review. This situation is particularly worrying for the respect of the rule of law since, as explained in the previous Recommendations of the Commission, a number of particularly sensitive new legislative acts have been adopted by the Polish Parliament.[21]

As regards the Supreme Court, the main concerns of the Commission can be summarised as follows: a) the compulsory retirement of a significant number of the current Supreme Court judges combined with the possibility of prolonging their active judicial mandate, as well as the new disciplinary regime for Supreme Court judges, structurally undermine the independence of the Supreme Court judges, whilst the independence of the judiciary and impartiality of judges are key components of the rule of law, b) the compulsory retirement of a significant number of the current Supreme Court judges also allows for a far reaching and immediate recomposition of the Supreme Court. That possibility raises concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary. In fact all new Supreme Court judges will be appointed by the President of the Republic of Poland on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by the political appointees. As a result, the current parliamentary majority will be able to determine, at least indirectly, the future composition of the Supreme Court to a much larger extent than this would be possible in a system where existing rules on the duration of judicial man-

[19] Point 182 of the Explanatory Memorandum (p. 41 of the document).

[20] Point 175 of the Explanatory Memorandum (pp. 38–39 of the document).

[21] It also refers to new acts such as the Act on the Civil Service, the Act amending the Police Act, the Act on the Prosecutor's Office, the Act on the Commissioner for Human Rights, the Act on the National Media Council, the Act on Counter-Terrorism.

dates operate normally – whatever that duration is and with whichever state organ the power to decide on judicial appointments lies, c) the new extraordinary appeal procedure raises concerns in relation to legal certainty and, when considered in combination with the possibility of a far reaching and immediate recomposition of the Supreme Court, in relation to the separation of powers.

Concerns of the Commission regarding ordinary courts: a) by decreasing the retirement age of judges while making prolongation of the judicial mandate conditional upon the discretionary decision of the Minister of Justice, the new rules undermine the principle of irremovability of judges which is a key element of the independence of judges, b) the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts without being bound by concrete criteria, with no obligation to state reasons, with no possibility for the judiciary to block these decisions and with no judicial review available may affect the personal independence of court presidents and of other judges.

As regards the National Council for the Judiciary, the Commission's concerns regarding the overall independence of the judiciary and impartiality of judges are increased by the termination of the mandate of all judges-members of the National Council for the Judiciary and by the reappointment of its judges-members according to a process which allows a high degree of political influence.

As noticed by the Venice Commission, the combination of proposed changes amplifies the negative effect of each of them to the extent that it puts at serious risks the independence of all parts of the judiciary in Poland.[22]

Presenting *in fine* proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, the Commission proposes (art. 2) that the Council recommends that Poland take the following actions:

"a) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed, by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;

b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;

c) ensure that the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National School of Judiciary are amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty;

[22] Opinion CDL-AD (2017) 035, point 131.

d) ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission;
e) refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole."

"Reasoned proposal" of the Commission of 20 December 2017 in accordance with art. 7 par. 1 of the Treaty on the European Union – opened in Poland a new stage of development of the internal situation and in relations as the Member State of the EU in the area of the condition of the national rule of law.[23]

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[23] With reference to the subject matter of the "Reasoned Proposal" (issues concerning the rule of law in Poland after 2015) see, among others: A. Szmyt, "Some Remarks on the Amendment to the Act on the National Council of the Judiciary in Poland" [in:] *The International Conference "European Unions History, Culture and Citizenship"* 2018, 11th ed., pp. 115–130, www.iccn.upit,ro (accessed: 2020.08.01); C.H. Beck Publishing House, Bucharest; *idem*, "Trudne czasy 'trzeciej władzy' w Polsce lat 2015–2018" [in:] *Nadanie Profesorowi Andrzejowi Szmytowi tytułu doktora honoris causa Kijowskiego Uniwersytetu Prawa Narodowej Akademii Nauk Ukrainy*, eds J. Boszycki, A. Rytel-Warzocha, Gdańsk–Kiev 2018, pp. 59–74; *idem*, "Destruction of the Constitutional Tribunal in Poland in the Light of Opinions of the Venice Commission" [in:] *Giustizia e Constitutione agli albori del XXI Secolo, a cura di Luca Mazetti e Elena Ferioli*, Bologna 2017, Bonomo Editore, vol. 1, pp. 641–656; *idem*, "Ocena zgodności z Konstytucją RP projektu nowelizacji ustawy – Prawo o ustroju sądów powszechnych" [in:] *Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej*, eds Z. Witkowski, J. Jirasek, K. Skotnicki, M. Serowaniec, Toruń 2017, pp. 257–271; A. Rytel-Warzocha, A. Szmyt, "The new law of 2016 on the Constitutional Tribunal in Poland", *Annales Universitatis Apulensis. Series Jurisprudentia* 2016, no. 19, pp. 263–290; A Rytel-Warzocha, A. Szmyt, "Dispute over the reform of the 'Third power' in Poland" [in:] *Constituent power v. review of constitutionality: collection of papers from the Bratislava legal forum 2018*, eds J. Andraško, J. Hamulak, Bratislava 2018, pp. 120–130; A. Szmyt, "W kręgu sporu wokół Trybunału Konstytucyjnego (uwagi w związku z poselskim projektem ustawy wniesionym do Sejmu 10 lutego i wycofanym 8 czerwca 2016 r.)" [in:] *Demokracja, teoria prawa, sądownictwo konstytucyjne*, eds M. Aleksandrowicz *et al.*; Białystok 2018, pp. 619–627; A. Rytel-Warzocha, P. Uziębło, "National Council of the Judiciary as the guardian of the independence of judges and courts in Poland in the light of recent legislative amendments" [in:] *The International Conference "European Union's History, Culture and Citizenship"*, Bucharest C.H. Beck Publishing House 2017, pp. 231–245; A. Szmyt, "W sprawie niepublikowanych orzeczeń Trybunału Konstytucyjnego" [in:] *Orzecznictwo sądowe jako źródło prawa*, eds H. Olszewski, M. Chmaj, Opole 2018 (in print).

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Wniosek Komisji Europejskiej w sprawie wszczęcia w stosunku do Polski procedury art. 7 TUE. Ramy prawno-polityczne, eds J. Barcz, A. Zawidzka-Łojek, Warsaw 2018.

Summary

Andrzej Szmyt

Circumstances of the Application of art. 7 par. 1 of the Treaty on European Union with Regard to the Rule of Law in Poland

Statutory changes introduced in Poland after 2015 with regard to the judiciary (the Constitutional Tribunal, common courts, the Supreme Court, as well as the National Council of the Judiciary) triggered a debate on the infringement of the rule of law in Poland and, consequently, the procedure under art. 7 par. 1 of the Treaty on European Union was initiated. The concerns of the European Commission were raised above all by two issues – the lack of an independent and lawful review of the compliance of law with the Constitution and the adoption of new statutory provisions relating to the judicial system, which has increased the threat to the independence of courts and the rule of law in Poland. The author presents in detail both the contents of art. 7 par. 1 of the Treaty and the conditions of its application, as well as the circumstances and consequences of the application of the procedure provided for therein in relation to Poland.

Keywords: rule of law, independence of courts, art. 7 par. 1 of the Treaty on European Union, Constitution

Streszczenie

Andrzej Szmyt

Okoliczności zastosowania art. 7 ust. 1 Traktatu o Unii Europejskiej w sprawie praworządności w Polsce

Zmiany ustawowe wprowadzone w Polsce po roku 2015 w odniesieniu do władzy sądowniczej (Trybunału Konstytucyjnego, sądów powszechnych, Sądu Najwyższego, jak również Krajowej Rady Sądownictwa) wywołały debatę na temat poszanowania zasady praworządności w Polsce, a w konsekwencji – uruchomienie w odniesieniu do Polski procedury z art. 7 ust. 1 Traktatu o Unii Europejskiej. Obawy Komisji Europejskiej wzbudziły przede wszystkim dwie kwestie – brak niezależnej i zgodnej z prawem kontroli zgodności prawa z Konstytucją oraz przyjęcie przez polski parlament nowych przepisów ustawowych, dotyczących systemu sądownictwa, które zwiększają zagrożenie dla niezależności sądów oraz praworządności w Polsce. Autor szczegółowo przedstawia zarówno treść i przesłanki zastosowania art. 7 ust. 1 Traktatu, jak i okoliczności oraz konsekwencje zastosowania przewidzianej tam procedury w odniesieniu do Polski.

Słowa kluczowe: praworządność, niezależność sądów, art. 7 ust. 1 Traktatu o Unii Europejskiej, Konstytucja

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2020 Amendments to the Russian Constitution – Change of the Constitution or Its Collapse?

Introduction

The constitution is supreme law and, when enacted, it is intended not only to be legally perfect, but also to be relevant for long decades and remain in line with the social, political and legal realities of the time. Changes in social life inevitably lead to changes in constitutional provisions. Even an unchanging text of a constitution, which has been in force for decades, inevitably changes by virtue of the power exercised by the institutions applying the constitution. This is why, through the power exercised by the institutions applying and interpreting its provisions, i.e. courts, the constitution – an act of direct application – remains relevant over several centuries, as in the case of the US Constitution of 1787, the formal amendment of which is particularly complex. Without the power of the US Supreme Court to interpret the provisions of the Constitution, its articles would not breathe the spirit of the twenty-first century.

Thus, change of the constitution is an inevitable process in order for the constitution to remain relevant supreme law, responsive to changing realities.[1] Rejection of the possibility of changing it would leave nothing but the mere hope that a new constitutional act should be adopted periodically, which would deny the essence of the constitution as stable supreme law, consolidating society.[2]

The way in which constitutional changes can take place is twofold. The constitution can be changed in the formal way provided for in the constitution itself – through constitutional amendments, involving participants of the political process – or in an informal way – through legal interpretation by institutions vested with the powers of constitutional review, that is, constitutional courts (tribunals or councils) or courts

[1] Amendments to the constitution and their consequences are currently a topical subject matter in the scholarly field of constitutional law, which is analyzed in outstanding works such as R. Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, Oxford University Press 2019.

[2] More on different aspects of longevity and endurance of the constitution see: Z. Elkins, T. Ginsburg, J. Melton, *The Endurance of National Constitutions*, Cambridge University Press 2009.

of general competence.[3] The way the constitution changes is determined by the constitutional provisions themselves, the national legal system based on a particular tradition of law, and the decision by drafters of the text of the constitution to choose a centralized, dispersed (diffuse) or mixed constitutional review system. Moreover, constitutional review institution may become a barrier preventing the constitution from being changed in a way that is incompatible with its principles and provisions.

Changes to the constitution resulting from the decisions of courts interpreting constitutional provisions often lie in complicated legal texts; the result of the interpretation of constitutional provisions is not always immediately obvious. When the decisions of constitutional review institutions interpreting the norms and principles of the constitution are assessed, discussions often arise as to the limits of their competence in interpreting and reinterpreting the provisions of the constitution, and whether the constitutional court, in adopting its decisions, is indeed guided solely by the requirements of the constitution and is independent of the influence of political stakeholders.

Where the formal way of changing the constitution through adopting constitutional amendments in parliament (or by referendum) is chosen, this process is obvious from its very beginning – from the moment when the right of initiative to amend the constitution is exercised; but, at the same time, this process remains indefinite and unclear for some time, as evidenced by the amendments proposed in 2020 to the 1993 Constitution of the Russian Federation (hereinafter also referred to as the Russian Constitution or the Constitution).

The 2020 amendments to the Russian Constitution also raise other important questions: where the limits lie to formal constitutional changes; whether two different constitutional documents may appear in a single constitutional text; and whether the constitution can protect itself against foreign matter that apparently destroys its original constitutional idea and denies the spirit of the constitution.

Adopted by the Russian Parliament and signed by the President of the Russian Federation (hereinafter also referred to as the President of Russia or the President), the Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority[4] (hereinafter also referred to as the Law on Amendment to the Constitution), substantially amending the provisions of the 1993 Constitution, (with latest amendments in 2019[5]) entered into force on 4 July 2020 upon approval in an "all-Russian vote."[6]

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[3] For more on the role and functions of the constitutional review see: M. Safjan, "The Constitutional Court as a positive legislator" [in:] *New Millennium Constitutionalism: Paradigms of Reality and Changes*, NJHAR Publishes 2013, pp. 409–428.

[4] http://publication.pravo.gov.ru/Document/View/0001202003140001; http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102768718&backlink=1&&nd=102693962 (accessed: 2020.08.01).

[5] The 1993 Constitution of the Russian Federation with amendments of 2019, http://konstitucija.ru/1993/15/ (accessed: 2020.08.01).

[6] In 2020, amendments to the 1993 Russian Constitution were adopted by the Russian Parliament, signed by the President, and assessed by the Constitutional Court of the Russian Federation. They were adopted through a postponed nationwide vote ("all-Russian vote") on 1 July 2020 and came into force on 4 July 2020. The official text of the 1993 Russian Constitution with amendments of 2020,

The 2020 amendments to the Russian Constitution provide a unique opportunity to observe not only the formal way of adopting constitutional amendments, but also to analyze the opinion of the institution interpreting the provisions of the Constitution – the Constitutional Court of the Russian Federation (hereinafter also referred to as the Constitutional Court), which had already given an assessment of not only this process, but also the content of the proposed amendments. Therefore, this article focuses on the assessment and process of the constitutional amendments referred to above.

I. The 2020 amendments to the Russian Constitution as a sudden, albeit expected, initiative by the President of Russia

The launch of amendments to the Constitution was announced by the President of Russia on 15 January 2020 and left even the Russian public, who had seen many things, astonished. On the same day, the President of the Russian Federation set up a broad working group for preparing constitutional amendments,[7] including not only politicians and lawyers, but also a wide circle of members of the public,[8] thereby seeking to give the appearance of public approval for the sudden constitutional amendments. This working group started its work immediately on 17 January 2020. It is not infrequent that authoritarian regimes seek to create quasi-democratic institutions to give the illusion of public support for their proposed undemocratic initiatives. Possibly, there was the intention thereby to give the initiative of constitutional amendments an image of wider authorship. The draft amendments were submitted to the State Duma on 20 January and were unanimously adopted in a first reading on 23 January. Thus, the launch of the constitutional amendments was remarkably rapid.

I.1. Constitutional requirements to amend the Russian Constitution

Before assessing the proposals of the President of the Russian Federation to amend the Constitution and the way they were treated by the Constitutional Court of the Russian Federation, it is pertinent to take note of some original particularities related to the amendment of the 1993 Constitution of the Russian Federation. In accordance with the provisions of art. 136 of chapter 9 of the Constitution, amendments to articles contained in chapters 3 to 8 of the Constitution are adopted according to the rules fixed for the adoption of federal constitutional laws[9] and come into force after they have been approved by the bodies of legislative power of not less than two-thirds

http://konstitucija.ru/1993/16 (accessed: 2020.08.01).

[7] Распоряжение "О рабочей группе по подготовке предложений о внесении поправок в Конституцию Российской Федерации," http://kremlin.ru/events/president/news/62589 (accessed: 2020.08.01).

[8] The working group set up by the President of the Russian Federation consisted of 75 members.

[9] The Federal Law on the amendments to the Constitution of the Russian Federation was adopted on 4 March 1998, http://www.kremlin.ru/acts/bank/12084 (accessed: 2020.08.01).

of the subjects of the Russian Federation. The procedure for the adoption of federal constitutional laws is governed by art. 108(2) of the Constitution, according to which a federal constitutional law is considered to be adopted if it is approved by not less than three-fourths of the total number of the members of the Federation Council and not less than two-thirds of the total number of the deputies of the State Duma. An adopted federal constitutional law must be signed by the President of the Russian Federation within fourteen days and must be made public.

Consequently, in order to amend the provisions of articles contained in chapters 3 to 8 of the Russian Constitution, which concern the organization of the Russian Federation and the functioning of public authorities, such an initiative must receive the approval of the Federal Assembly (Russian Parliament), which consists of the State Duma and the Federation Council,[10] and such an adopted law on constitutional amendments must be signed by the President of the Russian Federation, and it comes into force after it has been approved by the bodies of legislative power of not less than two-thirds of the subjects of the Russian Federation.[11]

According to the provisions of art. 135(1) of chapter 9 of the Constitution, the Russian Parliament – the Federal Assembly – may not revise the provisions of chapters 1, 2, and 9 of the Constitution. The amendment of the provisions of these chapters requires not only a particularly strong approval by both chambers of the Russian Parliament (three-fifths of the total number of members of both chambers), but also requires convening a Constitutional Assembly (art. 135(2) of the Constitution), which either confirms the invariability of the provisions of the Constitution or drafts a new Constitution of the Russian Federation, which must be adopted by the Constitutional Assembly by two-thirds of the total number of its members or must be submitted to a nationwide vote (referendum). In the event that a new constitution is put to a nationwide vote, it is deemed to be adopted if, on the condition that over half of the electorate participated in the referendum, over half of the voters who came to the polls supported it (art. 135(3) of the Constitution). Thus, a new constitution of the Russian Federation must be drawn up in order to amend the provisions of chapters 1, 2 and 9 of the Russian Constitution.

This complex and, in principle, impossible procedure for amending chapters 1, 2, and 9 of the Constitution not only reflects the identity of the Constitution, but was intended to be the guarantor of the democratic foundations consolidated in chapters 1 and 2 of the 1993 Russian Constitution. The drafters of the 1993 Russian Constitution formulated the constitutional doctrine concerning the invariability of the provisions

[10] According to art. 94 and art. 95 of the 1993 Russian Constitution, the representative and legislative body (Parliament) of the Russian Federation is called the Federal Assembly. It consists of two chambers – the Federation Council and the State Duma http://konstitucija.ru/1993/15/; http://konstitucija.ru/1993/16 (accessed: 2020.08.01).

[11] It should also be noted that the provisions of art. 137 of chapter 9 of the Russian Constitution provide for a specific procedure for amending art. 65 of chapter 3 (Federal Structure) of the Constitution, according to which the provisions on amending art. 65 are also governed by a special federal constitutional law http://konstitucija.ru/1993/15/; http://konstitucija.ru/1993/16 (accessed: 2020.08.01).

of the Constitution in order to protect the essential constitutional provisions, consolidating the foundations of the constitutional system (chapter 1) and constitutional rights and freedoms (chapter 2) against amendments. These chapters lay down the democratic foundations for the Republic of Russia, which have unfortunately not been implemented, as the Russian political system has taken the path of authoritarianism, and the sole rule of President Vladimir Putin, instead of the Constitution, has become the basis of the Russian political system.

I.2. Overstepping the requirements to amend the Constitution

At the beginning of 2020, however, few expected that the President of the Russian Federation, having recourse to the powers conferred on him by art. 134 of the Constitution of the Russian Federation,[12] would initiate constitutional amendments early in 2020, by submitting the draft Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority" to the State Duma on 20 January 2020.[13] This was the case because, following the regular undemocratic election of the President of Russia in 2018, there was still a long time left until the end of his second and, in accordance with art. 81(1) (as amended in 2008) of the Constitution, his last six-year term of office expiring in 2024. While it was speculated that the President of the Russian Federation could consider possibilities for finding ways of staying at the top of Russian power in a formally legal manner, there were doubts that he would venture to propose an amendment to art. 81(3) of the Constitution, lifting the restriction on the number of terms of office of the President of the Russian Federation (that one and the same person may not be elected as the President of the Russian Federation for more than two consecutive terms). The original provisions of art. 81(1) of the 1993 Constitution of the Russian Federation, which provided for a four-year term of office of the President of the Russian Federation, were once amended in 2008 and established a six-year term of office.[14] The draft Law on Amendment to the Constitution, submitted to the State Duma by the President of Russia on 20 January 2020, did not propose an amendment to art. 81(1) of the Constitution. Neither was such an amendment reflected in the amendments to the Constitution adopted by the State Duma in the first reading. In the draft Law on Amendment to the Constitution, the President of Rus-

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[12] In accordance with the provisions of art. 134 of the 1993 Constitution of the Russian Federation, the right of initiative to amend the provisions of the Constitution is also granted to the President of Russia http://konstitucija.ru/1993/15/; http://konstitucija.ru/1993/16/ (accessed: 2020.08.01).

[13] Проект закона Российской Федерации о поправке к Конституции Российской Федерации "О совершенствовании регулирования отдельных вопросов организации публичной власти," http://kremlin.ru/acts/news/62617; http://kremlin.ru/events/president/news/62589 (accessed: 2020.08.01).

[14] Art. 81(1) of the Constitution was amended upon the adoption by the Russian Parliament of the Law of 30 December 2008 on amending the length of office of the President of the Russian Federation and the length of office of the State Duma. This amendment to the Constitution came into force on 31 December 2008.

sia proposed a broad set of amendments to various other provisions of the Constitution, thereby opening a Pandora's Box for a number of additional initiatives to amend the Constitution. The before-mentioned working group for preparing constitutional amendments, set up by the President of Russia, was actively engaged in this process. Some of the ideas of the members of this working group were reflected in the draft law on amending the provisions of the Constitution as adopted in the second reading (10 March 2020) and the third reading (11 March 2020), which already contained the provisions amending art. 81 of the Constitution and setting it out in a new wording, making it possible for the President of the Russian Federation in office to stand in an election for two additional six-year terms.[15] The possibility for the President in office at the time when the constitutional amendments came into force to stand again in an election for the President of the Russian Federation is provided for in art. 3 of the Law on Amendment to the Constitution,[16] which concerns the entry into force of the new amendments to the Constitution.

Thus, on 11 March 2020, the Federal Assembly (Russian Parliament) – the Federation Council and the State Duma – almost unanimously approved the Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority,"[17] initiated by the President of Russia. By 14 March 2020, the constitutional amendments were supported by the legislative authorities of 85 subjects of the Russian Federationy,[18] and, on the same day (14 March 2020), the President of the Russian Federation signed the Law on Amendment to the Constitution.[19] On 14 March 2020, urgently and, thus, on the same day, he applied to the Constitutional Court of the Russian Federation for the conclusion on whether the provisions of art. 1 and art. 2 of the Law on Amendment to the Constitution and the procedure for the entry into force of this law are in conformity with the provisions of chapters 1, 2, and 9 of the Constitution.[20] The application to

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[15] The amendment to art. 81 of the Constitution, making it possible for President Putin to stand in election for two further six-year terms of office, was proposed by Valentina Tereshkova, a member of State Duma, who is widely known to the public.

