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National Parliaments in the European Union – Toward a More Active Role?

Introduction

Ever since the founding of the European Union, with the initial three Communities, the role of national parliaments of the Member States in its overall functioning has mainly been indirect and informal. One might say that, in a certain way, national parliaments have usually been hidden behind their governments and have only been asked to take a direct role on exceptionally rare occasions, such as the adoption of Treaty amendments. Although, over the years the initial Community has changed significantly and soon after expanding its goals from predominantly economic to more ambitious, clearly expressed political ones, the deepening of the integration project and a rethinking of the political process did not significantly affect the position of national parliaments. Their legislative competences were weakened in comparison with those of supranational institutions,[1] and it is true that their participation in EU affairs "depended on national legal provisions (or customs)."[2]

The adoption of the Lisbon Treaty in 2007 finally created various new possibilities for the greater involvement of national parliaments in the overall functioning of the EU. Moreover, it was the first time that an EU treaty specifically acknowledged the role of national parliaments in the EU. Among these novelties probably the most important one concerned the Early Warning Mechanism (EWM, which is also called the Early Warning System) introduced with Protocol No 2 of the Treaty of Lisbon. The EWM was envisaged precisely to be the most significant improvement for national parliaments as regards their participation in the EU policy-making process. In this aspect, national parliaments are given the right to receive direct information on EU affairs without the intervention of their governments as well as to raise objections regarding EU legislative acts, making them the guardians of the subsidiarity principle.

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[1] A. Cygan, *National Parliaments within the EU polity – no longer losers but hardly victorious*, "ERA Forum" 2012, Vol. 12, Issue 4, p. 517 *et seq*.

[2] D. Fromage, *Subsidiarity as a means to enhance cooperation between EU institutions and National Parliaments*, PE 583 131, European Parliament, Brussels 2017, p. 2.

From the beginning the purpose of the EWM was dual.[3] First, national parliaments were tasked with the ostensibly technical task of examining new legislative proposals from the EU for compliance with the concept of subsidiarity defined in the Art. 5(3) of the Treaty on European Union (TEU);[4] this refers specifically to the idea that the EU should exercise its powers only when Member States are unable to achieve objectives sufficiently and if such Union action is justified by the added value it provides. Hence, any national parliament may issue a "reasoned opinion" outlining its objections to a legislative proposal on the basis of subsidiarity. Simultaneously, the EWM also has the broader goal of improving the EU's overall democratic legitimacy by expanding the involvement of national legislatures in its legislative process. Since, until recently, national parliaments were thought of as democratically legitimate entities with little or no aggregate influence over EU policy,[5] it was envisaged that their participation in EU affairs by using the EWM would enhance the democratic legitimacy of the EU and further legitimize the whole integration project through its parliamentarization that will no longer be concentrated solely on the institution of the European Parliament.

It is our objective in this article to elaborate the position of the national parliaments in the EU following the Lisbon Treaty entering into force, with special insight into the functioning of the EWM and its normative framework. We also provide a short overview of the subsidiarity check procedures triggered thus far by national parliaments to assess the measure of their factual inclusion in legislative process at the EU level as well as the overall potential of the EWM. We also identify its shortcomings and include proposals for reforming the system structure and advocate for the overall enhancement of the position of national parliaments in the law-making process at the European level.

1. Strengthening the position of national parliaments in the EU

For a long period, the position of national parliaments in the European integration project was that of irrelevance, basically without any significant possibility of influencing the process and faced with constant strengthening of the executive at both supranational and national levels. Parliaments were largely dependent on their governments for information on EU affairs on the national level. At the same time, EU institutions acquired more competences at the supranational level, and they were deemed distant and hardly accessible to citizens, while their operating methods were complex and

[3] I. Cooper, *National parliaments in the democratic politics of the EU: The subsidiarity early warning mechanism, 2009–2017*, "Comparative European Politics" 2019, Vol. 17, No. 6, p. 920.

[4] Treaty on European Union, Art. 5.3: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

[5] I. Cooper, *National parliaments*…, p. 920.

qualified majority voting progressively replaced unanimity. This, together with some other factors such as economic hardship in Europe, contributed to the questioning of the democratic legitimacy of the EU. The quest to reduce the democratic deficit problem and to enhance the role and position of the European Parliament, which was being progressively realized from the end of the 1970s, was a logical choice. Over the years, however, national parliaments have begun to recognize the growing influence of European policymaking on their primary legislative responsibilities, while the EU has also realized that (re)integrating national parliaments into the process might help in legitimizing the integration project and reduce the democratic deficit since reforming and strengthening only the European Parliament will not solve the problem.