[16] The Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority," http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

[17] *Ibidem*.

[18] http://kremlin.ru/acts/news/62988 (accessed: 2020.08.01).

[19] *Ibidem*; http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

[20] The inquiry "On the conformity of the provisions of the Law of the Russian Federation on Amendment to the Constitution of the Russian Federation ‚On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority,' which have not yet come into force, with chapters 1, 2 and 9 of the Constitution of the Russian Federation, as well as the conformity of the procedure for the entry into force of art. 1 of said Law with the Constitution of the Russian Federation" (Запрос "О соответствии главам 1, 2 и 9 Конституции Российской Федерации не вступивших в силу положений Закона Российской Федерации о поправке к Конституции Российской Федерации ‚О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти' и о соответствии Конституции Российской Федерации порядка вступления в силу статьи 1 указанного Закона"), http://kremlin.ru/acts/news/62989 (accessed: 2020.08.01).

the Constitutional Court, as a condition for the entry into force of art. 1 and art. 2 of the Law on Amendment to the Constitution, was also provided for in art. 3 of the Law on Amendment to the Constitution.[21]

The Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority", which was initiated by the President of Russia and was approved by the Russian Parliament, consists of three articles,[22] which enter into force under a different and complicated procedure.

Article 3 of the Law on Amendment to the Constitution regulates the procedure for the entry into force of this law and, in accordance with its provisions, this law enters into force upon its official publication (after it is adopted by the Russian Parliament – the Federal Assembly, which consists of the State Duma and the Federation Council – and after it is also approved by the legislative authorities of two-thirds of the subjects of the Russian Federation and is signed by the President of the Russian Federation). The entry into force of art. 1 of the Law on Amendment to the Constitution, which concerns amendments to specific articles of the Constitution, and art. 2 of the Law on Amendment to the Constitution, which contains the provisions on the "all-Russian vote" and its procedure, is also linked to the conclusion of the Constitutional Court on the conformity of the provisions of art. 1 and art. 2 of the said law (including the conformity of the procedure provided for in this law for its entry into force) with chapters 1, 2 and 9 of the Constitution. If the conclusion of the Constitutional Court is favorable, art. 2 of the Law on Amendment to the Constitution, which provides for the "all-Russian vote" and its procedure, also enters into force. Meanwhile, as provided for in art. 3(5) of the Law on Amendment to the Constitution, if over half of the total number of those taking part in the "all-Russian vote" support the new constitutional amendments (provisions of art. 1), the Law on Amendment to the Constitution comes into force in full (together with art. 1 thereof) from the moment of the official publication of the results of the "all-Russian vote".

Having received a favorable opinion from the Constitutional Court of the Russian Federation,[23] on 17 March 2020, the President of Russia signed the order setting the date of 22 April 2020 for the "all-Russian vote" on approving the Law on Amendment to the Constitution[24] (these powers of the President were provided for by the Law on

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[21] http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

[22] It should be noted that the initial Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority," submitted by the President of Russia to the State Duma on 20 January 2020, contained only two articles, http://kremlin.ru/acts/news/62617 (accessed: 2020.08.01).

[23] Following an inquiry filed by the President of Russia on 14 March 2020 concerning the conformity of the Law on Amendment to the Constitution with chapters 1, 2, and 9 of the Russian Constitution, on 16 March 2020, the Constitutional Court of the Russian Federation adopted a conclusion finding no inconsistency of the said law with the Constitution, http://doc.ksrf.ru/decision/KSRFDecision459904.pdf (accessed: 2020.08.01).

[24] Указ "О назначении общероссийского голосования по вопросу одобрения изменений в Конституцию Российской Федерации," http://kremlin.ru/acts/news/63003; http://www.pravo.gov.ru/ (accessed: 2020.08.01).

Amendment to the Constitution). Due to the consequences of the pandemic, however, the vote was postponed by a presidential decree issued on 25 March 2020.[25] The new presidential decree was issued on 1 June 2020 and 1 July 2020 was set for the "all-Russian voting."[26]

As regards the procedure for the entry into force of the Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority", which was initiated by the President of Russia and adopted by the Russian Parliament, in terms of its conformity with the provisions (concerning constitutional amendments and alteration to the Constitution) of chapter 9 of the 1993 Russian Constitution, it is important to note that such a differentiated procedure for amending the Constitution is not provided for in this chapter of the Constitution, nor is such a vote as an "all-Russian vote"[27] or the role of the Constitutional Court in determining the entry into force of certain constitutional amendments provided for there either.

The amendments to the Constitution initiated by the President of Russia can be divided into certain groups: the amendments, which have already been partially discussed, concerning the institution of the President and the strengthening of his powers; the powers of other state authorities; the composition and powers of the Constitutional Court; human rights provisions on the development of social guarantees; family life; ideological provisions; and the relationship between constitutional law and international law, etc. Thus, not only the vast number and scope, but also the content of the changes, suggest that this is not a mere alteration of individual constitutional provisions, but the emergence of new autonomous constitutional content within the framework of the former Constitution.

This raises the legitimate question as to whether such an alteration of the Constitution does not change the nature of the Constitution and whether it is compatible or in conflict with the Constitution.

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[25] Указ "О переносе даты общероссийского голосования по вопросу одобрения изменений в Конституцию Российской Федерации," http://kremlin.ru/events/president/news/63066, http://www.pravo.gov.ru/ (accessed: 2020.08.01).

[26] http://kremlin.ru/events/president/news/63443 (accessed: 2020.08.01).

[27] It should be noted that a comparison of the constitutional criterion of the "all-Russian vote", as provided for in the amendments to the Constitution, and the constitutional criterion of the "nationwide vote", referred to in art. 135 of chapter 9 of the 1993 Constitution, shows an evident difference: the "all-Russian vote" does not require that over half of all the voters support the constitutional amendments on the condition that over half of the electorate participate in the vote, as provided for under the requirements of the "nationwide vote". The new "all-Russian vote" requires only a majority of votes cast by those taking part in the vote. Moreover, analyzing this issue in its conclusion of 16 March 2020, the Constitutional Court of the Russian Federation, in a very unconvincing way, explains such a difference in terms of the free choice of voters to take part in such a vote, http://doc.ksrf.ru/decision/KSRFDecision459904.pdf) (accessed: 2020.08.01).

II. Politics and the Constitutional Court. Crossing the line

The formal amendment of a constitution – the initiation and adoption of constitutional amendments – is a political process, and control over this process can be entrusted to the constitutional court. Such control, however, can be exercised effectively only by a constitutional review institution independent of the political process.[28]

A constitutional court that gives way to pressure exercised by politicians and abandons its judicial independence does not fulfil its role as the guardian of the constitution; it rather becomes an instrument for approving political decisions.[29] Unfortunately, this can be applicable to the Constitutional Court of the Russian Federation after it delivered its 19 March 2014 Judgment No 6-П/2014, giving an appraisal of the constitutionality of the International Treaty between the Russian Federation and the Republic of Crimea on the Admission of the Republic of Crimea into the Russian Federation and the Creation of New Subjects in the Composition of the Russian Federation.[30]

The amendments to the Constitution of the Russian Federation, provided for in art. 1 of the Law on Amendment to the Constitution, are substantial and concern various areas of constitutional law; therefore, they could be properly overviewed only in a much broader academic piece of work. This article deals only with some of the provisions amending the Russian Constitution that are addressed in the conclusion of the Constitutional Court of the Russian Federation of 16 March 2020,[31] in particular those that can be considered to fundamentally change the previously formulated constitutional doctrine.

First of all, it is also important to discuss those provisions of the Law on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Specific Issues in the Organization and Functioning of Public Authority" that concern the Constitutional Court itself and that had to be assessed by the Constitutional Court.

The provisions of art. 3(2) and (3) of the Law on Amendment to the Constitution, which are related to the entry into force of this law, provide for the power of the Presi-

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[28] More on the mission of judiciary in the democracy see: A. Barak, *The Judge in a Democracy*, Princeton University Press 2006.

[29] T. Birmontiene, "Avoiding Political Influence on Constitutional Courts – Is this mission Possible?" [in:] *Current Constitutional Issues. A jubilee Book on the 40th Anniversary of Scientific work of Professor Boguslaw Banaszak*, C.H. Beck 2017, pp. 3–23.

[30] Judgment No 6-П/2014 of the Constitutional Court of the Russian Federation of 19 March 2014 on the constitutionality of the International Treaty between the Russian Federation and the Republic of Crimea on the Admission of the Republic of Crimea into the Russian Federation and the Creation of New Subjects in the Composition of the Russian Federation pending its entry into force, http://doc.ksrf.ru/decision/KSRFDecision155662.pdf (accessed: 2020.08.01). For more on this issue see: T. Birmontiene, "On the Constitutionality of Amendments to the Constitution" [in:] *Estudos em Homenagem ao Coselheiro Presidente Rui Moura Ramos*, Tribunal Constitutional (Portugal) 2016, vol. II, pp. 245–270; Т. Бірмонтієнє, "Nevidimi popravki do konstitucii: rol konstitucionnogo sudu" [in:] *Visnyk Konstytucijnoho Sudu Ukrajiny* 2016, no. 4–5 pp. 223–238.

[31] The conclusion of the Constitutional Court of the Russian Federation of 16 March 2020, http://doc.ksrf.ru/decision/KSRFDecision459904.pdf (accessed: 2020.08.01).

dent of Russia to apply to the Constitutional Court for a conclusion as to whether the provisions of the said law are in conformity with chapters 1, 2, and 9 of the Constitution. The Constitutional Court, thus, is given the previously un-envisaged competence to assess in advance the constitutionality of amendments to the Constitution in this particular case. In addition, in connection with amending art. 125 of the Constitution, art. 1 of the Law on Amendment to the Constitution provides, among other things, for the new functions of the Constitutional Court to carry out the preliminary review[32] of the constitutionality of some legal acts that have not yet come into force – laws that have been vetoed by the President of the Russian Federation but that have gained no support for the presidential veto in the Parliament. Before signing such laws, the President of Russia will have the possibility of applying to the Constitutional Court for the assessment of their compliance with the Constitution.[33] This function of initiating the *a priori* verification of constitutionality, as well as some of the other constitutional amendments provided for in art. 1 of the Law on Amendment to the Constitution, strengthen the already broad – "super-presidential" – powers of the President of Russia. Under the provisions of art. 125(2) of the 1993 Constitution on the powers of the Constitutional Court, the *a priori* verification of constitutionality was limited to international treaties of the Russian Federation that have not come into force.[34]

As mentioned before, art. 3(2) of the Law on Amendment to the Constitution provides that, when the Law on Amendment to the Constitution comes into force (i.e. art. 3 thereof), the President of Russia applies to the Constitutional Court with an inquiry for a conclusion on the conformity of the provisions (i.e. art. 1 and art. 2) of the Law on Amendment to the Constitution, which have not yet come into force, with chapters 1, 2, and 9 of the Constitution, as well as on the conformity of the procedure for the entry into force of art. 1 of said law with the Constitution. The fact that art. 1 of the Law on Amendment to the Constitution is singled out in terms of constitutional verification of its entry into force is not coincidental; as has already been mentioned, the procedure for the entry into force of the said law (art. 1 and art. 2 thereof) is not consistent with the provisions of chapter 9 of the Russian Constitution. Article 3(3) of this law also provides that the above-mentioned inquiry must be examined by the Constitutional Court within seven days.

Even though the time limit of seven days for giving a reasoned conclusion by the Constitutional Court on such wide-ranging constitutional amendments as proposed in the Law on Amendment to the Constitution was apparently unreasonably short, the

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[32] See more on the arguments in favor or against preliminary constitutional review: A. Rytel-Warzocha, "*A priory* constitutional review – pros and cons in the lights of doctrinal opinions and practical experience" [in:] *The Concepts of Democracy as Developed by Constitutional Justice. XXII International Congress on European and Comparative Constitutional Law, Vilnius, 4–5 October 2019*, eds R. Arnold, I. Daneliene, Vilnius 2020, pp. 410 *et seq*.

[33] The provisions of art. 1 of the Law on Amendment to the Constitution amending art. 107 of the Constitution and setting it out in a new wording, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

[34] The provisions of art. 125 of the 1993 Constitution of the Russian Federation, http://konstitucija.ru/1993/16/ (accessed: 2020.08.01).

Constitutional Court adopted the conclusion within an even shorter period. The President of Russia applied with the inquiry to the Constitutional Court on 14 March 2020, and the Constitutional Court gave its conclusion on 16 March 2020.[35] In the conclusion itself, the Constitutional Court stresses that it is based on legal arguments;[36] however, both the apparent hastiness with which it was adopted and its content testify to the fact that the Russian Constitutional Court turned itself into a political institution,[37] which it had already became upon adopting its judgment of 19 March 2014,[38] providing the justification for the annexation of Crimea.

The Law on Amendment to the Constitution initiated by the President of Russia affected the guarantees of the independence of the judiciary, including the Constitutional Court. The provisions of the said law provide for the procedure for terminating the powers of judges, under which the President of the Russian Federation may present a submission to the Federation Council to terminate the powers of the president and judges of the Constitutional Court and the president and judges of the Supreme Court.[39] There were no such provisions previously established in the Russian Constitution. This attests to the fact that the already illusory principle of judicial independence has been further undermined. The provisions of the constitutional amendments providing for a reduction in the composition of the Constitutional Court (from 19 judges as established under art. 125(1) of the 1993 Constitution) to 11 judges, by amending art. 125 of the Constitution,[40] also attest to a restriction on the activity of judges of the Constitutional Court, who had, indeed, already lost their independence. It is likely

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35 The conclusion of the Constitutional Court of the Russian Federation of 16 March 2020, http://doc.ksrf.ru/decision/KSRFDecision459904.pdf (accessed: 2020.08.01).

36 *Ibidem*, par. 1.

37 Only rare rulings by the Constitutional Court of the Russian Federation or, to be more precise, separate opinions, recall the former judicial nature of the Russian Constitutional Court. It should be noted that the conclusion of 16 March 2020 was adopted by the Constitutional Court sitting without Judge Konstantin Aranovskiy. It can be understood that this is not accidental. In the case in which the judgment of 19 January 2019 was adopted, Judge Aranovskiy gave a separate opinion in which he disagreed with and sharply criticized the provisions of the said judgment of the Constitutional Court. This judgment, in his view, unfoundedly identified the state of Russia with the former Soviet Union, which had carried out acts of brutal repression; in his view, the Russian Federation cannot be the successor to the Soviet Russia, http://doc.ksrf.ru/decision/KSRFDecision442846.pdf (accessed: 2020.08.01). It can be considered that such an opinion by the said judge could also have led the President of Russia to propose, together with the new constitutional amendments, a reduction in the composition of the judges of the Constitutional Court (from 19 to 11), as well as to propose that, by art. 1 of the draft Law on Amendment to the Constitution initiated by the President of Russia, art. 67 be supplemented with par. 1, underlining that the Russian Federation is the successor to the Soviet Union, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

38 The judgment of the Constitutional Court of the Russian Federation of 19 March 2014, http://doc.ksrf.ru/decision/KSRFDecision155662.pdf (accessed: 2020.08.01).

39 The provisions of art. 1 of the Law on Amendment to the Constitution amending art. 83 and art. 102 of the Constitution, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

40 The provisions of art. 1 of the Law on Amendment to the Constitution amending art. 125 of the Constitution, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

that the inevitable criticism from international institutions had probably determined that the provisions of art. 3(7) of the Law on Amendment to the Constitution in its final version[41] included the provisions, which were not in the initial draft law presented by the President of Russia, stipulating that the judges of the Constitutional Court who are in office at the time of the entry into force of art. 1 of the Law on Amendment to the Constitution will continue to perform their duties until the expiry of their powers on the grounds provided for under the Federal Law on the Constitutional Court,[42] and new judges will not be appointed if there are 11 or more judges of the Constitutional Court. Thus, when deciding on the provisions of the Law on Amendment to the Constitution, the Constitutional Court of the Russian Federation also decided on its own fate.

Much discussion has also been generated as a result of the provisions of art. 1 (and art. 3) of the Law on Amendment to the Constitution, which not only strengthen the powers of the President of Russia by introducing amendments to art. 80, art. 82, art. 83, art. 92, and art. 93 of the Constitution,[43] but also raise additional burdensome requirements for candidates for the post of the President of the Russian Federation. The amendments to art. 81 of the Constitution impose the requirement for a candidate to be permanently resident in the Russian Federation for not less than 25 years (the current provision of art. 81(2) of the Constitution provides for a period of 10 years), as well as introducing a new requirement that such a candidate may not hold (including in the past) citizenship of another state or a permit or another document granting the right of permanent residence in a foreign state. There were no such requirements in the provisions of art. 81 of the 1993 Russian Constitution[44] that was currently in force.

Unlike the requirements imposed with respect to a candidate for the post of the President of Russia, the prohibition on persons in public office holding the citizenship of another state or a document allowing permanent residence in another state is not applied retroactively.

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41 The provisions of art. 3(7) of the Law on Amendment to the Constitution, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

42 Article 3(7) of the Law on Amendment to the Constitution, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01); the Federal Law of the Russian Federation on the Constitutional Court of the Russian Federation of 21 July 1994 (with amendments), http://kremlin.ru/acts/bank/6650/page/8 (accessed: 2020.08.01).

43 *Inter alia*, the provisions of art. 1 of the Law on Amendment to the Constitution, while strengthening the powers of the President of the Russian Federation, amend the first paragraph of art. 110 of the Constitution, by providing that the executive power in the Russian Federation is exercised by the Government under the general direction of the President of the Russian Federation. It should be noted that the office of Prime Minister is retained, but his/her role in directing the Government is undermined by the amendments, leaving the functions of the Prime Minister (Chairman of the Government) to organize the work of the Government and to execute the orders of the President of the Russian Federation. The powers of the President of Russia are also strengthened by the amendments granting him the right to form the State Council of the Russian Federation – a newly formed state institution, whose participation in the implementation of state power was not previously provided for in the provisions of the Constitution, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

44 The 1993 Constitution of the Russian Federation (including the amendments of 2019), http://konstitucija.ru/1993/15/ (accessed: 2020.08.01).

The provisions of chapter 1 of the 1993 Russian Constitution, which, as has already been mentioned, could not be amended by the Law on Amendment to the Constitution and against which the conformity of the Law on Amendment to the Constitution had to be examined by the Constitutional Court, are rather liberal in relation to dual (multiple) citizenship. The provisions of art. 62(1) and (2) of the Constitution provide that a citizen of the Russian Federation may have citizenship of a foreign state (dual citizenship) in cases established under federal law or an international agreement of the Russian Federation; the possession of foreign citizenship by a citizen of the Russian Federation does not derogate his or her rights and freedoms, nor does it remove his or her obligations stipulated by citizenship of the Russian Federation. Thus, the 1993 Constitution defines the institution of dual citizenship in a rather liberal manner.

The Constitutional Court of the Russian Federation had to investigate the constitutional justice case (judgment of 22 June 2010)[45] concerning a restriction on the rights of a Russian citizen to be appointed as a member of a territorial electoral commission, with the right to a decisive vote, due to the fact that he or she had the right of permanent residence in a foreign country.[46] In this case, the Russian Constitutional Court formulated a broad doctrine stating, *inter alia*, that the Constitution does not give rise to restrictions on Russian citizens, *inter alia*, to move abroad for residence, nor to obtain the status of a permanent resident, and declared such a legal regulation restricting the rights of a citizen to be contrary to the Constitution, *inter alia*, art. 19(1) of chapter 2 of the Constitution, which consolidates the principle of the equality of persons, as well as art. 55(3) of chapter 2 of the Constitution, which prohibits unjustified restrictions on the rights of persons.

In its conclusion of 16 March 2020, the Constitutional Court put forward the argument that the said non-conformity with the Constitution in the above-mentioned case is applicable only with respect to federal law and, therefore, it cannot be regarded as a limitation on establishing such a legal regulation in the context of amending the Constitution; however, this did not answer the question that had to be answered by the Constitutional Court – whether the proposed constitutional amendments comply with, *inter alia*, chapter 2 of the Constitution, which contains the above-indicated provisions of the Constitution (art. 19 and art. 55), and whether the newly introduced prohibition is in conflict with these provisions based on the doctrine formulated by the Constitutional Court in its judgment of 22 June 2010.

In the above-mentioned case, the compatibility of the provisions of the law with the provisions of art. 62 of the Constitution was not examined, as the person had no citizenship of another state. It can be assumed that, in this case, the Russian Constitutional Court at that time would also have taken note of the judgment of 27 April 2010 of the Grand Chamber of the European Court of Human Rights in the case of *Tănase*

[45] The judgment of the Constitutional Court of the Russian Federation of 22 June 2010, https://rg.ru/2010/07/07/postanovlenie-ks-dok.html (accessed: 2020.08.01).

[46] It should be noted that, in this case, the citizen of the Russian Federation had a document confirming the right of permanent residence in the Republic of Lithuania.

v Moldova,[47] in which the Court formulated the criteria prohibiting the imposition of such bans on the electoral right that result in the requirement for a person elected to the parliament to initiate a procedure for renouncing the other nationality before the validation of his/her election as a member of the parliament. The current Russian Constitutional Court has not demonstrated such carefulness and, providing this as an additional justification for the new constitutional amendments, pointed out that a citizen of the Russian Federation always has the opportunity to renounce foreign citizenship or a document enabling him or her to reside permanently in a foreign country. An analogous argument is made by the Constitutional Court regarding the new prohibition, introduced by art. 1 of the Law on Amendment to the Constitution, on the President of the Russian Federation and Russian citizens in public office holding accounts in foreign banks and keeping funds in these accounts.[48] The Constitutional Court did not even attempt to further clarify the conformity of such a prohibition with the provisions of art. 35 of chapter 1 of the Constitution, which protects the right to private property.

By amending the provisions of art. 81 of the Constitution, art. 1 of the Law on Amendment to the Constitution prevents one and the same person from standing for election as the President of the Russian Federation for more than two six-year terms of office, while the provision that such a limitation applies if a person is elected for two consecutive terms of office is abandoned. However, as it has already been pointed out, the reservation is in parallel made that, although such a requirement also applies to a person who previously held or is holding the office of the President of the Russian Federation, the previous or current term served by such a person in this office is discounted – the President in office at the time of the entry into force of the Law on Amendment to the Constitution may stand in an election for two six-year terms. Article 3 of the Law on Amendment to the Constitution, which regulates the procedure for the entry into force of the constitutional amendments, virtually repeats the possibility for the President in office taking part in future presidential elections and standing in election for two further six-year terms of office. This additional guarantee envisaged for the President in office could lead to the question why it is necessary to additionally provide for such a requirement in the procedure for the entry into force of the new constitutional amendments. It can be assumed that this was done to circumvent the reasoning of the strict constitutional doctrine formulated by the Constitutional Court in its judgment of 5 November 1998.[49]

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[47] The judgment of the Grand Chamber of the European Court of Human Rights of 27 April 2010 in the case of *Tănase v Moldova*, application no. 7(08).

[48] Notably, the argument, provided in the conclusion of the Constitutional Court of 16 March 2020, that the citizens of the Russian Federation holding or seeking public office become vulnerable if they hold accounts and keep money in foreign banks located outside the Russian Federation, sounds like one from the texts of the Soviet period (the duty of persons holding public office to declare is replaced with a prohibition).

[49] The judgment of the Constitutional Court of the Russian Federation of 5 November 1998, http://www.szrf.ru/szrf/doc.phtml?nb=100&issid=1001998046000&docid=1461 (accessed: 2020.08.01).

In the judgment of 5 November 1998, the Constitutional Court dealt with the question of whether, at the time of the entry into force of the Constitution of the Russian Federation in 1993, Boris Yeltsin, who was then holding the office of the President of the Russian Federation, could be re-elected as President upon the end of his second term of office; and also whether his term of office as President served before the entry into force of the Constitution could be discounted and whether this would not prejudice the rule of two consecutive terms of office of the President, as set out in art. 81(3) of the Constitution. In this judgment, interpreting the provisions of art. 81(3) of the Constitution, the Constitutional Court formulated the strict imperative that two consecutive presidential terms constitute a constitutional limit, which cannot be exceeded. This constitutional imperative was also substantiated by the Constitutional Court with the fact that the transitional provisions prior to the entry into force of the 1993 Constitution, in recognition of the term of office served by President Yeltsin at that time, did not make an exception that this term of office, which had started before the entry into force of the Constitution, could be discounted from the application of art. 81(3) of the Constitution. Therefore, at the time of adopting the 1993 Constitution of the Russian Federation, there was no such reservation as provided for in art. 3(6) of the Law on Amendment to the Constitution.[50] This became the main argument in the conclusion of the Constitutional Court of 16 March 2020 in order to justify the exception, provided for in art. 1 and art. 3 of the Law on Amendment to the Constitution, for the President in office to stand for election as President for two more six-year terms of office.

The strict imperative, indicated by the Constitutional Court in its judgment of 5 November 1998, that two consecutive presidential terms constitute a constitutional limit, which cannot be exceeded, was left without a proper response in the conclusion of 16 March 2020. The Constitutional Court tried to undermine this imperative by stating that it was not formulated in connection with the interpretation of the provisions of chapters 1 and 2 of the Constitution[51] (art. 81 is in chapter 4 of the Constitution). Thus, denying the formulated constitutional imperative, which could not be overstepped, the Constitutional Court justified the amendment to art. 81 of the Constitution, enabling a person to stand in presidential election even for four terms of office.

The content of one of the proposed amendments to the Constitution, raising doubts regarding its conformity with the articles of chapter 1 of the Constitution, was assessed by the Constitutional Court not for the first time. In its judgment of 14 July 2015,[52] the Constitutional Court of the Russian Federation decided on the relationship between the Constitution and an international treaty, as well as on the binding nature of the execution of judgments given by the European Court of Human Rights, and con-

[50] Art. 3(6) of the Law on Amendment to the Constitution, http://publication.pravo.gov.ru/Document/View/0001202003140001 (accessed: 2020.08.01).

[51] The judgment of the Constitutional Court of the Russian Federation of 19 March 2014 (6.2), http://doc.ksrf.ru/decision/KSRFDecision155662.pdf (accessed: 2020.08.01).

[52] The judgment of the Constitutional Court of the Russian Federation of 14 July 2015, http://doc.ksrf.ru/decision/KSRFDecision201896.pdf (accessed: 2020.08.01).

cluded that the final decision on the execution of a judgment of the European Court of Human Rights is taken by the Russian Constitutional Court, following an assessment of the compliance of such a decision with the Constitution.[53] Consequently, the provisions of art. 1 of the Law on Amendment to the Constitution whereby art. 79(1) of the Constitution is amended, to the effect that decisions adopted by international institutions operating under international treaties are not applicable in cases where these decisions contain interpretation divergent with the Constitution of the Russian Federation, in principle, constitute a transposition of the decision formulated in the judgment of 14 July 2015 into the provisions of the Constitution. The above-mentioned provisions correlate with the amendments proposed to art. 125 of the Constitution, according to which the Constitutional Court has the powers, in this respect, to assess the possibility of enforcing decisions adopted by international institutions (including foreign courts, foreign and international arbitration).[54] According to the Constitutional Court, such amendments to art. 79 and art. 125 of the Constitution are consistent with the provisions of art. 15(4) of chapter 1 of the Constitution, under which the universally recognized norms of international law and international treaties of the Russian Federation are a component part of the legal system of the Russian Federation and, if an international treaty of the Russian Federation provides for other rules than those envisaged by law, the rules of the international treaty are applied.

In the conclusion of 16 March 2020, it is explained that the power assigned to the Constitutional Court to decide on the non-enforcement of decisions of international

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[53] This judgment of the Constitutional Court also determined the amendment (14 December 2015) of the provisions of art. 3 of the Federal Law on the Constitutional Court of the Russian Federation, regulating the competence of the Constitutional Court, http://kremlin.ru/acts/bank/6650/page/8 (accessed: 2020.08.01).

[54] Art. 125 of the Constitution was supplemented with provisions on the extended powers of the Constitutional Court to assess constitutionality of legal acts *a priori*, and also to resolve the issues of the enforceability of decisions of interstate bodies (this competence was developed in the previous decisions of the Constitutional Court:

"1251. Constitutional Court of the Russian Federation:

a) at the request of the President of the Russian Federation, checks the constitutionality of draft laws of the Russian Federation on amendments to the Constitution of the Russian Federation, draft federal constitutional laws and federal laws, as well as those adopted in the manner prescribed by parts 2 and 3 of article 107 and part 2 of article 108 of the Constitution of the Russian Federation, laws prior to their signing by the President of the Russian Federation;

b) in the manner prescribed by federal constitutional law, resolves the issue of the possibility of enforcing decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation, contrary to the Constitution of the Russian Federation, as well as the possibility of enforcing a decision of a foreign or international (interstate) court, a foreign or international arbitration court (arbitration) imposing obligations on the Russian Federation, if this decision contradicts the foundations of the public order of the Russian Federation;

c) at the request of the President of the Russian Federation in the manner prescribed by the federal constitutional law, verifies the constitutionality of the laws of the subject of the Russian Federation prior to their promulgation by the highest official of the subject of the Russian Federation (the head of the supreme executive body of state power of the subject of the Russian Federation;"

http://konstitucija.ru/1993/16/ (accessed: 2020.08.01).

institutions (a certain mechanism for implementing decisions of international courts) is aimed at finding an acceptable way to implement such decisions and ensure the supremacy of the Constitution in the national legal system. It would be difficult to agree that the non-enforcement of a decision of an international or foreign court is an acceptable way of implementing the obligations deriving from an international treaty, particularly in view of the lack of independence and the political nature of the Russian Constitutional Court and in the light of instances of such practice.[55]

Certain other newly introduced amendments to the Constitution, which did not receive a proper reasoned analysis in the conclusion of the Constitutional Court, also raise considerable doubts.

The Constitutional Court did not make any appraisal of the fact that the proposed amendments to the Constitution fundamentally disrupt the framework of the Constitution itself. Organically linked to human rights, to which chapter 2 of the Constitution is devoted, the provisions concerning the proposed guarantees of social rights, health protection, the protection of the rights of the child, the institution of marriage, support for foreign compatriots, etc., under art. 1 of the Law on Amendment to the Constitution, are scattered throughout various other chapters of the Constitution, designated for other purposes. The same equally applies to the constitutional amendments linked to chapter 1 of the Constitution, which is devoted to the foundations of the constitutional system: such as the new provisions relating to the identity of the state, *inter alia*, establishing that the Russian Federation is the successor to the Soviet Union; the provisions concerning faith in God, which are not only inseparable from art. 14 of chapter 1 of the Constitution, stipulating the secular nature of the Russian Federation, but are also contrary to it; the relationship between the international and national legal systems (provisions of art. 15(4) of chapter 1 of the Constitution), etc.; all these provisions appear in chapters designated to govern other issues. The amendments contained in art. 1(4) to (7) of the Law on Amendment to the Constitution, strengthening the powers of the President of the Russian Federation and proposing the centralization of local self-government, also subvert the provisions of chapter 1 of the Constitution concerning the law-governed state (art. 1), the separation of state powers (art. 10 and art. 11), local self-government (art. 12), etc.

Thus, the entry into force of the 2020 amendments to the Russian Constitution[56] will inevitably raise questions concerning the altered nature of the Constitution, its integrity, and the compatibility of its provisions. Neither the conclusion given by the Russian Constitutional Court, nor the "all-Russian vote" carried out on 1 July 2020 will remove these doubts.

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[55] *Inter alia*, the judgment of the Constitutional Court of the Russian Federation of 19 January 2017 *(Yukos Case)*, http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf (accessed: 2020.08.01).

[56] The 1993 Constitution of the Russian Federation in the wording of 2020 entered into force on 4 July 2020, http://konstitucija.ru/1993/16/ (accessed: 2020.08.01).

In lieu of conclusions

After the entry into force of the proposed constitutional amendments, the 1993 Constitution of the Russian Federation in its wording of 2020 will not only lose its structural integrity, but its new amendments will also compete or conflict with the foundations set out in chapters 1 and 2 (and also 9) of the Constitution. As the 1993 Constitution, while existing merely as a formal legal document, has long been not actually significant in the Russian Federation, this will not prevent the public from continuing to live with the illusion that the governance of Russia is based on the Constitution.

As a result, the academic field of comparative constitutional law will provide a forum for discussion on the constitution in a new form, the nature of constitutional amendments and their destructive role, the role of constitutional review institutions in the process of amending constitutions, and the political character of such an institution in an authoritarian state, etc.

Meanwhile, the Constitutional Court of the Russian Federation, each time when it decides constitutional disputes and inevitably invokes not so much the Constitution as the reasoning in the conclusion of 16 March 2020, will not only look for possibilities of justifying the contradictions existing in the constitutional text, but will also be uneasily awaiting the time when the Constitutional Court of Russia, restored on the democratic grounds of a state under the rule of law, declares the 2020 constitutional amendments, along with the arguments set out in its conclusion of 16 March 2020, contrary to the Constitution.

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Summary

Toma Birmontiene

2020 Amendments to the Russian Constitution – Change of the Constitution or Its Collapse?

The article is intended to examine the 2020 amendments to the Russian Constitution (1993), which not only substantially changed the constitutional structure of powers in Russia, but also led to a crisis in the identity of the Russian Constitution. The 2020 amendments to the Russian Constitution raise many important constitutional questions. The author analyzes, *inter alia*, the nature of constitutional amendments and their destructive role, the role of the constitutional review institution in the process of amending the constitution, the political character of such an institution in an authoritarian state, etc. The author presents the process of adopting the constitutional amendment initiated by the President of Russia, which was remarkably rapid. The 2020 amendments to the Russian Constitution provide also a unique opportunity to analyze the opinion of the Constitutional Court of the Russian Federation, which had already given its assessment of both this process and the content of the proposed amendments in the opinion of 16 March 2020, also in regard to amendments that concern the Constitutional Court itself and its independence. The 2020 amendments to the Russian Constitution, thus, inevitably raise questions concerning the altered nature of the Constitution, its integrity, and the compatibility of its provisions. Neither the conclusion given by the Russian Constitutional Court, nor the "all-Russian vote" carried out on 1 July 2020, will remove these doubts.

Keywords: Constitution, constitutional amendments, constitutional jurisprudence, constitutional law, Russian Constitutional amendments

Streszczenie

Toma Birmontiene

Nowelizacja Konstytucji Rosyjskiej z 2020 r. – zmiana konstytucji czy jej upadek?

Artykuł poświęcony został uchwalonej w 2020 r. z inicjatywy Prezydenta Rosji nowelizacji Konstytucji Rosji z 1993 r., która nie tylko w istotny sposób zmieniła konstytucyjną strukturę władz w Rosji, ale także doprowadziła do kryzysu tożsamości rosyjskiej Konstytucji. Wprowadzone zmiany wywołują wiele istotnych pytań konstytucyjnych. Autorka analizuje m.in. charakter zmian Konstytucji i ich destrukcyjną rolę, rolę organu kontroli konstytucyjności prawa w procesie nowelizacji konstytucji, czy polityczny charakter takiej instytucji w państwie autorytarnym. Autorka przedstawia również procedurę uchwalenia powyższej nowelizacji, która została przeprowadzona niezwykle szybko. Nowelizacja Konstytucji Rosyjskiej z 2020 r. stanowi także niepowtarzalną okazję do dokonania analizy opinii Sądu Konstytucyjnego Federacji Rosyjskiej, wydanej w dniu 16 marca 2020 r. Sąd Konstytucyjny odniósł się w niej zarówno do kwestii pro-

ceduralnych, jak i treści proponowanych zmian, także do poprawek dotyczących samego Sądu Konstytucyjnego i jego niezależności. Zmiany wprowadzone do rosyjskiej Konstytucji w 2020 r. nieuchronnie rodzą zatem pytania o nowy charakter Konstytucji, jej integralność i kompatybilność jej postanowień. Ani opinia rosyjskiego Sądu Konstytucyjnego, ani „ogólnorosyjskie głosowanie" przeprowadzone 1 lipca 2020 r. nie rozwiewają tych wątpliwości.

Słowa kluczowe: konstytucja, nowelizacja konstytucji, orzecznictwo konstytucyjne, prawo konstytucyjne, zmiany rosyjskiej Konstytucji

COMMENTARIES

Requirements for the delegation of sovereign rights to the European Union, or so-called formal transfer control

Decision of the Federal Constitutional Court of 13 February 2020,
FCC 2 BvR 739/17

The Federal Constitutional Court requires that an act of parliament must be approved by a two-thirds majority if the delegation of sovereign rights entails an amendment to the Union's treaties or to German Basic Law itself (see art. 23 par. 1, s. 3, art. 79 par. 2 BL). Every citizen has an individual claim covered by art. 38 par. 1 s. 1 BL regarding compliance with these formal requirements (so-called formal transfer control).

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Commentary

I. The facts

The European Union is planning the establishment of a unified European Patent Court for future judicial disputes about European patents that will be implemented in the majority of its Member States. This common court will be responsible, for instance, for complaints about patent infringements or issues concerning the existence of patents. From the point of view of German Basic Law, the establishment of the unified Patent Court requires the delegation of sovereign rights by an act of legislation (art. 23 par. 1 s. 2 BL[1]). Only 35 members of the parliament were present for the final positive vote for the bill in the *Deutschen Bundestag*[2]. The complainant claims the violation of

[1] Basic Law.

[2] A concise summary of the facts is accessible at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2020/bvg20-020.html (accessed: 2020.04.23).

his right to democratic self-determination covered by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL.[3]

II. The legal situation and the outline of the problem

The essential provisions regarding Germany's participation in the European Union are laid down in art. 23 BL, which was incorporated into the German Constitution by the ratification of the Maastricht Treaty in 1992.[4] To a certain extent, the Federal Republic of Germany contributes to the development of the European Union (art. 23 par. 1 s. 1 BL). Therefore, the Federal Government can delegate sovereign rights by an act of legislation that requests the approval of the Federal Council (art. 23 par. 1 s. 2 BL). The additional requirements of art. 23 par. 1 s. 3 BL, like the two-thirds-majority (art. 79 par. 2 BL), had to be fulfilled at the creation of the European Union, and is necessary for modifications to its treaty foundations and when the German Basic Law is amended.

Whereas art. 38 par. 1 s. 1 BL grants all citizens the individual right to be subject only to this kind of public power that has been democratically legitimated.[5] Thus, the right to vote constitutes for the individual the noblest right for the citizen in a democratic state.[6] In other words, art. 38 par. 1 s. 1 BL represents the individual legal form of the principle of democracy (art. 20 par. 1 BL).[7] This warranty also includes a protection against modifications concerning the legal State organization – as does the delegation of sovereign rights to the European Union.[8] In general, art. 38 par. 1 s. 1 protects a citizen – as an expression of his right to democracy – from a situation where his influence on German public power, which is guaranteed by his right to vote, is reduced by the delegation of sovereign rights to the European Union.[9] So far, the Federal Constitutional Court has only recognized such an individual subjective right when the delegation of sovereign rights exceeds the EU's competences (so-called *ultra-vires*-control) or if the identity of the German Constitution (art. 79 par. 3 BL), like human dignity (art. 1 par. 1 BL) or the principles of art. 20 BL, were violated (so-called identity control).[10]

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[3] See FCC, order of 13 February 2020, 2 BvR, 739/17 recital 35 *et seq.*

[4] Instead of many see: C.D. Classen [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 23 recital. Regarding the elaboration of art. 23 BL compare F. Wollenschläger [in:] *Kommentar GG*, eds *idem*, H. Dreier *et al.*, art. 23 recital 4 ff *et seq.*

[5] Settled case-law: FCC vol. 123, 267, 341; vol. 142, 123, 191 recital 128.

[6] Fundamentally yet: FCC vol. 1, 14, 33.

[7] See e.g. M. Morlok [in:] *Kommentar GG*, eds *idem*, H. Dreier, *et al.*, art. 38 recital 60; Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 170. Compare FCC vol. 135, 317, 386 recital 125: The citizen's right to democracy.

[8] FCC vol. 129, 124, 169; vol. 142, 123, 190 recital 126.

[9] FCC vol. 89, 155, 172; vol. 123, 267, 330; vol. 134, 366, 396 recital 51; vol. 142, 123, 173 *et seq.* recital 81.

[10] Concisely described by Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 173. Compare also FCC vol. 134, 366, 382 *et seq.* recitals 22 *et seq.*; vol. 142, 123, 188 *et seq.* recitals 121 *et seq.*

Thus, the individual claim warranted by art. 38 par. 1 s. 1 BL requests, generally speaking, a substantial erosion of the political power of the German parliament because the openness of the German Constitution towards European Law (*Europarechtsfreundlichkeit*) demands that the existence of such a right is accepted in a restrictive manner.[11]

But the complainant claims, in addition to the above, that the delegation of sovereign rights to the European Union, such as competences concerning jurisdiction, also demands compliance with the requirements of art. 23 par. 1 s. 3, and art. 79 par. 2 BL – like the approval by two thirds of the members of parliament. The citizen's right to have democratic influence (art. 38 par. s. 1 BL) requires with other words, in his opinion, that the formal conditions must be respected[12] since 35 members of parliament do not represent a two-thirds majority.[13] In summary, one can question whether the disregard of the formal requirements for the act of legislation concerning the delegation of sovereign rights to the European Union was so closely related to the democratic principle that it violated the citizen in his individual rights guaranteed by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL.

III. The decision of the Federal Constitutional Court

The Federal Constitutional Court recognized the violation of the complainant's rights guaranteed by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL since the requirements of art. 23 par. 1 s. 3 and art. 79 par. 2 BL were not fulfilled.[14] The Court pointed out concretely the following: In general, the comprehension of the European Union in art. 23 par. 1 BL needs to be interpreted more widely so that this understanding also includes intergovernmental institutions and international organizations.[15] Consequently, there is no doubt that the unified European Patent Court, as a supranational institution, falls under art. 23 par. 1 BL.[16] Furthermore, the necessary measures are linked to the integration program of the European Union as can be inferred by art. 118 and 262 TFEU[17] in a material sense. Since members states are planning –

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11 Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 173 *et seq.*

12 FCC, order of 13 February 2020, 2 BvR, 739/17 recital 35 *et seq.*

13 The German parliament currently has 709 members, https://www.bundestag.de/parlament/plenum/sitzverteilung_19wp (accessed: 2020.05.01).

14 FCC, order of 13 February 2020, 2 BvR, 739/17, recital 117 *et seq.*

15 *Ibidem*, recital 122. Compare also FCC vol. 131, 152, 199 *et seq.*

16 Compare also FCC, order of 13 February 2020, 2 BvR, 739/17, recitals 143 *et seq.*

17 Art. 118 TFEU: "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."

Art. 262 TFEU: "Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court

instead of delegating competences concerning the jurisprudence to the European Court of Justice – the establishment of a unified European Patent Court as a functional alternative under the condition that it remains bound to European Union law.[18] Besides, European bodies and institutions have been involved in bringing this project to life.[19]

The demands of art. 23 par. 1 s. 1 BL are also relevant. The national act of legislation concerning the establishment of a unified European Patent Court entails modifying its treaty foundations and thus is relevant to for the German Constitution by implementing a new jurisdiction in the German legal system.[20] It also alters the Constitution itself as the establishment of the new supranational court influences national provisions with regard to the national structure of the jurisdiction (art. 92 BL) and even the principle of separation of powers (art. 20 par. 2 s. 2 BL).[21] Thus, a two-thirds-majority would have been necessary to adopt the law (art. 23 par. 1 s. 3, art. 79 par. 2 BL) and this was obviously not obtained.[22]

The Federal Constitutional Court justified the disregard of the demands of art. 23 par. 1 s. 3, and art. 79 par. 2 BL as a violation of an individual citizen's right to have democratic influence covered by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL as follows: If the delegation procedure of sovereign powers is observed, public power will not be delegated. The supranational organizations would rather act without democratically legitimated authority and would therefore be in violation of the principle of popular sovereignty (art. 20 par. 2 s. 1 BL: All state authority is derived from the people).[23] If the formal requirements of art. 23 par. 1 s. 3 BL concerning the delegation of sovereign rights are disregarded, art. 38 par. 1 s. 1 BL has to protect the individual from the disclosure of the principle of popular sovereignty as a part of the identity (compare art. 79 par. 3 BL) of the German Constitution (so-called formal transfer control). Since the competences were delegated at one point to the European Union, they are regularly lost and cannot be retrieved.[24] Without a valid – as unconstitutional in a formal matter – delegation, the European Union and its institutions lack democratic legitimation, which is the core of the right of democratic self-determination covered by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL[25].