Maastricht Treaty (1992) Declarations Nos. 13 and 14 were the first, albeit modest, steps toward acknowledging the importance of national parliaments at the EU level. With a call for improved communication and information sharing between national parliaments and the European Parliament, attempts to restore the somewhat broken links between these bodies that existed in the period when European Parliament members exercised dual mandates as delegates nominated by national parliaments, it also urged national governments to make sure that national parliamentarians receive the Commission's proposals in a timely manner.[6] Furthermore, the Treaty of Maastricht introduced the principle of subsidiarity as a general principle applicable to all areas of non-exclusive competence.

While the Treaty of Amsterdam (1997) introduced the Protocol on the Role of National Parliaments in the EU concerning the transmission of documentation from EU institutions to national parliaments and also formally recognized the Conference of the Committees of the National Parliaments (COSAC),[7] and the Treaty of Nice (2001) provided the impetus for re-configuring national parliaments' position in the European integration project through the Declaration on the Future of the Union, it was the Lisbon Treaty entering into force in 2009 that created specific arrangements to secure

[6] The Maastricht Treaty recognized the role of national parliaments as active participants in the process through Declaration No. 13 on the Role of National Parliaments in the European Union and Declaration No. 14 on the Conference of Parliaments. Declaration No. 13 encourages national parliaments to participate more actively in order to improve communication between national parliaments and the European Parliament. The inclusion of the national governments was made in an effort to accomplish the aforementioned goals, since doing so would guarantee that their parliaments receive Commission proposals on time and have proper time to review or be informed of them. At the same time, Declaration No 14 urges the European Parliament and national parliaments to convene whenever required as a conference of parliaments. The inclusion of these statements in the Treaty represented a political advance even if they were not legally enforceable and acknowledged national parliaments' authority to observe EU legislation ex-ante. See *National Parliaments within the enlarged European Union. From 'victims' of integration to competitive actors?*, eds. J. O'Brennan, T. Raunio, London–New York 2007, p. 12.

[7] The importance of national parliaments increased with the adoption of the Amsterdam Treaty, both because they were made the subject of the Protocol that has the same value as the treaties and because they were given certain guarantees. For instance, adequate time for thorough review was ensured because a legislative proposal could only be put on the Council's agenda after six months. D. Fromage, *Subsidiarity…*, p. 2.

the greater involvement of national parliaments in EU activities, including their participation in the legislative process.

Of the several Lisbon Treaty provisions concerning national parliaments, the most important is Art. 12 of the TEU as it attributes to them the responsibility of "contributing actively to the good functioning of the Union." Further, the treaty secures the right to information for national parliaments, since EU institutions are obliged to forward to them all draft legislative acts of the Union and applications for accession to the Union (Art. 12, 49 TEU), as well as information on policies in the area of freedom, security and justice and proceedings on internal security (Art. 70, 71 TFEU).

Furthermore, according to Protocol No. 1, other information must be provided directly to national parliaments. The Commission must forward all consultation documents and legislative proposals to national parliaments upon their publication (Art. 1); the agendas for and the outcomes of meetings of the Council, including minutes, must be forwarded to national parliaments at the same time as to Member States' governments (Art. 5); possible initiatives of the Council intending to adopt certain decisions with qualified majorities even if unanimity is normally required, must be forwarded at least six months before any decision is adopted (Art. 6); annual reports of the European Court of Auditors must be forwarded at the same time as to the European Parliament and to the Council (Art. 7).

The active participation of national parliaments within certain fields of decision-making processes at the EU level is also secured, for example through treaty revision procedures (Art. 12, 48 TEU), involvement in the political monitoring of Europol and the evaluation of Eurojust's activities (Art. 12 TEU, Art. 85 & 88 TFEU), and adopting measures concerning family law with cross-border implications (Art. 12 TEU, Art. 81 TFEU).

National parliaments also have the right to express objections to policy proposals concerning treaty changes that are proposed under a simplified procedure instead of the normal one (Art. 48.7 TEU) and regarding measures of judicial cooperation in civil law matters with cross-border implications (Art. 81.3 TFEU). In both instances, proposals must be forwarded to national parliaments, and, if a national parliament makes known its opposition within six months of the date of notification, the decision shall not be adopted.

Finally, objections can be voiced with regard to the principle of subsidiarity. Namely, the monitoring of subsidiarity, which is one of the fundamental principles of the EU (together with the principles of conferral and proportionality, Art. 5 TEU), has been seen by many as the most important improvement introduced by the Lisbon Treaty with regard to national parliaments.[8]

[8] M. Zalewska, O.J. Gstrein, *National Parliaments and their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity, College of Europe*, "Bruges Political Research Papers" 2013, No. 28, p. 12.