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of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements."

18 FCC, order of 13 February 2020, 2 BvR, 739/17 recitals 144 *et seq.*

19 *Ibidem*, recitals 148 *et seq.*

20 *Ibidem*, recitals 153 *et seq.*

21 *Ibidem*, recitals 157 *et seq.*

22 *Ibidem*, recitals 164 *et seq.*

23 *Ibidem*, recital 133.

24 *Ibidem*, recital 137.

25 *Ibidem*, recitals 137 *et seq.*

IV. Critical appraisal

The decision of the Federal Constitutional Court presented in this review is convincing in every respect. Thus, the expressly manifested dissenting opinion within the senate of the court to formal transfer control had to be refused. First, the criticism is wrongfully based on the court's decision on the European stability mechanism.[26] In this judgement, the court cited that art. 79 par. 2 and art. 23 par. 1 s. 3 BL did not grant an individual citizen – with the exception of an *ultra-vires*-constellation – the individual right as the extent of the decision-making authority, thus the substance of the right to vote, does not depend on whether the parliament made its decision with a two-thirds-majority.[27] To that, the Federal Constitutional Court maintains that the decision itself cannot be transferred to the situation regarding the establishment of the unified European Patent Court, since the underlying case – in contrast to the decision on the European stability mechanism – involves the "non-retrievable delegation of sovereign rights" to the European Union. Rather, an act of legislation that is unconstitutional in a formal matter entails an *ultra-vires*-constellation – a fact that the Federal Constitutional Court recognized as an exception.[28]

Furthermore, the dissenting opinion criticizes the fact that formal transfer control would not be suitable to protect a democratically legitimated body like the *Deutsche Bundestag* from disempowerment because formal defects in legislative procedures cannot substantially endanger the democratic process.[29] Formal transfer control could actually even lead to a situation in which the German parliament and the Federal council would always and compulsively organize a two-thirds majority unlike the provision in art. 23 par. 1 s. 2 BL. Such a hurdle could delay and also jeopardize European Union integration (art. 23 par. 1 s. 1 BL) and the general democratic process (art. 20 par. 1 and 2 BL). This would narrow the political scope, thus reversing the sense of art. 38 para 1 s. 1 BL.

These points of criticism, however, disregard the following aspects: it is important to remember that every citizen has an influence on public authority by exercising their right to vote.[30] By voting, he affects the political decision-making process.[31] From a constitutional point of view, the democratic legitimation of the European Union assumes the participation of the German Parliament protected by the citizen's individual claim of art. 38 par. s. 1 BL.[32] But if only a fraction of elected representatives of the people participate in the vote to enact a law in the sense of art. 23 par. 1 BL, and, thus, undercut the necessary two-thirds majority, it is no longer possible to recognize

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26 FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 12.
27 FCC vol. 135, 317, 388 *et seq.* Recital 129.
28 Convincing: FCC, order of 13 February 2020, 2 BvR, 739/17, recital 99.
29 FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 16.
30 See again: FCC vol. 89, 155, 171; vol. 123, 267, 332.
31 FCC vol. 123, 267, 341; vol. 142, 123, 173 *et seq.* recital 81.
32 Instead of many see: Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recitals 32, 172.

the delegation of sovereign rights as democratically legitimated. The small number of members of the parliament that were present cannot represent the citizens' will in its entirety to establish a unified European Patent Court or not. This corresponds, in general, with the fact that the German constitutional bodies can violate their permanent responsibility for integration in the sense of art. 23 par. 1 BL and, consequently, the citizen's right covered by art. 38 par. 1 s. 1 BL, not only by active behavior but also by omission.[33] In other words, the citizens' political will – expressed through their vote – to what degree the Federal Republic of Germany should participate to the development of the European Union can only be reflected by a certain number of members of the parliament – namely two-thirds (art. 23 par. 1 s. 3, art. 79 par. 2 BL). For this reason, the main idea behind the requirements of a two-thirds majority is, in principle, to avoid an act of legislation that has been enacted in the mood of a political arbitrariness.[34] Hence, it is convincing that the *Deutsche Bundestag* can enact a law in the context of art. 23 par. 1 s. 3 BL if a two-thirds majority is in favor. Otherwise, the democratic process could be in substantial danger in terms of the delay of the integration process to the European Union according to art. 23 par. 1 BL.

Furthermore, the critics claim that the existence of formal transfer control would blur the contours of the right to democratic self-determination.[35] In fact, it would lead to a general legality control.[36] In other words, as a result of such an individual claim every lack in the legislative procedure would mean a failed delegation of sovereign rights.[37] Contrastingly, this opinion misjudges multiple fundamental constitutional principles. Since, the Federal Constitutional Courts understands the constitutional complaint (*Verfassungsbeschwerde*) as defined in art. 93 par. 1 Nr. 4a BL – besides the fundamental rights art. 38 BL can be claimed to be a specific instrument to guarantee legal protection concerning the objective constitutional law. The constitutional complaint also has the function of preserving objective constitutional law and serving for its interpretation.[38] The Federal Constitutional Court controls the challenged acts from every constitutional point of view.[39] Therefore, the acts of legislation constraining fundamental rights have to be reviewed in a formal manner.[40] So, if a citizen can claim through a fundamental right that a law is formally unconstitutional, then it would be a contradiction to deny such an individual control in the case of art. 38 par. 1 s. 1 BL that can be in the same way the subject of a constitutional complaint (compare again: art. 93 par. 1

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33 FCC vol. 134, 366, 395 recital 49; vol. 142, 123, 172 *et seq.* recital 78 *et seq.*

34 Precisely: P. Badura *et. al*, *Handbuch des Staatsrechts*, eds J. Isensee, P. Kirchhof, vol. XII, par. 270 recital 3, Heidelberg, München, Landsberg, Frechen, Hamburg 2016.

35 FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 13.

36 *Ibidem*, dissenting opinion recital 15. So far, also rejecting such a possibility: Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 171.

37 FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 6.

38 Settled Case Law: FCC vol. 33, 247, 259; vol. 45, 63, 74; vol. 98, 163, 167; vol. 113, 29, 47.

39 Concisely: A. Voßkuhle [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 93 recital 195. Compare also for instance FCC vol. 99, 100, 119 (settled case law).

40 See with further references from the jurisdiction: A. Voßkuhle [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 93 recital 180.

nr. 4a BL). If an individual person asserts the violation of art. 38 par. 1 s. 1 BL because of an act of legislation in the sense of art. 23 par. 1 BL, the Federal Constitutional Court has to control it from every constitutional point of view as well as its compatibility with the requirements of art. 23 par. 1 s. 3, art. 79 par. 2 BL, which stipulates a two-thirds majority.

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Summary

Toni Fickentscher

Requirements for the delegation of sovereign rights to the European Union, or so-called formal transfer control

The delegation of sovereign rights to the European Union requires an act of legislation by the German parliament (*Deutscher Bundestag*) that is subject to approval by the Federal Council (*Deutscher Bundesrat*) (see art. 23 par. 1 s. 2 BL). So far, citizens have had the opportunity to take legal action against such a delegation only if the identity of Basic Law (art. 79 par. 3 BL) has been violated (so-called identity control) or if the institutions of the European Union have acted *ultra vires* (so-called *ultra-vires* control). Since its decision on the 13 February 2020 (FCC 2 BvR 739/17), the Federal Constitutional Court requires that an act of parliament must be approved by a two-thirds majority if the delegation of sovereign rights entails an amendment to the Union's treaties or to German Basic Law itself (see art. 23 par. s. 3, art. 79 par. 2 BL). Every citizen has an individual claim covered by art. 38 par. 1 s. 1 BL regarding compliance with these formal requirements (so-called formal transfer control).

Keywords: delegation of sovereign rights to the European Union, formal transfer control, integration program, right to democratic self-determination, two-thirds majority

Streszczenie

Toni Fickentscher

Wymagania dotyczące delegowania suwerennych praw na Unię Europejską, czyli tzw. formalna kontrola transferu

Przekazanie suwerennych praw Unii Europejskiej wymaga aktu ustawodawczego niemieckiego parlamentu (Deutscher Bundestag), który podlega zatwierdzeniu przez Radę Federalną (Deutscher Bundesrat) (zob. art. 23 ust. 1 pkt 2 BL). Do tej pory obywatele mieli możliwość wytoczenia powództwa przeciwko takiej delegacji tylko w przypadku naruszenia tożsamości Ustawy Zasadniczej (art. 79 ust. 3 BL) (tzw. kontrola tożsamości) lub jeśli instytucje Unii Europejskiej działały *ultra-vires* (tzw. kontrola *ultra-vires*). Od momentu wydania decyzji przez Federalny Trybunał Konstytucyjny w dniu 13 lutego 2020 r. (FCC 2 BvR 739/17) wymagane jest, aby akt parlamentu został podjęty większością dwóch trzecich głosów, w przypadku gdy przekazanie suwerennych praw wymaga wprowadzenia zmiany do traktatów unijnych lub do samej niemieckiej Ustawy Zasadniczej (zob. art. 23 ust. 3, art. 79 ust. 2 BL). Każdy obywatel ma indywidualne roszczenie objęte art. 38 ust. 1 s. 1 BL, dotyczące zbadania zgodności przeprowadzonej procedury z tymi formalnymi wymogami (tzw. formalna kontrola transferu).

Słowa kluczowe: delegacja suwerennych praw na Unię Europejską, formalna kontrola transferu, program integracyjny, prawo do demokratycznego samostanowienia, większość dwóch trzecich

Dysfunctionality of the National Council of the Judiciary in the Polish Constitutional System After Statutory Changes

Resolution of the Combined Chambers of the Supreme Court: Civil, Criminal, Labour Law and Social Security of 23 January 2020, BSA I-4110-1/20

Abbreviation of the term of office of the hitherto members of the National Council of the Judiciary and selection of new members of this authority pursuant to the Act amending the Act on the National Council of the Judiciary of 8 December 2017 raises fundamental reservations with respect to the compliance with art. 187(1) and (3) of the Constitution of the Republic of Poland and thus casts doubts as to the legality of operation of the National Council of the Judiciary and the nomination procedure of candidates for judges, in which the National Council of the Judiciary participates.

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Commentary

1. The resolution of the Combined Chambers of the Supreme Court: Civil, Criminal, Labour Law and Social Security[1] has recently been one of several communications of the judicature pertaining to the issues related to the broadly understood position of the judiciary in Poland. Statutory changes of the third authority systematically introduced on the legislative level since 2015 by the currently ruling parliamentary majority have raised numerous doubts in the doctrine and the governmental practice. It is worth noting once again that such initiatives are clearly aimed at reduction of the con-

[1] Resolution of the Combined Chambers of the Supreme Court: Civil, Criminal, Labour Law and Social Security of 23 January 2020, BSA I-4110-1/20, *OSNK* 2020, no. 2, item 7, *OSNC* 2020, no. 4, item 34, LEX no. 2784794.

stitutional principle of the independence of courts (art. 173 of the Constitution[2]) and the independence of judges (art. 178 of the Constitution)[3], and their extensive range has even led to the formulation of a thesis on the "hostile takeover" of the constitutional order in the reference books. "A *hostile takeover* is the process of procuring, by the parliamentary majority (…), of control over the essential state authorities and mechanisms of their operation by the application of unconstitutional and anti-constitutional methods. The process does not meet the criteria required for constitutional changes due to the absence of a qualified majority in the parliament required for changes in the constitution and meets with opposition of (…) constitutional state authorities safeguarding the constitution and the legal order (…)"[4]

2. It is obvious that one of the issues tackled in the multi-layered grounds of the resolution are the issues related to the National Council of the Judiciary.[5] The National Council of the Judiciary is an authority that "safeguards the independence of courts and judges" (art. 186(1) of the Constitution). It is emphasised in reference books that the existence of such special state authority in some modern democracies is considered a significant safeguard for the independence of the judiciary. Even though the standardisation of the constitutional role of the Council should not be perceived as the defining task of this authority consisting exclusively in opposition to the violations of independence of courts and judges, yet by using – in the aforementioned provision – of a phrase on safeguarding the independence of courts and judges, the particular importance of these principles was definitively highlighted (including their protection) with respect to the existence and the operation of a democratic state.[6] Therefore, it goes without doubt that the NCJ is a constitutional safeguard for the independence of courts and judges.[7] In any case, the function consisting in the protection of independence of the third authority is fundamental and typical for this type of body.[8]

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[2] Constitution of the Republic of Poland of 2 April 1997 (Polish Journal of Laws No. 78, item 483 as rectified and amended; hereinafter: the Constitution).

[3] K. Grajewski, "Rada do spraw sądownictwa czy rada do spraw kontroli sądownictwa? Uwagi na tle projektów konstytucji Prawa i Sprawiedliwości" [in:] *Konstytucjonalizm polski. Refleksje z okazji 70-lecia urodzin i 45-lecia pracy naukowej Profesora Andrzeja Szmyta*, eds A. Gajda, K. Grajewski, A. Rytel-Warzocha, P. Uziębło, M.M. Wiszowaty, Gdańsk 2020, p. 1079.

[4] M. Wyrzykowski, "'Wrogie przejęcie' porządku konstytucyjnego", http://konstytucyjny.pl/wrogie-przejecie-porzadku-konstytucyjnego-miroslaw-wyrzykowski/ (accessed: 2020.08.19).

[5] Hereinafter: the Council, NCJ.

[6] L. Garlicki, uwagi 2 i 5 do art. 186 [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 13, Warsaw 2005. Cf. also: S. Patyra, *Krajowa Rada Sądownictwa w Polsce* [in:] *Rady sądownictwa w wybranych krajach europejskich*, eds R. Balicki, S. Grabowska, M. Jabłoński, *Przegląd Prawa i Administracji*, vol. 119, p. 125.

[7] A. Łazarska, *Niezawisłość sędziowska i jej gwarancje w procesie cywilnym*, Warsaw 2018, p. 401. It should be noted that the safeguarding role of the Council has been emphasised, a number of times, in the judgements of the Constitutional Tribunal. Cf., e.g., judgement of the Constitutional Tribunal of 18 July 2007, K 25/07, *OTK-A* 2007, no. 7, item 80; and judgement of the Constitutional Tribunal of 16 April 2008, K 40/07, *OTK-A* 2008, no. 3, item 44.

[8] P. Mikuli, "Krajowa Rada Sądownictwa – zakres regulacji konstytucyjnej i ustawowej a potencjał kompetencyjny organu" [in:] *Minikomentarz dla maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego*, ed. M. Zubik, Warsaw 2017, p. 790.

The statement that the independence of courts and judges is a value related to other constitutional principles is a cliché. Here, the general regulations of the system of government are taken into account (e.g. the principle of separation and the balance of powers – art. 10(1) of the Constitution), but also the greatly important judgements related to the position of the individual in the state. Independence of courts and judges is the *sine qua non* condition for the fulfilment of the right to "fair and public hearing of the case, without undue delay, before a competent, impartial and independent court" (art. 45(1) of the Constitution, also cf. art. 6(1)1 European Convention on Human Rights[9]), because the independence of courts and judges forms the basic safeguard of the right to trial formulated in this manner.[10]

3. Pursuant to the Act of 2011,[11] the basic area of operation of the National Council of the Judiciary encompasses personnel issues of the judiciary, e.g. review and assessment of candidates who are going to hold the positions of judges, decisions pertaining to promotions and transfers of judges, as well as furnishing the President of the Republic of Poland with motions for the appointment of judges. The constitutional role of the Council is dominant not only because the head of state cannot nominate candidates to any court positions without the NCJ submitting a relevant motion (art. 149 of the Constitution, also see section 31 of the grounds of the resolution), but also because the quality of the system of justice is dependent on the fulfilment of high ethical and professional requirements.[12] In this context, it seems justified to conclude that only a body independent from the legislative and executive authority and from the authority to which a motion for the appointment of a judge is to be submitted[13] is capable of selecting proper candidates, who will offer a guarantee of holding of the position of judges in an independent mode, in an adequate procedure.

In reference to the prior judgements of the Constitutional Tribunal, the Supreme Court justly claims that the motion for the appointment of judges "cannot derive from merely anybody, but only from an authority acting as the National Council of the Judiciary, not only on account of reference to a certain name, but also the mode of staffing these positions and the terms in which the judges competence is exercised."[14] In reference to the former of the aforementioned issues (mode of staffing), it is to be noted in the first place that in the aforementioned judgement K 40/07, the Constitutional

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[9] The Convention for the Protection of Human Rights and Fundamental Freedoms, prepared in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented with Protocol No. 2 (Polish Journal of Laws 1993, no. 61, item 284 with amendments).

[10] M. Bożek, "Sądy i prokuratura" [in:] *Polskie prawo konstytucyjne na tle porównawczym*, ed. R.M. Małajny, Warsaw 2013, p. 576.

[11] Act on the National Council of the Judiciary of 12 May 2011 (unified text: Polish Journal of Laws 2019, item 84).

[12] A. Łazarska, *Niezawisłość sędziowska*…, p. 401.

[13] Cf. section 137 and 138 of judgement of the European Court of Justice (grand chamber) of 19 November 2019, C-585/18, C-624/18 i C-625/18, https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1597856714359&uri=CELEX:62018CJ0585 (accessed: 2020.08.19). Cf. also: section 17 of the grounds of the resolution.

[14] Cf. section 31 of the grounds.

Tribunal stated that the Constitution defines "the rules *pertaining* to the composition of the Council", as well as the "term of office of its members and the mode of appointing and selecting them, offering a definite advantage in the composition of the Council to the *selected* judges of the Supreme Court, common, administrative and military courts. Regulations *pertaining to the selection* of judges to the Council are constitutionally grounded and have special significance in the system of government, given the fact that their position, in fact, determines the independence of this constitutional authority and efficiency of the Council's operation."[15] As is commonly known, by means of Act of 8 December 2017[16] very material changes were introduced in the mode of appointment of a significant part of the members of the Council, namely the judges selected to the Council, who are referenced in art. 178(1) and (2) of the Constitution. The Constitution does not define, *expressis verbis*, the selecting entity, yet the hitherto interpretation of this provision had not posed any difficulties. It was commonly believed that these judges were selected by the judges of individual courts.[17] This was not an interpretative misuse: the conclusion about the right to elect fifteen judges forming a part of this authority followed from the provisions of art. 187 of the Constitution also regulating the competence of other state authorities to elect the non-judge members of the Council. Apart from it, the presented interpretation was supported by reference both to the basic constitutional principles (the principle of separation and balance of powers – art. 10 of the Constitution and the principle of separateness of the judiciary – art. 173 of the Constitution), as well as the ascertainment of the protective (guarantee) function of the Council in reference to the authorities of the judiciary and the judges. Meanwhile, by means of the amending the Act of 2017, the mode of selection of the judges was completely changed and entrusted to the Sejm. In the grounds to the resolution, the Supreme Court noted justly that such legislative solution is not only contradictory with art. 187(1) and (2) of the Constitution, but also deprives the representatives of the judiciary of any impact on the composition of such authority "and in this mode indirectly – also in relation to amendments in other system acts – on candidates presented to the President for the purpose of appointing them to hold the position of judges (…)." One must also agree with another conclusion of the Supreme Court

[15] Cf. also: S. Patyra, "Opinia prawna na temat zgodności z Konstytucją Rzeczypospolitej przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw", http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=2002, pp. 4–5 (accessed: 2020.08.20).

[16] Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Polish Journal of Laws 2018, item 3, hereinafter: Amending act of 2017). The Act entered into force on 17 January 2018, with the exception of certain provisions which entered into force on the day following the date of publication of the Act, thus 3 January 2018.

[17] Cf. for example: T. Ereciński, J. Gudowski, J. Iwulski, *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, ed. J. Gudowski, Warsaw 2009, pp. 714–716; Anna Rakowska-Trela, "Krajowa Rada Sądownictwa po wejściu w życie nowelizacji z 8.12.2017 r. – organ nadal konstytucyjny czy pozakonstytucyjny?" [in:] *Konstytucja. Praworządność. Władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*, eds Ł. Bojarski, K. Grajewski, J. Kremer, G. Ott, W. Żurek, Warsaw 2019, pp. 111–112; and K. Grajewski, "Krajowa Rada Sądownictwa w świetle przepisów ustawy z dnia 8 grudnia 2017 r. – zagadnienia podstawowe," *Krajowa Rada Sądownictwa* 2018, no. 1, pp. 19–20.

in line with which the Council became, in this mode, "dominated by politically selected persons", and transfer of the right to select judges to the Sejm resulted in the fact that nowadays as many as twenty-one persons among twenty-five members of the NCJ have the political backing of both chambers of the Polish parliament.[18] This situation is in blatant contradiction not only to the above-listed basic principles pertaining to the system of government, but – which should be strongly stressed – also to the constitutional concept of the composition of the NCJ, which has been shaped in a manner that debates can be held as part of the collegial body and most important decisions pertaining to the judiciary can be made by persons appointed or holding specific positions (functions) in bodies forming a part of the legislative, executive and judicial authority. It goes without doubt that the adopted solution not only violates but also completely undermines this specific construction.