2. Normative framework of the EWM

As laid down in Art. 5 of the TEU, each institution shall ensure constant respect for the principles of subsidiarity and proportionality. The relevant procedure regarding the EWM, set out in Protocol No 2 on the application of the principles of subsidiarity and proportionality, is as follows: before proposing legislative acts, the Commission shall consult widely, taking into account regional and local dimensions of the action envisaged. Upon consulting, it shall forward its draft legislative acts and its amended drafts to national parliaments at the same time as to the Union legislator. The European Parliament shall forward its draft legislative acts and its amended drafts to national parliaments. The Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, and amended drafts to national parliaments. Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national parliaments. Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality.[9]

Each national parliament has two votes, shared out on the basis of the national parliamentary system. If the parliamentary system is a bicameral one, then each of the two chambers shall have one vote. National parliaments may, upon receiving a legislative proposal i.e., within eight weeks from the date of its transmission in EU official languages, give a reasoned opinion on whether the relevant proposal complies with the principle of subsidiarity (Art. 6). Furthermore, if a "violation" is detected, national parliaments may trigger two different procedures, widely known as yellow cards and orange cards.[10]

As regards the yellow card procedure, in the first eight weeks following receipt, each national parliamentary chamber may publish a reasoned opinion formally expressing its concerns regarding legislative proposal from the EU in areas of shared competence. Hence, reasoned opinions issued by unicameral national parliaments would count as two votes, while reasoned opinions published by a chamber of bicameral national parliaments would count as one vote when determining whether a proposal receives a yellow card (so each national parliament is given two votes and each well-reasoned view counts as one or two votes against the proposal). A yellow card is triggered when at least one third of national parliaments, i.e., of all votes allocated to them or a quarter of them if the proposal concerns areas of freedom, security, and justice, conclude that a legislative proposal does not comply with the principle of subsidiarity.

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[9] Consolidated version of the Treaty on European Union – PROTOCOLS – Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Official Journal 115, 09/05/2008, pp. 0206–0209, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/02:EN:HTML [accessed: 2023.06.04].

[10] See Relations with National Parliaments – The New Role of National Parliaments in the European Decision-making: Implications of the Lisbon treaty, EPP Group, November 2009, p. 6, www.eppgroup.eu [accessed: 2023.06.04]; A. Cygan, *National Parliaments…*, p. 522 *et seq*.

If this threshold is met, the Commission (or other respective institution) must review the questioned draft legislative act, and it may decide to maintain, amend, or withdraw the draft. In other words, there is no obligation on the side of the Commission to withdraw the draft. So, the yellow card method might initially appear to offer significant formal power to national parliaments, but, in fact, it just calls on the Commission to look at its plan without exerting the obligation of changing draft legislative acts in any way. The only real restriction is the requirement that the Commission must justify its final choice in a reasoned decision. There is, of course, the possibility of ex-post judicial review before the Court of Justice of the EU.[11]

The second mechanism, referred to as the orange card, applies to the ordinary legislative procedure. It is triggered when at least a simple majority (i.e., more than half of the allocated votes) of national parliaments conclude that a legislative proposal does not comply with the principle of subsidiarity. If this threshold is met, the proposal must be reviewed by the Commission which, after such review, may decide to maintain, amend, or withdraw the proposal. Nevertheless, if the Commission decides to maintain the proposal and move forward with the text as it is, its reasoned opinion as to why the proposal complies with the principle of subsidiarity (together with those of national parliaments) must be submitted to the Union legislator (the European Parliament and the Council) for consideration. If 55% of the members of the Council or a simple majority of the European Parliament members confirm that the proposal in question is incompatible with the principle of subsidiarity, it shall not be given further consideration, and the legislative procedure shall be halted.[12]

Therefore, national parliaments can even be defined as a collective Virtual Third Chamber of the EU, that together with Council and European Parliament forms the imaginary legislative body of the EU. When national parliaments receive a draft proposal from the Commission, they scrutinize it to determine whether it is at odds with either the subsidiarity and proportionality principles.[13] In addition, they have occasionally used other principles as well, such as conferral, policy efficacy, and political expediency to support their arguments against EU proposals.[14]

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[11] M. Huysmans, *Euroscepticism and the Early Warning system*, "Journal of Common Market Studies" 2019, Vol. 57, No. 3, p. 433.

[12] M. Goldoni, *The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation*, "European Constitutional Law Review" May 2014, Vol. 10, p. 92.

[13] I. Cooper, *A 'Virtual Third Chamber' for the European Union? National Parliaments After the Treaty of Lisbon*, "West European Politics" 2012, Vol. 35, No. 3, pp. 441–465.

[14] I. Cooper, *Is the Subsidiarity Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology, European University Institute*, "Robert Schuman Centre for Advanced Studies Research Paper" 2016, No. 18, p. 17.