4. One must also agree with the opinion of the Supreme Court which, in the assessment of the capacity of the current Council to perform its constitutional functions, took into account not only the selection of judges by the Sejm, but also the fact of "extinguishing" by the legislature of the mandates of the hitherto judge-members of the Council (art. 6 of the Amending act of 2017), which is in direct contradiction to art. 187(3) of the Constitution, where the members of the Council are guaranteed a four-year term of office. In the context of the "extinguishing" of mandates of the hitherto members of the Council, the anti-constitutional purpose of the regulation transferring the elective competence becomes particularly obvious. Paradoxically, this conclusion is reinforced by the one of the fragments of the presidential amending draft act, where it is stated that the introduction of the solution consisting of the "extinguishing" of the mandates of the hitherto judge members of the Council does not violate the principle of the four-year term of office. In line with the draft act, only the introduction of, e.g., a three-year term of office would be a violation of such constitutional principle.[19] These absurd arguments ultimately show that the purpose of the statutory changes was not introduction of a concept of changes that would be consistent with the system of government, but simply the taking over of political control over the NCJ.

5. Over the course of its two years of operation, the incorrectly formed Council has held a number of sessions at which opinions were issued on persons who were candidates for positions in various courts. Therefore, the Council performed the tasks of an authority with a composition strictly defined in the Constitution, in a situation where its composition was formed in violation of such provisions. Such state of affairs offers sufficient justification for the statement of the Supreme Court adopted in the resolution, in line with which the "political domination of the National Council of the Judiciary results in high probability of settlement of selection processes for the positions of judges not according to the substance-related criteria, but on the basis of political loyalty or support for the reforms of the parliamentary majority pertaining to

[18] Cf. section 31 of the grounds.

[19] Sejm printed matter 2002/8th parliamentary term.

the system of justice, contradictory with the Constitution of the Republic of Poland."[20] In other words: the NCJ does not offer sufficient guarantee of independence from the legislative and the executive authority and thus from the currently ruling parliamentary majority in the procedure of judge appointment.[21] It is obvious that the Supreme Court cannot deprive persons appointed in this manner of the status of judges, yet it is difficult to overestimate the significance of the aforementioned statements of the supreme body of the third authority in Poland.

It is worth adding that two more arguments are also significant with respect to the negative assessment of the current NCJ. First of all, it must be taken into account that – as mentioned earlier – changes in the legal status of the Council are only one of the many elements of the broadly planned so-called reform of the judiciary. They co-exist with a whole range of provisions and with a practice of operation of certain authorities intended to accomplish an at least significant – if not dominant – impact of the political class on the operation of the judiciary. In this context, it is sufficient to mention, for example, the disciplinary proceedings initiated *en masse* against judges in relation to the judgements passed by them.[22] Although constitutional solutions are known in democratic countries where the selection of a member of a body handling judicial matters is made by the parliament[23], the present-day statutory shape of the NCJ is to be assessed negatively not only on account of blatant contradiction with the Constitution which does not foresee selection of judges who form a part of the NCJ by a legislative authority, but also due to the context of other statutory changes.

Secondly, a significant element of evaluation of the new National Council of the Judiciary is the actual mode of its operation. In a certain scope, it was already the object of assessment of the European Court of Justice. In the context of the attempt at making changes in the composition of the Supreme Court assuming, among others, retirement of the First President of the Supreme Court and a significant part of its judges, the Court of Justice assessed that "analysis of the operation of the newly created NCJ shows complete lack of resolutions where the authority would take a stance aimed at protecting the independence of the Supreme Court in the context of the crisis caused by (…) the legislative reforms that referred to this court. On the other hand, the NCJ or its members publicly criticised the members of the Supreme Court for applying to the Tribunal with prejudicial inquiries or cooperation with the EU institutions, in particular with the European Commission. Furthermore, the practice applied by the NCJ when issuing opinions on the further holding of the position of judges of the Supreme Court after the end of the newly-determined age of retirement at 65 years of age consists in (…) issue of negative opinions without presentation of any grounds or limited to the

[20] Cf. section 38 of the grounds.

[21] Cf. section 60 of the grounds to judgement of the Supreme Court of 5 December 2019, III PO 7/18, *OSNCP* 2020, no. 4, item 38.

[22] With respect to this issue, cf. very extensive study: D. Mazur, "Sędziowie pod specjalnym nadzorem, czyli „wielka reforma' wymiaru sprawiedliwości" [in:] *Konstytucja. Praworządność*…, pp. 261–367.

[23] This is the case in, e.g., Spain. Cf. P. Glejt-Uziębło, P. Uziębło, "Rada Główna Władzy Sądowniczej w Hiszpanii" [in:] *Rady sądownictwa w wybranych*…, pp. 63–65.

reiteration of content" of provisions adopted at that time. Unfortunately, this description does not paint a picture of an independent authority, guarding the independence of the courts and the independence of the judges, but an authority acting at the political order of the current parliamentary majority.

6. Taking the presented arguments into account, in the conclusion of this paper one must reiterate after the Supreme Court that the currently existing "defectiveness of the procedure of designating candidates to the office of the judge by the National Council of the Judiciary has a structural nature, making this authority incapable of correctly performing its constitutional functions. At the same time, it cannot be exculpated by the mere statements of the members of the National Council of the Judiciary that it operates in a correct and reliable mode." This conclusion deserves full endorsement.

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Summary

Krzysztof Grajewski

Dysfunctionality of the National Council of the Judiciary in the Polish Constitutional System After Statutory Changes

The subject of the commentary is related to the resolution of the three chambers of the Supreme Court devoted to the most important constitutional problems of the third authority in Poland in the context of anti-constitutional changes in the legislation on the judiciary which have been carried out by the legislature for several years. The subject under analysis is the issue of the National Council of the Judiciary which, according to the Constitution, is to be a body that safeguards the independence of courts and judges. The author of the paper strongly endorses the view of the Supreme Court, which proves that the statutory changes made in the recent years concerning the third authority, including changes in the way in which the so-called "judicial part of the NCJ" is selected, are directly unconstitutional and deprive the judicial milieu of its influence on appointments within the judiciary. This situation entails illegal operation of the authority whose composition has been formed in violation of the Constitution, and results in a systemic flaw in the judicial nomination procedure.

Keywords: National Council of the Judiciary, independence of courts, independence of judges

Streszczenie

Krzysztof Grajewski

Dysfunkcjonalność Krajowej Rady Sądownictwa w polskim systemie ustrojowym po zmianach ustawowych

Tematyka glosy jest związana z uchwałą trzech izb Sądu Najwyższego, poświęconą najistotniejszym problemom ustrojowym trzeciej władzy w Polsce w kontekście przeprowadzanych od kilku lat przez ustawodawcę antykonstytucyjnych zmian w przepisach dotyczących sądownictwa. Analizowanym tematem jest problematyka Krajowej Rady Sądownictwa, która zgodnie z Konstytucją, ma być organem stojącym na straży niezależności sądów i niezawisłości sędziów. Autor glosy zdecydowanie aprobuje pogląd Sądu Najwyższego, który dowodzi, że dokonane w ostatnich latach zmiany ustawowe dotyczące trzeciej władzy, w tym zmiany sposobu wyłaniania

tzw. sędziowskiej części KRS, są wprost niezgodne z Konstytucją i pozbawiają środowisko sędziowskie wpływu na nominacje w obrębie sądownictwa. Ta sytuacja *de facto* oznacza nielegalność działania organu, którego skład został ukształtowany wbrew przepisom Konstytucji, co skutkuje systemową wadliwością procedury nominacji sędziowskich.

Słowa kluczowe: Krajowa Rada Sądownictwa, niezależność sądów, niezawisłość sędziów

Right to Request the Disclosure of Personal Data of an Entity Accused of Infringing Personal Rights on the Internet as a Part of the Right to a Fair Trial

Resolution of the Supreme Court of 6 August 2020, III CZP 78/19

Thesis of the Supreme Court's resolution: The court is entitled – according to art. 159.2.4. of the Act of 16 July 2004, Telecommunications Law (unified text: Journal of Laws 2019, item 2460, with amendments) – to request information from an entity bound by telecommunications secrecy to verify a claimant's claim that the act infringing personal data has been committed by the defendant in the case.

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Commentary

It is worth pointing out that this glossed resolution has not yet been provided with reasons for judgment by the Supreme Court until the text is sent for printing. Nevertheless, due to its great importance, it is worth paying attention to the legal issue raised in it. The resolution of the Civil Chamber of the Supreme Court significantly influences the understanding of the right to a fair trial, implemented as the right to a properly constituted court procedure, and of that element which emphasizes, above all, the procedural dimension of the right to a fair trial.[1] The resolution was issued as a result of the determination of a legal issue presented by the Court of Appeal in Gdańsk, while considering case III CZP 89/18 and may constitute an important step in establishing the liability of persons violating personal rights on the internet.

The issue presented to the Supreme Court arose on the basis of the following facts. The conflict arose in a housing cooperative in Gdańsk and concerned the plans to

[1] Z. Czeszejko-Sochacki, "Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (Ogólna charakterystyka)," *Państwo i Prawo* 1997, vol. 11–12, p. 102.

build a large sports and entertainment hall. As a result, there was a court dispute in which the plaintiff demanded protection of her personal rights. In the course of the appeal proceedings, the Court of Appeal summoned the company that ran the neighborhood website to provide the personal data of subscribers to the internet access service under specific IP numbers. These people used nicknames which made them anonymous. The company refused to disclose this data, referring to the telecommunications confidentiality that was binding on it. The plaintiff's attorney requested to ask a question to the Polish Supreme Court. After accepting this request, the Court of Appeal formulated the following question: "Is the entity providing an internet access service – an entity bound by telecommunications confidentiality according to art. 160.1 of the Telecommunications Act – entitled to refuse to present a subscriber's personal data in a case of infringement of personal data, if it is the content presented via the internet that may constitute the basis for this violation, and if, in this case, the basis for disclosing such data at the request of a civil court is art. 159.2.4. of the Telecommunications Law?"

Article 160.1. of the Telecommunications Law[2] imposes on an entity that participates in the performance of telecommunications activities in public networks and entities cooperating lewith it the obligation to maintain telecommunications confidentiality. However, art. 159 of the Telecommunications Law indicates admissible exceptions to the general rule and indicates an exception to the prohibition of reading, recording, storing, and transmitting content or data covered by telecommunications confidentiality by persons other than the sender and recipient of the message in a situation where it is necessary for reasons provided for in the Act or separate regulations (art. 159.2.4). Moreover, this prohibition, in the terms set out in par. 4 of this article, does not apply to messages and data that are public or disclosed by a court decision issued in criminal proceedings, by a prosecutor's order , or under separate provisions.

The understanding of the above-mentioned provisions has raised doubts and discrepancies so far.[3] As a rule, the waiver of telecommunications confidentiality has been considered permissible only in criminal proceedings. Therefore, the basic legal problem has become whether the indication in art. 159.4 as an exception to the data rule resulting from a court order issued in criminal proceedings, excludes the possibility of requesting disclosure of such data in civil proceedings too. The question whether the reference to, for example, a criminal procedure as one that allows the waiving of telecommunications confidentiality excludes the possibility of its suspension in civil proceedings, should be answered negatively. The provision of art. 159 of the Telecommunications Law does not contain a closed list of exceptions; so it should not be in-

[2] Act of 16 July 2004, Telecommunications Law (unified text: Journal of Laws 2019, item 2460, with amendments).

[3] See: judgment of the Court of Appeal in Białystok of 6 April 2011, I ACz 279/11, LEX nr 787378; judgment of the Supreme Administrative Court of 20 February 2013, I OSK 368/12, LEX nr 1354099; A Krasuski, "Komentarz do art. 159" [in:] *Prawo telekomunikacyjne. Komentarz*, LEX/el.; contrary: judgment of the Supreme Administrative Court of 21 February 2014, I OSK 2324/12, LEX nr 1475200; judgment of the Supreme Administrative Court of 22 March 2018, I OSK 454/16, LEX nr 2482989.

terpreted narrowly. Otherwise, the possibility of seeking legal protection through civil proceedings, and, thus, of exercising the individual's right to a fair trial, will be significantly limited. In this matter the judgement of the Supreme Administrative Court[4] is significant, in which the Court stated that: telecommunications confidentiality is not unlimited. First of all, it does not apply to online activities that violate the applicable legal order. Therefore, making possible actions to remedy this situation, including prosecution, not only ex officio, but also by way of a private indictment or by demanding the protection of personal rights in civil proceedings, is an action within the law, allowing exemption from this protection. This is permitted by the provisions of art. 159.2.4. and art. 161.1 of the Telecommunications Law. The Court referred to the value protected by this interpretation. People infringing the law on the internet must not be allowed to go unpunished, and their actions should be assessed in terms of their legality. The confidentiality of communication in telecommunications networks is not absolute. Its boundaries are determined by other values protected by law, such as the protection of personal rights in the form of good name, individual image, and honor. When there is a suspicion that activities contrary to these values are protected by telecommunications confidentiality, these values should be given priority because they constitute a higher good. Such an interpretation alone corresponds to the changing conditions of the functioning of modern society and the state. There is no doubt that the legislator is not able to keep up with all changes occurring in the contemporary communication world. Hence, since a phenomena such as hate on the internet is socially unacceptable, the practice of applying the law should aim at facilitating the protection of victims of such attacks.

The legal issue presented here is also important for an understanding of the constitutional right to a fair trial (art. 45.1 of the Constitution) and the right to privacy and information-related autonomy of an individual (art. 47 and art. 51 of the Constitution). This was pointed out by the Polish Ombudsman (Commissioner for Human Rights), who took a position in the proceedings. This position stated that an entity that is the supplier of an internet access service (thus, an entity bound by telecommunications confidentiality pursuant to art.160.1 of the Telecommunications Law) is not entitled to refuse to provide a subscriber's personal data in a case of infringement of personal rights, if content represented via the internet may give rise to this infringement.[5]

Article 45.1 of the Constitution of the Republic of Poland[6] regulates a civil personal right,[7] the right to a fair trial, which is considered as a public subjective right, creating

[4] Judgment of the Supreme Administrative Court of 21 of February 2014, I OSK 2324/12, LEX nr 1475200.

[5] Rzecznik Praw Obywatelskich, Stanowisko RPO dla SN: Dostawca internetu może ujawniać dane abonenta na potrzeby procesu o ochronę dóbr osobistych z 4 sierpnia 2020 r., www.rpo.gov.pl (accessed: 31.08.2020).

[6] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 with amendments).

[7] W. Jakimowicz, *Publiczne prawa podmiotowe*, Zakamycze 2002, p. 174.

a claim on the part of an individual against the state and its organs.[8] According to , everyone has the right to a fair and public hearing of his/her case, without undue delay, before a competent, impartial, and independent court. The proper understanding of this law has been determined primarily by the jurisprudence of the Polish Constitutional Tribunal. The law is currently considered to consist of the following elements: 1) the right of access to a court; 2) the right to an appropriately constituted court procedure; 3) the right to a court judgment;[9] 4) the right to enforce a court decision;[10] and 5) the right to an appropriate structure and position with regard to the bodies examining the cases.[11] The law is often supplemented in doctrine by, for example: 6) forfeiture of items only on the basis of a court judgment.[12]

The issue that raises doubts on the basis of the glossed resolution of the Supreme Court is the limitation of the court's right to demand information making it possible to verify a plaintiff's claim that the act infringing personal rights was committed by the defendant in the case. This means that the court cannot claim the data of the infringer of personal rights if he/she is not a defendant in the case. Such a statement of the Supreme Court may be justified by the differences that are reserved for criminal and civil proceedings. The purposes of criminal proceedings include, *inter alia*, detecting a perpetrator and bringing him/her to justice (art. 2 par. 1 of the Code of Criminal Procedure[13]). The result of the development of modern communication methods is the necessity of using new methods of prosecuting torts and their perpetrators under criminal procedure. Such methods certainly include the possibility of waiving telecommunications confidentiality, when that is justified by an important social interest. By definition, civil proceedings are of a different nature. As a rule, when the plaintiff decides to take civil action with a request for protection of personal rights, he/she must indicate the defendant whom the claims relate to. The court issues a judgment on the validity of these claims. The permissible procedural differences occurring in civil and criminal proceedings are to ensure faster and more effective protection of the rights and interests of entities claiming their rights before the court.[14] The Supreme Court resolution applies to a situation where the defendant has already been indicated and is a party to court proceedings. The court's right to act in the manner described concerns only the confirmation that the right person has been the defendant. Thus, the claimant is under the obligation to indicate the identity of the defendant who infringed the

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[8] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle*…, p. 89.

[9] Judgment of Constitutional Tribunal of 9 June 1998, K 28/97, OTK 1998, no. 4, item 50.

[10] M. Jabłoński, S. Jarosz-Żukowska, *Prawa człowieka i systemy ich ochrony. Zarys wykładu*, Warszawa 2010, p. 133; , *Zasady ustroju III Rzeczypospolitej Polskiej*, ed. D. Dudek, Warszawa 2009, p. 85.

[11] See: judgment of the Constitutional Tribunal of 24 October 2007, SK 7/06, *OTK-A* 2007, no. 9, item 108; J. Sobczak, *Przepisy płacowe sędziów sądów powszechnych a wzorce konstytucyjne* [in:] *Państwo i Prawo* 2008, vol. 11, p. 85; A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego*, Łódź 2006, p. 103.

[12] A. Młynarska-Sobaczewska, *Wolności i prawa człowieka i obywatela* [in:] *Polskie prawo konstytucyjne*, ed. D. Górecki, Warszawa 2009, p. 94.

[13] Act of 6 June 1997, Code of Criminal Procedure (unified text: Journal of Laws 2020, item 30).

[14] Judgment of the Constitutional Tribunal of 16 January 2006, SK 30/05, *OTK-A* 2006, no. 1, item. 2.

plaintiff's personal rights on the internet. Access to other data must be sought in other appropriate proceedings, e.g. in administrative proceedings.

The resolution of the Supreme Court confirms the understanding of the right to a fair trial, which includes the proper shaping of the court procedure aimed at resolving the case. In the jurisprudence of the Constitutional Tribunal, the understanding of a case as an imperative intervention by a court, an examination by a court, and a court's coming to a decision whether the behavior of other entities violates those interests protected by law, has become established.[15] A fair court procedure is to provide the parties with procedural rights adequate to the subject of the proceedings.[16] Procedural justice in civil proceedings is not achieved in the same way as in judicial-administrative or criminal proceedings. In each of them, however, the participants of the proceedings must have a real opportunity to present their arguments. It is the court's duty to consider them.[17] Moreover, the adversarial principle presupposes the active participation of the parties in the proceedings and refers to a party's right to quote the facts and evidence supporting its/his/her conclusions or to counter the conclusions and statements of the opposing party until the hearing is closed. Court proceedings are aimed at resolving a dispute arising between parties, providing the plaintiff with the possibility of requesting a court authorization to hear the case and to issue a ruling in accordance with the results of the evidenciary proceedings and in accordance with substantive law. The defendant has the opportunity to defend him/herself by means of the available procedural means. It can, therefore, be concluded that the essence of the right to a fair trial implies that a provision of civil procedure should allow a telecommunications company to disclose a telecommunications secret in accordance with art. 159.2.4 of the Telecommunications Law, if that is the only way to prove certain facts or statements. The proper exercise of this right should be guaranteed by the court which, in the circumstances of a given proceeding, decides whether to file such a request or not, as it is not necessary for a fair settlement of the case.

From the thesis of the resolution of the Supreme Court it is not clear what the legal basis was hat the Court was thinking of. According to art. 159.2.4 of the Telecommunications Law, the court is entitled to request specific information, but this provision imposes an obligation to indicate a "separate provision" justifying such a request. Can art. 248 par. 1 of the Code of Civil Procedure be treated as a separate provision within the meaning of art. 159.2.4 of the Telecommunications Law? In the light of the circumstances of those cases in which the Court of Appeal in Gdańsk decided to put a question to the Supreme Court , the answer should be in the affirmative.[18] Accord-

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[15] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle*…, p. 93.

[16] Judgment of the Constitutional Tribunal of 10 May 2000, K 21/99, *OTK* 2000, no. 4, item 109; A. Góra-Błaszczykowska, "'Rzetelne postępowanie przed sądem' według Trybunału Konstytucyjnego (na podstawie wybranych orzeczeń)" [in:] *Ius et remedium. Księga jubileuszowa Profesora Mieczysława Sawczuka*, eds A. Jakubecki, J.A. Strzępka, Warszawa 2010, p. 171; P. Grzegorczyk, K. Weitz, "Komentarz do art. 45" [in:] *Konstytucja. Komentarz*, eds M. Safjan, L. Bosek, vol. I, Warszawa 2016.

[17] Judgment of the Constitutional Tribunal of 13 May 2002, SK 32/01, *OTK-A* 2002, no. 3, item 31.

[18] Contrary ex.: A. Krasuski, "Komentarz do art. 159"…

ing to art. 248 par. 1 of the Code of Civil Procedure everyone is obliged to present, upon the court's ordering this, at a specified time and place, a document in his/her possession and constituting evidence of a fact essential for the resolution of a case, unless the document contains classified information. The aforementioned provision enables the court to obtain knowledge about the validity of the plaintiff's statements in court proceedings. Often only in this way will it be possible in civil proceedings to obtain information on the entity infringing the personal rights of the plaintiff on the internet. The resolution of the Supreme Court does not constitute a general authorization for the court to demand data covered by telecommunications confidentiality, but only an authorization to make such a request in order to verify the fact that the defendant is the infringer of personal rights in any pending proceedings. Therefore, it is not intended to obtain general knowledge but to obtain an answer to a specific question about the identity of an infringer/defendant. Therefore, it will only take place when, in the course of the proceedings, the court comes to the conclusion that information obtained in this way constitutes evidence of a fact significant for the resolution of the case.

Finally, it should be stressed that the world is changing; realities and ways of communicating are changing. Especially the experience of forced isolation related to the Covid-19 pandemic has made us realize that we are facing a completely new reality, a new organization of the life of the individual, state, and society as a whole. The internet has become the primary medium of communication. Therefore, in order to meet the changing socio-political conditions, one should look differently at the mechanisms protecting persons against so-called hate, against the dissemination of untrue information or of information infringing the personal rights of an individual. Hence, a positive assessment should be given of the resolution of the Supreme Court granting a court in civil proceedings the right to request information from an entity bound by telecommunications confidentiality in order to verify a plaintiff's claim that an act infringing personal rights was committed by the defendant in the case. At the same time, it can be hoped that this judgment will open a discussion on the need for even wider protection of the rights of persons whose personal rights are violated on the internet, and will open up the possibility of obtaining information on violators not only in criminal or administrative proceedings, but also in civil proceedings.

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Summary

Agnieszka Gajda

Right to Request the Disclosure of Personal Data of an Entity Accused of Infringing Personal Rights on the Internet as a Part of the Right to a Fair Trial

The gloss refers to the resolution of the Civil Chamber of the Supreme Court of 6 August 2020, III CZP 78/19, which significantly influences the understanding of the right to court realized as the right to a properly formed court procedure. From now on, the entity bound by telecommunications secrecy cannot refuse to provide a subscriber's personal data in a case of infringement of personal rights, if it is the content represented via the internet that may constitute the basis for this infringement. However, this only applies to information that makes it possible to verify the claim that the act infringing personal rights was committed by the defendant in the case and only if it is the only way to prove these facts.

Keywords: protection of personal rights on the internet, the right to a fair trial, revealing telecommunications secrets

Streszczenie

Agnieszka Gajda

Prawo żądania ujawnienia danych osobowych podmiotu naruszającego dobra osobiste w Internecie jako element prawa do sądu

Glosa odnosi się do uchwały Izby Cywilnej Sądu Najwyższego z dnia 6 sierpnia 2020 r., III CZP 78/19, która w istotny sposób wpływa na rozumienie prawa do sądu realizowanego jako prawo do prawidłowo ukształtowanej procedury sądowej. Od tej pory podmiot związany tajemnicą telekomunikacyjną, nie może odmówić przedstawienia danych osobowych abonenta tej usługi

w sprawie o naruszenie dóbr osobistych, jeżeli treści udostępniane za pośrednictwem Internetu mogą stanowić podstawę tego naruszenia. Jednak dotyczy to wyłącznie informacji pozwalających zweryfikować twierdzenie, że czynu naruszającego dobra osobiste dopuścił się pozwany w sprawie, i tylko wtedy, gdy jest to jedyny sposób udowodnienia tych faktów.

Słowa kluczowe: ochrona dóbr osobistych w Internecie, prawo do sądu, uchylenie tajemnicy telekomunikacyjnej

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Main Effects of Law No. 13.964/2019 (Anti-Crime Package) in Brazilian Criminal Law

1. Introduction

The present work discusses a study on the effects of Law No. 13.964/2019 in Brazilian criminal execution that aims to make substantial changes in the execution of sentences from rules implemented by the new legislation.

In the so-called anti-crime project, several changes in the Brazilian penal legislation were foreseen, including changes in the Criminal Execution Law, especially in the progressive penalty system.

Before presenting the aforementioned amendments, it is essential to analyze the purpose of the penalty and the currents of thought that deal with the subject. In Brazil, a progressive system of penalty enforcement was adopted that had a severe impact with the introduction of Law No. 13.964 of 24 December 2019.

As a result of the new legal system, there has been intense discussion on the constitutionality of the changes implemented in Brazilian criminal enforcement and these discussions merit analysis.

The study is relevant because of the contemporaneity of the matter since the changes in the Criminal Execution Law that have recently come into force have provoked intense debates in view of the profound change in the progressive penalty system in the country.

2. Penalties and their purposes

A penalty is a kind of criminal sanction, a response to the offender of the incriminating rule (crime or misdemeanor), consisting in the deprivation or restriction of certain rights of the individual. The imposition of the penalty necessarily depends on due

legal process, through which the authorship and materiality of a typical, anti-legal, culpable behavior is verified.[1]

Throughout history, various currents of thought or theories have emerged to explain the functions of sentencing, with three groups standing out. The first, known as absolute theories, understands that the penalty is a natural consequence of a crime, with the purpose of returning the evil generated. The penalty would have, for the defenders of these theories, the end of mere retribution. The second, also known as relative or utilitarian theories, bases the penalty on the ends that it can achieve (useful to avoid new crimes), looking to the future (*ne peccetur*).[2] For the theorists of this current of thought, the penalty should serve as general negative prevention; that is, it should act as a deterrent to the commission of new crimes. There is also the purpose of positive general prevention (this is elaborated by Jakobs) in the sense of justifying the penalty in a demonstration of the validity of the law, generating in the community the reinforcement of trust in the State after a crime has been committed.

Another purpose is special prevention, aimed at the offender him- or herself, forming two divisions, consisting of a negative one in which the purpose of the penalty would be to inhibit recidivism, and a positive one aimed at the reintegration and social reinsertion of the offender against the criminal rule.

Finally, there are the so-called mixed theories, which bring together the concepts of absolute and preventive theories, understanding the penalty as retribution for evil, in addition to prevention, general and special.

According to Oliveira,[3] instead of denying these two foundations of the penalty (vengeance and prevention), mixed theories seek to correlate the retributive and preventive nature of the criminal sanction. As far as the retributive aspect is concerned, instead of revealing a character of revenge, it corresponds to the necessary measure of proportionality between the penalty and the crime, adapting the general and special preventive functions to the criteria of justice. At the same time, the penalty seeks both a deterrent effect of criminal practices by other members of society and a discouragement to the repetition of criminal actions by the individual already convicted, allowing him or her to be re-socialized and reintegrated into society. Brazil has adopted the mixed or eclectic theory of punishment, also called *mixtum compositum*, covering the ideas of retribution, prevention, and the social reinsertion of the convicted.

If a crime is committed, after due process of law, with the issuance of a sentence, the purpose of retribution and prevention is verified. Through art. 59 of the Penal Code, sentences must be necessary and sufficient to condemn and prevent the crime. Thus, according to our criminal legislation, the penalty must reprove the evil produced by the conduct committed by the agent, as well as prevent future criminal infractions.[4]

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1 R. Cunha, *Manual de direito penal: parte geral*, Salvador 2018, p. 443.
2 R. Roig, *Execução penal: teoria crítica*, São Paulo 2018, p. 23.
3 T. Oliveira, *Pena e racionalidade*, Rio de Janeiro 2013, p. 118–119.
4 R. Greco, *Curso de direito penal*, Niterói 2016, p. 587.

Criminal execution also has the character of retribution and special prevention, especially positive prevention, referred to by many authors as re-socialization.[5]

Finally, it is verified that the character of social reinsertion of the convicted person is provided for in art. 1 of Law No. 7.210/1984, Law of Criminal Execution: "The criminal execution has the objective of effecting the provisions of sentence or criminal decision and provide conditions for harmonious social integration of the convicted person and the internee."

3. Evolution of the sentence enforcement system

Prison sentences originated in the monasteries of the Middle Ages as a way of punishing members of the religious community who practiced irregularities. These people were sentenced to gather in cells for meditation in order to incite repentance and atonement for sin.

The first occurrence of imprisonment was already connected to the theory of special positive prevention and resocialization, because it induced the prisoner to reflect on the behavior considered wrong, so that he would not make mistakes again.[6] However, imprisonment as a form of serving a sentence began to be adopted on a massive scale and, a few centuries later, it presented itself globally. In fact, the penitentiary systems originated in the eighteenth century and evolved, with the abandonment of certain practices, the creation of new alternatives, and the maintenance of some characteristics of the old systems that are still in use today. In penal doctrine, three main systems of penitentiary fulfillment are highlighted, known as penitentiary, Philadelphia or cellular, Auburn, and progressive systems. Begun in 1790, under the influence of the Quakers, in the Walnut Street Jail in Pennsylvania, the Philadelphia system was created and later adopted in Belgium.[7] There was absolute cellular isolation, and the prisoner was taken to his cell, being isolated from the others, besides not being able to work or receive visits. Its main characteristics were the obligation to pray and the impossibility of drinking alcohol, stimulating reflection on the criminal act committed and the consequent repentance of the inmate. It was characterized by the retributive character of the sentence, receiving various criticisms due to the impossibility of communication of the inmates, which did not contribute to the social reinsertion of the condemned, and generating deep psychological and psychiatric disturbances in the inmates. As a way to replace the Pennsylvania system, due to the flaws pointed out, the so-called Auburn system appears. In the penitentiary of Auburn, New York, United States of America, prisoners were isolated and silent at night, and worked during the day, which would resemble the current semi-open Brazilian regime.[8] This system also

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5 R. Cunha, *Manual de direito penal: parte geral*, Salvador 2018, p. 444.

6 https://revistas.unifacs.br/index.php/redu/article/view/1835/1394 (accessed 2020.08.01).

7 http://www.depen.pr.gov.br/arquivos/File/DISSERTACAOALEXANDRECALIXTO[1].pdf

8 D. Nardo, *Diagnóstico e proposta de unificação ao regime semiaberto na terceira entrância do estado do Tocantins*, Palmas 2017, p. 45.

had the characteristic of not allowing conversation among inmates, with silence prevailing. However, it was clearly less strict than the penitentiary system.

The second pillar of the Auburn system was the possibility of working during the day while serving the sentence, on the assumption that the work helped the social reinsertion of the convict. This system ended up engendering the exploitation of prison labor by the capitalist system, in view of the exploitation of the fruit of the labor involved. Such circumstances generated clashes with the free working class, and one of the causes of this failure was the pressure of union associations that opposed the development of penitentiary work. Production in prisons represented lower costs and could pose competition with free work. And yet another negative aspect of the Auburn system was the strict disciplinary regime applied.[9]

The third system, known as the progressive system, had some variants, with the English system being abandoned, with three phases of serving a sentence, and the Irish system, with four phases.

The basis of these models was the stimulus for good behavior of the inmate and the incitement for his return to social coexistence, which were benefits granted according to the conduct of the convicts. As a rule, there is a phase of isolation, moving on to a second phase of nighttime isolation and daytime work, for later preparation for social coexistence.[10] The progressive system has spread to countries in Europe and several other countries outside the European continent and is widely adopted today.

Brazil has adopted the progressive system, with some peculiarities. This system was welcomed in our country in the Decree-Law No. 2.848, of 7 December 1940, in the original wording of the general part of the Brazilian Penal Code, foreseeing, in the terms of art. 30, the beginning of the sentence in isolation, for later possibility of common work during the day and night isolation. The convict could also be sent to a penal colony or similar with half of the sentence if it was less than three years or with one-third of the sentence if it was more than three years. There was also the possibility of the convict being co-placed on conditional release, according to art. 60.[11]

Subsequently, with the enactment of Law No. 6.416, of 24 May 1977, the so-called closed, semi-open and open regimes were provided for, which is the case up to the present moment.

With the introduction of the Criminal Execution Law in 1984, the whole structure of penalty enforcement in Brazil was formatted, and was recently modified by Law No. 13.964/2019.

According to Roig,[12] our country is founded on the progressive system, with the flexibility of the possibility of transfer between regimes. Exactly in this sense, Brazilian Criminal Execution Law establishes that the custodial sentence will be executed in a progressive form with the transfer to a less rigorous regime, to be determined

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9 C.R. Bitencourt, *Tratado de direito penal: parte geral*, São Paulo 2012, p. 356–357.

10 A. Bruno, *Das penas*, Rio de Janeiro 1976, p. 58–59.

11 https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2192353 (accessed: 2020.08.01).

12 R. Roig, *Execução penal: teoria crítica*, São Paulo 2018, p. 353.

by a judge (art. 112) while also providing for the possibility of regime regression (art. 118). The understanding prevails that the nature of regime progression is a subjective public right that is, therefore, required of the State whenever the objective and subjective requirements for its concession are met. The rule was to establish the fraction of one-sixth for each phase of the sentence, with consequent progression of the regime in fulfilling the objective requirement, as well as the presentation of good behavior, which is the subjective requirement.

According to the provisions of art. 33 par. 1 of the Penal Code, as amended by Law No. 7.209, of 11 July 1984, the closed regime must be complied with in a maximum- or medium-security facility; the semi-open regime in an agricultural, industrial, or similar facility; and, finally, the open regime must be complied with in a simpler, open facility.

The Heinous Crimes Law (Law No. 8.072/1990) introduced a special provision in which the convict should serve his sentence in a fully closed regime. However, the Federal Supreme Court declared the unconstitutionality of this rule in February 2006, in the HC 82959-7/SP judgment.

With this understanding, the National Congress mobilized, culminating in the enactment of Law No. 11.464, of 28 March 2007, which provided for, with a conviction for a heinous crime, progression to a less serious regime at two-fifths of the sentence and, in the event of re-offending, at three-fifths.

4. Changes in criminal enforcement with the introduction of law no. 13.964/2019

It must be recognized that there was, and still is, in Brazilian society a deep dissatisfaction with the national model of penalty fulfillment. There is a clear perception of a general lack of effectively attaining the purposes of penalties, without the observation of the due and proportional punishment to those who commit crimes and with much fewer conditions for the resocialization of convicts. In the years after the enactment of the Law on Penal Executions, legal changes were promoted to give greater rigor to the enforcement of sentences.

In view of the need to better deal with criminal execution, Bill No. 882 of 2019, known as the anti-crime package, was processed, along with other projects dealing with the same issues, and discussions and deliberations were held on various matters relating to Brazilian criminal legislation and criminal procedure, and the criminal execution law.

According to the bill that was approved, Law No. 13.964/2019 makes substantive changes in three main topics of the Criminal Execution Law, which are: a) classification of convicted persons; b) differentiated disciplinary regimes; and c) differentiated percentages for the progression of prison regimes and granting of other benefits.

4.1. Prisoner classification: identification of the genetic profile

The Federal Constitution expressly establishes the principle of individualization of the penalty, through art. 5, item XLVI, establishing that the law will regulate the individualization of the penalty.[13]

The Criminal Execution Law, in this line, has not forgotten to determine that "The prisoners will be classified, according to their background and personality, to guide the individualization of criminal execution." According to the classification of the convicted, Law No. 12.654/2012 added to the Criminal Execution Law the obligation of those convicted for a crime committed with intent, with violence against a person, or for any of the crimes foreseen in art. 1 of Law No. 8.072, of 25 July 1990 (Heinous Crimes Law), to submit to the identification of their genetic profile by DNA (deoxyribonucleic acid) testing using an appropriate, painless technique (art. 9-A).

According to the position of the Superior Court of Justice, it is perfectly feasible to identify a person by their genetic profile:

> CRIMINAL EXECUTION. HABEAS CORPUS. COLLECTION OF GENETIC MATERIAL. A PERSON CONVICTED OF A CRIME OF VIOLENCE AGAINST A PERSON AND A HEINOUS CRIME. FULFILLING THE REQUIREMENTS. ABSENCE OF ILLEGAL CONSTRAINT. APPEAL DENIED. 1. According to art. 9-A of the Criminal Execution Law, those convicted of a crime committed with violence or of a serious nature against a person, or for any of the crimes provided for in art. 1 of Law No. 8072, of 25 July 1990, the identification of their genetic profile shall be compulsorily by the extraction of DNA (deoxyribonucleic acid) using an appropriate, painless technique. 2. In the case under examination, the person is punished for the crimes of homicide, concealment of a corpse, cruelty against animals and irregular possession of a firearm of permitted use, thus remaining satisfied the legal requirements established by the aforementioned provision: conviction for a crime with violence of a serious nature against a person or those listed in art. 1 of Law No. 8.072/1990. 3. Habeas corpus denied.[14]

In fact, collecting genetic profiles is an attempt to better identify individuals who commit serious crimes against the law. However, there is intense discussion about the constitutionality of this legal provision, so much so that in view of the number of claims of unconstitutionality, the Supreme Court recognized, in an Extraordinary Appeal, the general repercussion of the matter (Theme 905), and the Constitutional Court has yet to issue a definitive position on the issue.

Law No. 13.964/2019 introduced procedural complements to art. 9-A of the Criminal Execution Law since the amendment approved in the main section of this article was vetoed by the President, which leaves open the possibility of subjecting those convicted of a crime committed with intent and with violence, or for any crimes considered heinous to the procedure of genetic profile identification. In the proposed bill

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[13] https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/CF.pdf (accessed: 2020.08.01).

[14] HC 536114/MG. HABEAS CORPUS 2019/0290604-2. Rel. Ministro NEFI CORDEIRO (1159). SEXTA TURMA. DJ 04/02/2020. DP - DJe 10/02/2020. Unless stated otherwise, all translations are by the authors.

it was intended that identifying genetic profiles could also occur even before final rulings, but this did not happen. Thus, according to Lima,[15] it should always be kept in mind that identifying genetic profiles is only possible for those convicted (a conviction with a final sentence) of intentional crimes that fall under the provision of art. 9a. Thus, if the individual is in the provisional execution of the sentence for crimes defined in the provision above, there is no provision, nor obligation, to identify him or her by genetic profile, due to the incidence of the constitutional principle of presumption of innocence, in the form of item LVII, of art. 5 of the Federal Constitution.

The new legislation establishes that:

> § 1-A. The regulation should include minimum guarantees of protection of genetic data, observing the best practices of forensic genetics; § 3 The holder of genetic data must be able to access their data contained in the genetic profile databases, as well as all documents in the chain of custody that generated this data, so that it can be contradicted by the defense; § 4 The offender convicted of crimes specified in the heading of this article whose genetic profile has not been identified upon entering the prison shall be submitted to the procedure while serving his or her sentence; § 8 It is a serious infraction for the convicted person to refuse to submit to the procedure for identifying his or her genetic profile.

Recent legislation has also amended Law No. 12.037/2009 to provide for the exclusion of genetic profiles from databases in the event of acquittal or, when there has been a conviction, after twenty years of the sentence is served upon request of an interested parties. In fact, the amendments approved refer mainly to procedural issues. Minimum data protection guarantees must be in place, and the offender is guaranteed access to his or her data contained in the respective databases, to other documents from which these data originated, and are assured the right to contradict them. It should also be noted that, since there is no collection of genetic material from convicts who meet the legal requirements when entering the prison, the collection can be made at any time during the completion of the sentence, even for those who are already in the final stage, for example, in an open regime or enjoying conditional release. This can even extend to prisoners already convicted on a date prior to the enactment of the new legislation, because it is a procedural rule.

The refusal to submit to the genetic profile identification procedure is an act of serious misconduct and, therefore, can lead to consequences provided for in the Law of Criminal Execution, such as regression of regime and revocation of other benefits, such as temporary release and the reduction of working time penalty.

According to Suxberger,[16] the normative option in the Bill brings the Brazilian State closer to other countries that have genetic profile banks with measures to improve criminal investigations. Moreover, if the criminal investigation in Brazil demands ur-

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[15] A. Lima, "Alterações promovidas pela lei anticrime na lei de execução penal: lei 7.210/84" [in:] *Lei anticrime comentada*, ed. J.H. Mizuno, Leme 2020, p. 99.

[16] A. Suxberger, "Projeto de lei ‚anticrime' e as modificações no regime legal da identificação criminal e do banco de perfis genéticos" [in:] *Projeto de lei anticrime*, ed. JusPo*Projeto de lei anticrime*, ed. Salvador: *JusPodivum* 2019, pp. 35–36.

gent improvements, either in the data of its ineffectiveness to solve crimes or by the option guaranteeing rights in favor of technical-scientific investigations (instead of the primacy of oral evidence, with all its flaws and problems of meaning and production), the change that prioritizes the technical-scientific aspect is welcome. According to Suxberger, this assertion gains even more importance when it takes into account that material in a genetic profile bank is generally used as a measure of exclusion of authorship and is not necessarily confirmation of a crime, the elucidation of which requires the understanding of its dynamics.

4.2. Differentiated disciplinary regime

The differentiated disciplinary regime (RDD) is considered a modality of disciplinary sanction, the origin of which in the Brazilian legal system occurred in the State of São Paulo through Resolution 26/2001 of the Secretariat of Penitentiary Administration, with the objective of combating organized crime, with provisions for isolating prisoners for up to 360 days that is applicable to the leaders of criminal factions or prisoners engaging in inadequate behavior. The following year of 2002, the State of Rio de Janeiro also instituted a similar measure.

In 2003, because of a strong popular appeal in the face of the country's violent situation, Law No. 10.972/2003 was approved that introduced into the Criminal Execution Law through an amendment to art. 52, a differentiated disciplinary regime. The main characteristic of this was its application to cases of the subversion of internal order or discipline within prison facilities in response to serious misconduct. In the face of the growth of organized crime, several debates have taken place in Brazilian society aiming at improving confronting this type of crime, culminating with the forwarding of the so-called anti-crime project to the National Congress. The concern with organized crime and its profound harm is included in the justification of the bill that was referred:

> It is obvious that we are faced with a different type of criminality, which jeopardizes the existence of the State itself through the planning of and executing the death of its agents. Some of these factions even have courts that judge not only their members but also third parties that commit common crimes. The internet shows the action of these agencies in a significant number of states that are deserving of trial in Pirassununga, SP.
> (https://www.youtube.com/watch?v=XVs9y1IXfZQ Accessed on 10/1/2019)
> and in Porto Alegre
> (http://diariogaucho.clicrbs.com.br/rs/policia/noticia/2016/08/como-funciona-o-tribunal-do-trafico-que-julga-condena-e-executa-desafetos-em-porto-alegre-7297938.html. Accessed on 10/1/2019).
> In both cases there was a death sentence that was executed immediately.

Thus, some topics in the discipline of the differentiated disciplinary regime were included, with the following wording in the Criminal Execution Law:

> Art. 52: The practice of an act foreseen as an intentional crime constitutes serious misconduct and, when it causes subversion of internal order or discipline, it shall subject the provisional

prisoner, or sentenced, national or foreign, without prejudice to the penal sanction, to the differentiated disciplinary regime, with the following characteristics:
I – maximum duration of up to two years, without prejudice to repetition of the penalty for further serious misconduct of the same kind;
II – holding in individual cells;
III – fortnightly visits of two persons at a time, to be carried out in facilities equipped to prevent physical contact and the passage of objects, by a person of the family or, in the case of a third party, legally authorized, lasting two hours;
IV – the right of the inmate to leave the cell for two hours daily for outdoor presence, in groups of up to four prisoners, provided there is no contact with prisoners of the same criminal group;
V – interviews always monitored, except those with their defender, in facilities equipped to prevent physical contact and the passage of objects, unless express judicial authorization to the contrary;
VI – inspection of the contents of correspondence;
VII – participation in judicial hearings preferably by videoconference, ensuring the participation of the defender in the same environment of the prisoner.
§ Paragraph 1 – The differentiated disciplinary regime will also be applied to provisional or convicted prisoners, domestic or foreign:
I – who present a high risk to the order and security of the penal institution or society;
II – under whom suspicions of involvement or participation, in any capacity, in a criminal organization, criminal association or private militia, regardless of the practice of serious misconduct, have been founded.
§ Paragraph 2 (Revoked).
§ 3 If there are indications that the prisoner exercises leadership in a criminal organization, criminal association or private militia, or that he has criminal activity in two or more States of the Federation, the differentiated disciplinary regime shall be compulsorily fulfilled in a federal prison facility.
§ 4 In the hypothesis of the previous paragraphs, the differentiated disciplinary regime may be extended successively, for periods of one year, there being indications that the prisoner:
I – continues to present a high risk to the order and security of the penal facility of origin or to society;
II – maintains ties with a criminal organization, criminal association, or private militia, also taking into account the criminal profile and the function performed by him in the criminal group, the persistent operation of the group, the supervening of new criminal proceedings, and the results of penitentiary treatment.
§ In the hypothesis presented in § 3 of this article, the differentiated disciplinary regime shall rely on high internal and external security, mainly with regard to the need to avoid contact by the prisoner with members of his criminal organization, criminal association, or private militia, or of rival groups.
§ 6 The visit referred to in item III in the heading of this article shall be recorded in an audio or audio and video system and, with judicial authorization, inspected by a prison guard.
§ 7 After the first six months of differentiated disciplinary regime, the inmate who does not receive a visit referred to in the main section of this article may, after previous scheduling, have telephone contact, which shall be recorded, with a member of his family two times per month and for ten minutes.

There was a change in the period for which a prisoner can remain in RDD for a limit of two years, with the possibility of repetition in case of new serious misconduct. There can still be a successive extension for one year, even if there is no other serious misconduct, but when there is still high risk to the order and security of the criminal facility of origin or society, or even if it is shown that the prisoner still maintains links with a criminal organization, a criminal association or a private militia under par. 4.

It is clear that the legislator presented a response to social desires, approving the project that establishes a strong limitation to prisoners submitted to the RDD, providing a series of limitations, among the main ones, holding in individual cells, limitation of visits, two hours of outdoor time daily, monitored interviews, and supervision of the content of correspondence.

However, the interview of a lawyer with an inmate is assured, and does not depend on judicial authorization, but the prohibition of physical contact and the delivery of any object to the inmate must be observed.

With the enactment of the Law, a discussion arose over the constitutionality of monitoring the inmate interviews and the content of correspondence, because of the guarantee of the inviolability of correspondence (art. 5, item XII of the Constitution of the Republic).

However, according to Lima,[17] this issue must be overcome:

> In these conditions, even though it is claimed that the secrecy of the prisoner's correspondence or his right to intimacy constitute fundamental rights, clauses V and VI of article 52 of the Criminal Execution Law are not unconstitutional since, in the face of the conflict with the rule of fundamental right that gives other individuals the right to life, physical integrity, and security, prisoners' rights may lose strength since the disciplinary regime introduced by Law 13.964/19 is constitutional.

Since the beginning of the institution of RDD in the Brazilian legal system, several criticisms have arisen in the homeland doctrine, with questions about the constitutionality of the institute, under allegations that the established regimes of isolation and rigidity go against the principle of human dignity.

However, the Superior Courts, on several occasions, recognizing the need for the security of the prison and the social order, have systematically recognized the constitutionality of the RDD.

This concludes with the Nucci's[18] observations:

> Reality has distanced itself from the law, allowing for the structuring of crime at all levels. But, worse, the marginality within the prison has been organized, which is an inconceivable situation, especially if we think that the prisoner must be, in the closed regime, at night, isolated in his cell, as well as, during the day, working or developing leisure or learning activities. Given these facts, one cannot turn one's back on reality. Therefore, the differentiated

[17] A. Lima, "Alterações promovidas pela lei anticrime na lei de execução penal: lei 7.210/84" [in:] *Lei anticrime comentada*, ed. J.H. Mizuno, Leme 2020, p. 106.

[18] G. Nucci, *Curso de execução penal*, Rio de Janeiro 2019, p. 78.

> disciplinary regime has become a necessary evil, but it is far from a cruel punishment. Severe, yes; inhumane, no. In fact, to proclaim the unconstitutionality of this regime, but to close our eyes to the filthy jails into which many prisoners in Brazil are thrown, is an immense contradiction. It is undoubtedly worse to be locked in a collective cell, full of dangerous convicts, with long sentences, many of whom mix with provisional prisoners, without any regimentation in a system that is completely unhealthy, than to be placed in an individual cell, away from violence of any kind, with more hygiene and cleanliness, and in which the prisoner is not subjected to any type of harassment from other criminals.

4.3. Progression of prison regime

Law No. 13.964/2019 brought about profound changes in the Criminal Execution Law and in other diverse legal provisions of a criminal nature and of criminal procedure.

As already highlighted, the Brazilian legal system has adopted the progressive system of sentence enforcement, which provides three regimes: closed, semi-open, and open. There is also the possibility of granting convicts conditional release when the requirements of art. 83 of the Penal Code are fulfilled.

The progression of the prison regime in Brazil is based on the principle of the individualization of the penalty (art. 5, XLVI, CF); the inmate is notified of the time of the penalty and the initial regime of the sentence.

With the progression of the regime, the convict also has the possibility of achieving reintegration into society since there is a return to the external coexistence of the prison in a gradual manner, through the implementation of the fraction of time provided for by law and the merit relating to the convict's self-discipline and responsibility.

Before the entry into force of Law No. 13.964/2019 there were few time limits for the progression of the regime. With the exception of a par. 3 of art. 112 of LEP, which provides special rules for the fulfillment of women's penalties in exceptional situations, such as pregnant women or mothers of children and handicapped people, demanding the fulfillment of 1/8 of the penalty for progression, the penalty is fulfilled, in the objective sense, as follows: a) common crimes – primary or recidivist – time lapse of 1/6; b) heinous and equivalent crimes – primary – 2/5; c) heinous and equivalent crimes – recidivist – 3/5. The new law significantly changes the time requirements for progression of the regime and is established as follows:

> Art. 112. The custodial sentence shall be executed in a progressive manner with the transfer to a less rigorous regime, to be determined by the judge, when the prisoner has at least served:
> I – 16% of the sentence if the convict is a primary offender and the crime was committed without violence to a person or a serious threat;
> II – 20% of the sentence if the convict is a repeat offender of a crime committed without violence to a person or a serious threat;
> III – 25% of the sentence if the convict is a primary offender and the crime was committed with violence to a person or a serious threat;

IV – 30% of the sentence if the convict is a repeat offender of a crime committed with violence to a person or a serious threat;
V – 40% of the sentence if the convict is a primary offender who has committed a heinous crime or a similar crime;
VI – 50% of the sentence, if the convict is:
a) convicted as a primary offender of committing a heinous crime or a similar crime resulting in death and conditional release is prohibited;
b) convicted of exercising command, individually or collectively, of a criminal organization structured for the commission of a heinous or similar crime; or
c) convicted of the crime of forming a private militia;
VII – 60% of the sentence if the convict is a repeat offender of a heinous crime or similar crime;
VIII – 70% of the sentence if the convict is a repeat offender of a heinous crime or a crime equivalent to a death and conditional release is forbidden.
§ Paragraph 1. In all cases, the convict shall only have the right to progression of the regime if he displays good prison conduct, attested to by the director of the facility and with respect to the rules that prohibit progression.
§ Paragraph 2. The decision of the judge that determines the regime progression shall always be motivated and preceded by the manifestation of the Public Prosecution Service and the defender, a procedure that shall also be adopted in the concession of conditional release, pardon, and commutation of sentences with respect to the deadlines provided in the rules in force.

§ 5 The crime of drug trafficking foreseen in § 4 of art. 33 of Law No. 11.343, of August 23, 2006, is not considered heinous or equivalent for the purposes of this article.
§ 6 Committing a serious misdeed during the execution of the custodial sentence interrupts the period for obtaining progression in the regime of the execution of the sentence in which case the resumption of counting for the objective requirement is based on the remaining penalty.

Art. 122:
§ 2 The convict serving a sentence for committing a heinous crime resulting in death shall not be entitled to the temporary release referred to in the heading of this article.

With regard to the length of sentences, art. 75 of the Criminal Code was amended to increase the maximum length of custodial sentences by ten years to extend the maximum period of imprisonment from 30 to 40 years.

Article 112 of the Criminal Execution Law was profoundly amended with the introduction of Law No.13.964/2019, with a staggering of the percentages of sentence served in the progression of the regime, with differentiations between primary and repeat offenders, between crimes with or without violence and a serious threat, heinous crimes or crimes similar to these resulting in death, crimes of criminal organization structured for the practice of heinous or similar crimes and the crime of constituting private militias.

In the previous rule, the progression happened with 1/6 of the fulfillment of the penalty, being modified only in cases of heinous or equivalent crimes and, in these

cases, differentiating itself, for the progression, for primary (2/5) and recidivist (3/5) offenders.

There are now eight different percentages, ranging from sixteen to seventy percent of sentences in given regimes, with several variables for applying the corresponding percentages.

The subjective requirement for regime progression is good prison behavior, which continues to be required by the new Law, which the director of the prison facility must attest to (§ 1). In the event of serious misconduct during the execution of the custodial sentence, there is an innovation compared with the previous legal system. In fact, the law introduces the understanding already summarized by the Superior Court of Justice, through Precedent No. 534, according to which the practice of serious misconduct interrupts the counting of the period for the progression of the sentence enforcement regime, which is resumed from the commission of the infraction.[19]

As a rule, there will be no retroactivity of this Law, since, in most of the issues provided for, the situation of the convict has worsened, in obedience to the principle of the irretroactivity of the law (art. 5, XL, of the Constitution of the Republic). However, in some points, such as the first fraction of sixteen percent for primary offenders with crimes committed without violence or a serious threat, there is a small decrease in relation to the previous rule of one sixth, which, if transformed into a percentage, would be 16.6%. Thus, in these cases, it is necessary to apply the new rule in view of the retroactivity of the most beneficial law.

An important point of discussion has appeared in relation to the legal nature of the recidivism foreseen in art. 112 of the Criminal Execution Law, whether it is specific or general. The interpretative divergence falls on the percentages foreseen for regime progression. The law provides for the need to serve 40% (forty percent) of the sentence if the convict is convicted of committing a heinous or similar crime, if it is a primary offense (item V); and 60% (sixty percent) of the sentence if the convict is a repeat offender in the commission of a heinous or similar crime (item VII). Thus, a current of thought has emerged that sustains the same treatment between a primary criminal and a non-specific recidivist, and a second current that defends the thought that specific recidivism is not necessary for the convict to progress with serving sixty percent of the sentence in his regime.

The first doctrinal current of thought assumes the position of the literal interpretation of the provisions, in which it would be required for specific recidivism to apply the highest percentage.

In this line of thought, when commenting on recidivism in cases of crimes with violence or a serious threat, Cunha[20] is relevant:

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[19] A. Lima, "Alterações promovidas pela lei anticrime na lei de execução penal: lei 7.210/84" [in:] *Lei anticrime comentada*, ed. J.H. Mizuno, Leme 2020, p. 112.

[20] R. Cunha, P*acote anticrime: lei n. 13.965/2019: comentários às alterações do CP, CPP e LEP*, Salvador 2020, p. 371.

> The provision refers to specific recidivism in a crime with violence or a serious threat. But what if the offender is a repeat offender, but only one of the crimes, past and present, was committed with violence or a serious threat? Reading and rereading the article in the commentary, we conclude that we are facing a gap, the integration of which, of course, should observe the principle of *in dubio pro reo*.

On the other hand, it is necessary to make use of other means of interpretation, such as logical, teleological, historical, and systematic. There seems to be no doubt that the so-called anti-crime package aimed at a more rigorous fight against crime, with the purpose of enabling the State to take more incisive action, especially in relation to the practices of heinous and similar crimes.

Moving on to a historical interpretation, we observe that all the discussions that culminated in Law No. 13.964/2019 were in the sense of giving greater robustness in the predictions of regime progression.

From the point of view of systematic interpretation, the conclusion of the requirement of specific recidivism for progression to a less rigorous regime with a reach of 60% of the fulfillment of the penalty sounds contradictory, because it would be recognized, at this point, as an improvement of the convict's situation, including in the application of the retroactivity of the law, bearing in mind that the previous rule for such cases would be more serious. Thus, it is not clear that a law that seeks to promote the fight against organized crime and greater strictness in the execution of sentences could improve the situation of those convicted of heinous and similar crimes, especially repeat offenders.

In fact, there is no mention in Law No. 13.964/2019 on specific recidivism in heinous or equivalent crimes; therefore, we should observe the understanding prior to the enactment of this law, which was consolidated in the sense of the need for specific recidivism for a lack of legal provision; therefore, the occurrence of generic recidivism is not required, which means the previous crime was also heinous or equivalent. It must be taken into consideration that, if the law intends to achieve specific recidivism, it must do so expressly, which does not occur in the present situation. In this sense, Lima[21] is relevant:

> Referring to art. 2, § 2 of Law No. 8072/90, the fulfillment of 2/5 of a sentence if the convict is a primary offender and 3/5 if a recidivist, without making any reservation as to the type of recidivism, it is concluded that the legislator refers to the generic recidivism of art. 63 of the Penal Code. After all, when the law wishes to refer to specific recidivism, it does so expressly. By the way, it is enough to see the example of art. 83, item V, of the Penal Code, included therein by virtue of Law No. 8072/90, which expressly mentions specific repeat offenders in crimes of a heinous and similar nature. Similarly, when dealing with the replacement of a custodial sentence by a restriction of rights, art. 44, § 3, *in fine*, of the Penal Code makes express reference to recidivism operated by virtue of the practice of the same crime. Therefore, in view of the silence of the Law – art. 2, § 2 of Law No. 8.072/90 refers generically to recidivism – it is not given to the interpreter to include different requirements under penalty of violation

[21] R. Lima, *Legislação criminal especial comentada: volume único*, Salvador 2019, p. 256.

of the principle of legality. Therefore, if someone commits a heinous or similar crime, after having already been irrecoverably convicted of another crime, heinous or not, in the last five years, he may progress only after serving 3/5 of the sentence under the previous regime.

There are already judicial questions about the controversy, and some courts have already consolidated the above position that specific recidivism is unnecessary. The Court of Justice of São Paulo recently decided on this subject:

> Criminal execution. Progression to a semi-open regime. Recidivist criminal. Allegation of the defense that the requirement of 60% (3/5) of the sentence, from Law 13.964/2019, applies only to specific recidivists. Appeal not granted. The new law was instituted with the objective of repressing in a more severe way those who commit crimes through criminal organizations, violent crimes, heinous crimes, and those equivalent to heinous, with differentiated treatment to the hypothesis of recidivism. The intention of the legislator that must be observed by those who apply the Law. The impossibility of being admitted the requirement of 3/5 of the penalty (currently 60%) only for specific recidivists. The maintenance of the calculation presented, which considered a reduction of 3/5 for the progression of the sentence of the recidivist sentenced, even if it is not specifically for a heinous crime. Decision maintained. Appeal not accepted.[22]

5. The constitutionality of the new rules on the progression of the system of the enforcement of penalties

The 1988 Constitution of the Republic introduces guidelines for Brazilian criminal execution that are established in the clauses of art. 5 that present the treatment of penalties, as follows:

> XLVI – the law will regulate the individualization of the penalty and will adopt, among others, the following: a) deprivation or restriction of liberty; b) loss of property; c) fines; d) alternative social benefits; e) suspension or prohibition of rights; XLVII – there will be no penalties: a) death, except in case of declared war, under the terms of article 5. 84, XIX; b) perpetual; c) forced labor; d) banishment; e) cruel; XLVIII – the penalty will be served in different facilities, according to the nature of the crime, the age, and the sex of the convict; XLIX – prisoners are assured respect for physical and moral integrity; L – prisoners will be assured conditions so that they can remain with their children during the period of breastfeeding.

There is a current of thought that defends the unconstitutionality of these changes with the allegation that this violates the progressive system of serving sentences. It also postulates the possibility of increasing the permanence of prisoners in the re-

[22] TJSP: Agravo de Execução Penal 0001822-18.2020.8.26.0521; Relator (a): Otávio de Almeida Toledo. Órgão Julgador: 16ª Câmara de Direito Criminal; Sorocaba/DEECRIM UR10 – Unidade Regional de Departamento Estadual de Execução Criminal DEECRIM 10ª RAJ; Data do Julgamento: 26/05/2020; Data de Registro: 26/05/2020.

spective prison facilities, which will subsequently lead to increased public spending on prisoners and the failure to uphold the principle of human dignity.

There is also the argument that the Supreme Court already declared in an analysis of a precautionary measure, the state of unconstitutional affairs in the penitentiary system in Brazil (ADPF No. 347), which was not taken into account by the ordinary legislator.

A second current of thought defends the rigors of the execution of the sentence, but also adheres to the guiding principles of criminal execution, as well as the individual rights of prisoners. This line of thought emphasizes the right to the security of the community in art. 6 of the Constitution of the Republic as one of the social rights presented there, so that public security is also considered a right of society. It is also argued that prison is a school of crime and that the custodial sentence is bankrupt. However, there is no point in sustaining non-compliance with the law. If the law were served faithfully, in all likelihood the penalty would not be bankrupt.

Criminal enforcement and the changes promoted by Law No. 13.964/2019, especially the new rules of progression of the regime, must be analyzed in terms of constitutional principles, which are the legal standards par excellence. Based on this assumption, the principle of legality must be observed, which achieves a high level of activity in the determination of penalties and security measures, extending to disciplinary sanctions. The principle of adversarial procedure cannot be forgotten, with the right of the parties to be informed of all procedural acts, in conditions of parity, allowing for a broad defense, both self-defense and technical defense. The individualization of the penalty should be the rule, with the appropriate facility for the fulfillment of the measure, and the appropriate classification of prisoners. The principle of humanity enshrines the need to respect the person who serves the sentence or security measure with protection of their physical and mental integrity.[23]

Indeed, the exceedingly difficult issue of a possible conflict of constitutional principles must be resolved by the so-called balancing of interests. This arises from the various ideas inserted in the Constitution since it is presented through the insertion of values from various social groups within a territory.

In the weighing of interests we must first analyze the constitutional principles that are in conflict. Afterwards, we must determine the weight that the system gives to these principles and, finally, we must analyze the weight that each principle has in that specific case, and the principle that has more specific weight over the one that has less must prevail. Thus, to achieve this restriction of interests it is necessary to use the elements of the principle of proportionality, and the weighing of interests must be based on the principle of the dignity of the human person in the final analysis.[24]

This analysis indicates that the ordinary legislator did not disrespect the constitutional precepts of human dignity by bringing, as a rule, more rigorous treatment

[23] https://bd.tjmg.jus.br/jspui/handle/tjmg/8598 (accessed: 2020.08.01).

[24] https://www.emerj.tjrj.jus.br/paginas/trabalhos_conclusao/1semestre2012/trabalhos_12012/viniciussobreira.pdf (accessed: 2020.08.01).

in Brazilian criminal execution. The legislative changes are compatible with constitutional precepts, with important emphasis on the principle of the individualization of penalties, with attention to different time limits for the progression of the regime according to the seriousness of the crime and the personal conditions of the convict. According to Nucci[25] regarding the individualization of the penalty, there are three aspects to consider: a) first, the legislator, if responsible for individualizing penalties, after all, when designating a new crime the type of penalty (simple detention or imprisonment) and the amount of penalty must be established, among other aspects; b) in the judicial sentence the judge must establish the penalty, choosing the appropriate amount, between the minimum and the maximum, abstractly provided for by the legislator, in addition to opting for the enforcement regime of the penalty and the possible benefits (alternative sentences, conditional suspension of the penalty, etc.); c) the third stage of the individualization of the penalty develops in the stage of criminal execution.

The legislator's wisdom in presenting more serious treatment only to convicts who have committed serious crimes and who have other previous convictions is thus noted. It should be noted that with primary offenses and crimes without violence or a serious threat, there is a reduction in the time frame of the progression of the regime.

Thus, using the principle of proportionality in the weighing of interests, it is concluded that the legislative changes are proportional to the seriousness of crimes and the personal conditions of convicts, and they are also proportional to the offense suffered by people in general through the lack of security in the country.

Therefore, it is stated that the changes brought about by Law No. 13.964/2019, which changed the rules for the progression of the regime throughout the serving of sentences, are constitutional.

6. Conclusions

Law No. 13.964/2019 profoundly changed the Brazilian criminal execution process, and effected important changes in the legal framework, especially with innovations to the classification of convicts, new rules for the differentiated disciplinary regime, and for the progression of the prison regime and other benefits throughout the sentence. After the presentation of the purpose of the sentence, the systems provided for its fulfillment were addressed, until the progressive regime of penalty was adopted in Brazil.

Due to the general discontent in society about the fulfillment of penalties in Brazil, the legislator opted to ensure, in the approval of the new law, the social right of security. Thus, the legislator rightly presented more rigorous treatment to those convicted of violent crimes or those committed by repeat offenders. It was then important to increase the conditions of the differentiated disciplinary regime and to improve the system of collecting genetic material from convicts.

[25] G. Nucci, *Curso de execução penal*, Rio de Janeiro 2019, p. 2.

As has been demonstrated, the principle of individualization of the sentence has been obeyed, and the recent alterations to the Brazilian Criminal Execution Law are constitutional.

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Summary

Tarsis Barreto Oliveira, André Ricardo Fonseca Carvalho

Main Effects of Law No. 13.964/2019 (Anti-Crime Package) in Brazilian Criminal Law

The present work analyzes the main changes in Brazilian criminal execution following the entry into force of Law 13.964/2019 (an anti-crime package), with a study of the principles and characteristics of criminal execution in the country. The legislation introduced several changes into the system of the execution of sentences, mostly with stricter rules. In turn, the constitutionality of the amendments in view of the 1988 Brazilian Constitution is demonstrated. The descriptive and comparative methods for examining past and current legislation is appropriate for the analysis of this study. The results of the study show that the legislator was right about the changes made in the Criminal Execution Law (Law No. 7.210/1984).

Keywords: Penal execution, legislative change, constitutionality

Streszczenie

Tarsis Barreto Oliveira, André Ricardo Fonseca Carvalho

Główne skutki ustawy nr 13.964/2019 (pakiet przeciwdziałania przestępczości) w brazylijskim prawie karnym

Artykuł został poświęcony analizie głównych zmian w egzekucji karnej po wejściu w życie ustawy 13.964/2019 (pakiet przeciwdziałania przestępczości) w Brazylii, a także analizie zasad i cech egzekucji karnej w tym kraju. Ustawodawca dokonał zmian dotyczących wykonywania wyroków, wprowadzając bardziej restrykcyjne zasady. Autorzy wskazują jednak, że poprawki te były zgodne z Konstytucją Brazylii z 1988 r. Przedstawiona analiza została dokonana w oparciu o opisową i porównawczą metodę badawczą, obejmując zarówno obecny, jak i wcześniejszy stan prawny. Wyniki badania wskazują, że zmiany wprowadzone przez ustawodawcę w prawie karnym egzekucyjnym (ustawa nr 7.210/1984) były uzasadnione.

Słowa kluczowe: egzekucja karna, zmiana legislacyjna, konstytucyjność

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Development of Constitutional Law through Constitutional Justice: Landmark Decisions and Their Impact on Constitutional Culture, Gdańsk University Press 2019

Review

In 2019, international legal culture in the area of constitutional law was enriched with a new and exceptional volume entitled *Development of Constitutional Law through Constitutional Justice: Landmark Decisions and Their Impact on Constitutional Culture*.

Published under the auspices of Gdańsk University Press and edited by Professor Rainer Arnold, Professor Anna Rytel-Warzocha, and Professor Andrzej Szmyt, the volume is dedicated to the memory of Paweł Bogdan Adamowicz, President of the Gdańsk Municipal Council, Vice-Rector of Gdańsk University and Mayor of the city, a protector of constitutional values, a humanist, and a true European, devoted to the cause of tolerance, whose death was so untimely.

The volume brings together papers presented during the *International Congress on European and Comparative Constitutional Law* held on 20–23 September 2018, celebrating the Congress's 20th anniversary in Gdańsk, a city of great importance for Europe, since it was the birthplace of the Solidarity movement, which is considered one of the causes of the fall of communism in Central and Eastern Europe.

The cooperation of the University of Gdańsk and the Faculty of Law made it possible to bring together at the same time and in the same place a range of university professors and prestigious scholars, as well as practitioners of constitutional law from different states.

We are honored that our country, Romania, was among the states contributing through their representatives to the conference's debates and, especially, we are honored by the opportunity to share with the readers of *Gdańsk Legal Studies* some thoughts on the post-congress volume. It is a valuable publication, useful for both theoreticians and practitioners of constitutional law, but also for PhD candidates, MA students, and undergraduates.

The volume has a total of 425 pages, gathering reflections from numerous constitutional law specialists from different states who have constructively approached the subject of constitutional justice through relevant commentary on the landmark decisions of the constitutional courts in their own states, and by emphasizing the essential and decisive role played by constitutional justice in the interpretation and development of constitutional law.

The interest generated by the conference was remarkable, because the theme, although a classic one, is of the utmost and enduring importance. It is clear that the supremacy of a state's constitution would remain a simple theoretical matter if there were no appropriate guarantees. The answer that Hans Kelsen gave in 1931 in the paper "Qui doit être le gardien de la Constitution?" (Who Should Be the Guardian of the Constitution? – Paris, Michel Houdiard Éditeur 2006, trans. Sandrine Baume), stating that the only guarantee for the supremacy of the Constitution is constitutional justice, remains a point of reference in relation to the birth of the concept of constitutional justice. Over time, constitutional justice has built up its legitimacy by asserting the importance of protecting human rights and limiting power. However, these are subsequent to the assertion of the supremacy of the constitution.

Constitutional justice is the crowning glory of the rule of law, the main objective of which is effectively to guarantee rights and fundamental freedoms.

These ideas are reflected in the Preface to the volume by Professor Rainer Arnold from the University of Regensburg. He emphasizes the fact that "constitutional justice has the competence and even the obligation to complement the written text of the Constitution, in particular in the field of values, in order to protect the individual against all threats to their freedom emerging in the course of time."

These initial reflections are developed by Professor Arnold in his article "The evolution of the German *Grundgesetz* through constitutional jurisprudence – some aspects," in which he convincingly illustrates the idea that "the FCC has confirmed the leading principles of the Constitution: the value orientation, stability of the political system, federalism and, with some reservations, an openness to the European and international community. It has especially emphasized dignity-oriented anthropocentrism with a vivid attention to an effective fundamental rights protection conceived as specifications of the central principle of freedom and moderated by the omnipresent instrument of proportionality. Rule of law has been associated with this value perspective and melted together into a functional unit."

An interesting and well-researched plea regarding the role of constitutional justice as a guarantor of the separation of state powers and protector of the rights and fundamental freedoms of citizens is made by Dragoljub Drašković, President of the Constitutional Court of Montenegro. He states that "Montenegro as a contemporary constitutional state has established a legal order based on the principle of the rule of law, and has placed within it the Constitutional Court whose core competence is the protection of constitutionality and legality, as well as of human rights and freedoms, or in other words the protection of the Constitution as a whole."

The role of constitutional justice as a neutral power and as a protector of rights is dealt with in "Protecting human rights and freedoms by constitutional control in Ukraine: constitutional complaint v official interpretation" by Professor Ihor Slidenko, Judge of the Constitutional Court of Ukraine, and Professor Dr. Sergiy Panasyuk of the Ukrainian-American Concordia University in Kyiv. They underline the fact that "the constitution complaint is a new instrument of human rights legal protection in Ukraine and in order to have real results or to understand a problem of implementation of such constitutional institute, Ukraine needs time and more real practice."

The article "Judicial (over)activism exemplified by the rulings of the Constitutional Tribunal concerning the democratic principle of the rule of law" by Professor Dr. Hab. Zbigniew Witkowski and Dr. Hab. Maciej Serowaniec from the Department of Constitutional Law, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń, highlights the important role played by the Polish Constitutional Court "in the initial implementation period of the democratic rule of law in the legal order. The advantage of the Tribunal's activism at that time was that the Constitution did not brake democratic changes, despite the fact that its core dates back to the times of real socialism."

Professor Leszek Garlicki, a former judge on the Constitutional Tribunal in Poland, a former judge at the European Court of Human Rights, and currently professor at Washington University in Saint Louis, and Dr. Marta Derlatka, a Warsaw lawyer, in their article that takes a historical perspective on the activity of the Polish Constitutional Court during the period 1996–2018, argue that its jurisprudence was "initially oriented on so-called procedural aspects of the rule of law. Also, the Court elaborated several *principles of decent legislation* like prohibition of retroactive laws, protection of vested rights and legitimate interests."

But, despite this experience, Poland has recently passed through a crisis of constitutional justice, showing evidence of a real "loss of the values of the rule of law," as Polish specialists in constitutional law claim. This crisis is also approached in the article by Professor Dr. Hab. Mirosław Wyrzykowski of the University of Warsaw. "The crisis was initiated in autumn 2015 by the combination of three elements: resolutions of the Parliament infringing the law, the President of the Republic and the President of the Council of Ministers. The constitutional crisis concerned the election by the Parliament of three judges of the Constitutional Tribunal to replace the judges already duly elected, the President's refusal to swear in the original three judges of the Constitutional Tribunal and the refusal of the Prime Minister to publish the judgments of the Constitutional Tribunal. The Acts passed in 2015 and 2016 regulate the Constitutional Tribunal in a way that is to be considered as violating the Constitution. The Constitutional Tribunal lost its role as guardian of the Constitution," notes Wyrzykowski. In a deeply critical spirit and with concern for the rule of law in Poland, the author concludes that "Poland has lost its constitutional identity, parliamentarianism emphasizing that there is an increasing risk of losing sustainable benchmarks for assessing the surrounding (non)constitutional reality."

"Constitutional Court within illiberal constitutionalism. Polish experience" by Professor Dr. Hab. Agnieszka Bień-Kacała of Nicolaus Copernicus University in Toruń

takes a similar critical line. She argues that "the application of illiberal judicialization of politics causes the defective functioning of constitutional courts. The adjudication is slowed down and the court is no longer an impartial and independent body. It becomes a servant of political will. As a consequence, the court starts to safeguard illiberal constitutionalism. Loyal constitutional judges deliver new readings of constitutional provisions to justify political actions of the day. The rights of an individual are no longer protected at the same level as in previous systemic solutions."

After the presentation of theoretical arguments and following the same line of ideas, starting from the role held by the Constitutional Court as guarantor of compliance with the principle of the separation of state powers, Dr. Hab. Monika Florczak-Wator of the Department of Constitutional Law at the Jagiellonian University in Kraków, turns her attention to the constitutional crisis experienced by Poland. According to her, "the Constitutional Court has the authority to protect the principle of separation of powers," but "when the Constitutional Court – as it currently stands in Poland – is subordinated to those who govern, and its judgments that do not meet their expectations are ignored, the Constitutional Court not only loses any real possibility of safeguarding the principle of separation of powers but also the legitimacy to take any measures in this field. A Constitutional Court subordinated to political powers ceases to be an objective and independent guarantor of the constitutional principle of separation of powers."

As a comment on the above views, Andrzej Szmyt, Professor at the Faculty of Law and Administration, University of Gdańsk, brings to the attention of readers a dispute over the publication of judgments of the Constitutional Tribunal in Poland in 2015–2018, underlining that this kind of dispute has been simply an element in wider processes involving the conscious destruction of the fundaments of the Polish constitutional system, starting in the fall of 2015.

An equally interesting approach is found in "European and Euro-Atlantic integration in Poland. Constitutional dimension," in which Mirosław Granat, Professor of Constitutional Law at the Stefan Cardinal Wyszynski University in Warsaw, discusses the evolution of the concept of constitutional identity in Poland, mentioning that "since 1997, practical experience has shown that the Constitution can, to a large extent, evolve through the Constitutional Tribunal's jurisprudence." The professor does not agree with the claim that "the crucial role of the courts in interpreting the constitution has faced the criticism of politicians, and even legal scholars, as it was seen as *judicial activism*." He continues his argument by ringing out an alarm regarding the situation after 2015: "The situation changed after 2015 when politicians used statutes to introduce changes concerning the judicial power. These changes were and still remain risky for the constitutional identity."

Professor Dr. Hab. Piotr Tuleja of the Jagiellonian University in Kraków analyses the constitutional determinants of the de-legalization of Polish political parties by the Constitutional Tribunal and reaches the conclusion that "the Constitution does not give the Constitutional Tribunal proper grounds for adjudicating on the de-legalization of political parties."

The issue of examining the conformity of the purposes and activities of the political parties with the Constitution of the Republic of Poland is developed in relation to the jurisprudence of the Polish Constitutional Tribunal by Professor Dr. Hab. Piotr Uziębło of the University of Gdańsk. He criticizes the defensive behavior of the Constitutional Tribunal and considers this approach dangerous for the democratic system.

Another key element of this volume is represented by articles dedicated to the role of a constitutional court in the formation and development of the constitutional culture of a state.

Thus, Professor Mathieu Disant of the University Lyon Saint-Etienne argues that Jean Monnet (France) at the beginning of his *Justice constitutionnelle et développement de la culture constitutionnelle. Observations à partir de la situation française* (Constitutional justice and the development of constitutional culture. Observations from the French situation) raises a pertinent question, namely: what is constitutional culture? From his point of view, it is a notion powerful, undecided, and hard to determine. Also, Disant wonders about the legal conditions for the development of a constitutional culture. With great refinement and deep analytical spirit, Disant shows that "one of the conditions is related to the existence of mechanisms adapted to the dissemination of constitutional norms," while another one refers to the involvement of other factors, emphasizing the role of administrative and judicial courts, which must accept or withdraw the constitutional norms interpreted by constitutional jurisprudence. The author concludes by asking whether "the added value is due, in this, to an immersion of the branches of law and the interpretation of the judge in a broader legal-constitutional culture or is another way of saying that constitutional culture does not belong to constitutionalists."

Sharing the point of view of Disant about the difficulty of defining constitutional culture, Professor Constance Grewe of the Robert Schuman University of Strasbourg and former Vice-President of the Constitutional Court, in her article "L'impact des grandes décisions des cours constitutionnelles sur la Culture Juridique. Une réflexion illustrée par la jurisprudence constitutionnelle allemande" (The impact of important decisions of constitutional courts upon legal culture: A reflection illustrated by german constitutional jurisprudence") states that "the legal culture is not homogeneous but pluralist, it can be expressed and formed at all levels, from the individual through groups to the supranational level and therefore it can be challenged, modified, in short, that it is dynamic."

Arta Vorpsi, expert in constitutional law, and Legal Adviser to the Judges at the Constitutional Court of Albania, in his discussion of the role of the Albanian Constitutional Court admits that it is difficult to describe the means by which the Court's activity has affected the Albanian state and society in the past three decades. But one can notice the impressive growth of the Constitutional Court, despite its limited competence and despite a lack of understanding of its role among political actors or even among judges themselves. "Following the 2016 justice reform, which significantly affected the composition, jurisdiction and competences of the Albanian Constitutional

Court," the author stresses that the Court should focus on the consolidation of the rule of law, but also on the general preparation of Albania for its accession to the EU.

In turn, Professor Dr. Hab. Eugen Chelaru of the University of Pitesti, in his article "*Le rôle de la Cour constitutionnelle de la Roumanie dans la formation d'une culture* constitutionnelle" (The role of the constitutional court of Romania in the formation of constitutional culture), states that the formation of Romanian constitutional culture will be helped not only by the decisions of the Court solving constitutional legal issues between public authorities, but also by decisions exercising constitutional control of laws, *a priori* or *a posteriori*, the Constitutional Court having a privileged position in relation to other state institutions.

Despite the Polish constitutional crisis, to which many pages within this volume are devoted, Professor Dr. Hab. Ryszard Piotrowski of Warsaw University, in his article "The influence of the Constitutional Tribunal on the development of legal culture in Poland" emphasizes that the Constitutional Tribunal had and still has an important contribution to make in the development of Polish constitutional culture. He argues that "The Constitutional Tribunal plays a key role in the democratic state governed by the rule of law."

Further, the volume provides numerous areas for debate, the area of discussions being expanded to include the concept of European constitutional culture. Regarding this notion, discussion is opened by Jiří Zemánek, Jean Monnet Professor of European Law at the Charles University in Prague, who, in "The contribution of the Czech Constitutional Court to the European constitutional culture," raises a series of extremely topical questions: "What can be called *a European constitutional culture* in times of big challenges, such as the project of a Europe *united in diversity* is facing (Brexit; dispute on immigration policy; President Trump's "America first!")? Are we witnessing its sunset and fragmentation by a substitution of national constitutional identities? In which way is a constitutional court as the judicial body empowered to protect constitutionality contributing by references to the national constitutional culture to the process of constitutionalization of EU law?" Zemánek offers answers to these questions in his article.

Another remarkable article dedicated to European constitutional culture and the role played by the Court of Justice of the European Union in its formation is that written by Siniša Rodin, Judge of the Court of Justice of the EU. It states that "the constitutional culture of the European Union is constructed on liberal democratic assumptions that assume separation of powers, independence of the judicial branch, protection of individual rights and protection of minorities by counter-majoritarian safeguards."

In a further discussion of the role of the Court of Justice of the European Union, Viktor Muraviov, Professor at Kyiv Taras Schevczenko National University, and Dr. Natalia Mushak of the National Academy of Law Sciences of Ukraine conclude that "the EU Court of Justice practice resulting from its constitutional court functions consolidates the supranational elements of the European Union and to a large extent gives a powerful impetus to the transformation of the EU into a full-fledged state."

Another topic discussed refers to the impact of national constitutional jurisprudence in the acclimatization of European legal culture within national constitutional

cultures, by emphasizing the undeniable importance of constitutional judges. In this meaning, the article "*Conseil constitutionnel français et ordre juridique de l'Union européenne*" (The French constitutional council and the legal order of the European Union), Joël Rideau, Professor emeritus at the Sophia Antipolis University of Nice, argues that the interventions of constitutional judges may promote the adjustment of national legal norms to fit in with the requirements of the European Union's legal order. However, he also draws attention to the fact that such judges may represent obstacles to this adjustment through the adoption of decisions contrary to the fundamental principles of the European Union's legal order.

In this context, Professor Dr. Hab. Krzysztof Wójtowicz of the Faculty of Law of the University of Wrocław stresses in his article the importance of the independence of national courts. Judicial independence is part of the essence of the fundamental right to a fair trial, a right of significant importance, being a guarantee that all human rights resultant from EU laws will be protected, and therefore also protecting the rule of law.

The matter of the independence of national courts and of judges is developed by Dr. Hab. Anna Rytel-Warzocha of the Faculty of Law and Administration, University of Gdańsk. In her article, she carries out a detailed analysis of the jurisprudence of the Constitutional Tribunal in Poland.

Continuing this topic, Dr. Agnieszka Gajda of the Faculty of Law and Administration at the University of Gdańsk, in her article devoted to the right to a fair trial, argues that the jurisprudence of the Constitutional Tribunal significantly alters the understanding of the content of this right. After presenting a well-researched commentary on a Judgment of the Constitutional Tribunal of Poland of 20 April 2017, the author expresses the hope that the decision of the Constitutional Tribunal issued in 2017 will represent the next big step towards the total implementation of the constitutional right to a fair trial.

The issue of a constitutional referendum is taken up by Dr. Hab. Michał Jackowski of the University of Poznań. He discusses this at length in "Constitutional referendum in Poland and primary constituent power." He launches a debate regarding the admissibility, according to the Polish Constitution, of the referendum *ex-ante* on a revision of the constitution.

Another topic discussed in the volume is that of constitutional liability. This subject is developed by Professor Toma Birmontienė of Mykolas Romeris University in Vilnius. He asserts that "constitutional liability is a complex institution of constitutional law. Impeachment is one of the strictest forms, but not the sole form of constitutional liability. The legal and political aspects inherent in the nature of constitutional liability become closely intertwined in the application of this constitutional institution."

The success of this post-conference volume is completed by the article by Gabriella Mangione, Professor at the University of Insurbia, who provides readers with an outstanding discussion of recent developments in Italian regionalism. The author argues that Italy is currently in the middle of a period of deep historical transformation, the end of which cannot be known yet, and that "the divide between the North and South,

the oldest and most persistent of Italian problems, has once again aggravated and severely conditioned public life."

Also, another point of view worthy of mention is that of Professor Enver Hasani former President of the Constitutional Court of the Republic of Kosovo, who in his article discusses "the transfer of sovereignty in a comparative perspective, with a special reference to Kosovo and its transfer of judicial and other powers to an internationalized institution founded by the EU."

Professor Aurel Băieșu from the Republic of Moldova proposes an analysis of the recent evolution of constitutional jurisprudence in his country, concluding that this evolution is part of a new model of constitutionalism based on judicial activism, which has gradually begun to appear in recent decades in European countries. This is followed by an article by Dr. Veaceslav Zaporojan, Judge at the Constitutional Court of the Republic of Moldova, who in a complex form develops the topic "*Le contrôle de la constitutionnalité des omissions législatives dans la jurisprudence constitutionnelle de la République de Moldova* (The control of the constitutionality of legislative omissions in the constitutional jurisprudence of the Republic of Moldova).

The issue of the economic neutrality of the Croatian Constitution is discussed by Professor Biliana Kostadinov of the Faculty of Law at the University of Zagreb, who indicates that "The economic neutrality of the constitution is the main theme of the relationship between the constitution and the economy under constitutional law compared to liberal democracies."

Two more interesting studies strengthen the points of view expressed on the subject of constitutional justice and emphasize the fact that the reason for each legal institution should be sought, first of all, in history. Thus, Valentina Colcelli, Researcher on the National Research Council (Italy), in her article "From cosmopolitan individual status to European Union citizenship" goes beyond the pertinent issue of EU citizenship and stresses the importance of history in the development of a legal institution, by showing that "the diverse range of institutions across the EU is rooted in history."

In addition, fully aware of the fact that one cannot truly know a legal institution without knowing its historical foundations, Professor Dr. Alexander Bröstl, a former Judge on the Constitutional Court of the Slovak Republic, and Director of the Gustav Radbruch Institute of Legal Theory in the Faculty of Law, Šafárik University in Košice, and Ľudmila Gajdošíková, a former Judge on the Constitutional Court of the Slovak Republic, and Senior Researcher at the Institute of State and Law, the Slovak Academy of Sciences in Bratislava, present in their article "Landmark decisions on the history of the Constitutional Court of the Slovak Republic."

We conclude this brief presentation of the articles gathered in the volume *Development of Constitutional Law through Constitutional Justice: Landmark Decisions and Their Impact on Constitutional Culture* with the hope that we have managed to interest potential readers. By harmoniously combining doctrine with jurisprudence, established opinions in judicial literature with their own opinions, analyzing constitutional regulations from several perspectives, and using accessible language and logically arguing

their ideas, the authors make a special contribution to deepening legal knowledge in the field of constitutional justice.

The value of the volume results from its particular way of presenting issues, from its critical attitude, and from the research methods used, but especially from the fact that the authors do not limit themselves to the simple statement of doctrinal opinions on the issues analyzed or to the simple presentation of data from practice, but aim to achieve a shared reflection on the significance of constitutional justice for their own countries and to contribute to the emergence of a transnational constitutional culture.