3. EWM in practice – procedures triggered to date

Although the EWM is a unique tool that enables national parliaments to play a certain role in legislative procedures by allowing them to give reasoned opinions to alert legislators that some proposals of legislative acts simply do not adhere to the principle of subsidiarity or other principles, it is also true that national parliaments have not often activated the mechanism, and, to date, only three yellow cards have been triggered, and the orange card procedure has never been used. The question remains of whether this is due to reluctance, a lack of knowledge, or perhaps inability, but the low number of cards drawn to date clearly shows that this procedure is certainly insufficient to lower the democratic deficit and shift citizens' perceptions and public opinion of the European Union and its institutions. Nevertheless, the overall record of national parliaments shows that they are not only prepared to make use of their new rights, but that they also co-ordinate across national borders.[15]

The most recent statistics (Report for 2021) indicate intensified collaboration with national parliaments, with considerably more opinions submitted than in the two previous years, of which there were a total of 16 reasoned opinions registered by the Commission expressing concerns regarding the infringement of the subsidiarity principle, while no individual proposal triggered more than three reasoned opinions.[16] It should also be pointed out that in several cases in which the threshold for triggering a yellow card was not reached, reasoned opinions put forward by national parliaments still managed to have significant influence on legislative acts that were adopted.[17] Furthermore, the conversation between the Commission and national parliaments is especially intense inside the informal political dialogue framework, which secures to national parliaments the possibility to express their opinion on every aspect of certain legislative proposals.[18] Besides including submitting opinions in written form, the political dialogue framework also includes visits by members of the Commission to national parliaments, and inter-parliamentary meetings and conferences with the participation

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15 K. Auel, C. Neuhold, *Multi-arena players in the making? Conceptualizing the role of national parliaments since the Lisbon Treaty*, "Journal of European Public Policy" 2017, Vol. 24, Issue 10, pp. 1547–1561.

16 Report from the Commission on the application of the principles of subsidiarity proportionality and on relations with national parliaments, Annual Report 2021, COM(2022) 366 final, https://commission.europa.eu/system/files/2022-08/com_2022_366_1_en_act_part1_v2.pdf [accessed: 2023.06.04]. It is interesting to point out that in the same report there is data that in the same year the European Parliament formally received 24 reasoned opinions. The European Parliament and the Commission (which registered 16 reasoned opinions during the same period) interpret the number of reasoned opinions differently. A reasoned opinion relating to more than one Commission proposal is counted by the Commission as only one reasoned opinion for statistical purposes, while for determining whether the threshold for a yellow/orange card has been reached for a Commission proposal, this reasoned opinion counts as one reasoned opinion for each of the proposals covered. By contrast, the European Parliament counts as many reasoned opinions as proposals involved.

17 D. Fromage, *Controlling subsidiarity in today's EU: The Role of the European Parliament and the national parliaments*, European Parliament, Brussels 2022, p. 10.

18 *Ibid.*, p. 11 *et seq.*

of the Commission, etc. One might therefore argue that there is a room for optimism as well. In this sense, the EWM is complemented by political dialogue or vice versa. Far from being the best and sole tool for decreasing the democratic deficit, the EWM enforces the subsidiarity principle and seeks to harmonize the relationship between European institutions and national parliaments, thus, between the EU and citizens.[19]

In the following sections we briefly refer to each of the three cases when a yellow card was triggered.

3.1. First yellow card (Monti II Regulation)

The first yellow card was triggered in 2012 following the Commission's proposal known as Monti II, which was adopted in March 2012 and officially transmitted to national parliaments on March 27.[20] The proposal was adopted based on the flexibility clause (Art. 352 TFEU) and provoked intense opposition because it was seen as interfering in domestic labor relations by placing limits on workers' rights to collective action and particularly the right to strike. It also confirmed that there was no primacy of the freedom to provide services or of establishment over the right to strike, while recognizing that situations may arise where these freedoms and rights could be reconciled in accordance with the principle of proportionality. Let us recall that a yellow card is triggered when the equivalent of one third of national parliaments pass reasoned opinions. Since each national parliamentary system is allotted two votes, one vote for each chamber in a bicameral parliament and two votes for a unicameral parliament, to trigger a yellow card, national parliaments needed to amass 18 votes by May 22. Although it is up to each parliament to decide how it will respond to a proposal, one parliament may take a leadership role by being the first to pass a reasoned opinion and then encouraging others to do so. In the case of Monti II, the leader was the Danish *Folketing*.[21] In the end, 12 national parliaments or parliamentary chambers passed reasoned opinions; the last two votes were collected in the afternoon of the closing day of the deadline, and there were 19 votes altogether. After the yellow card was triggered, the Commission had three choices: maintain, amend, or withdraw the Monti II proposal. The Commission considered the views expressed and the discussions among the co-legislators, the European Parliament, and the Council, and recognised that its proposal was unlikely to garner the necessary political support for its adoption. In September 2012, the Commission therefore announced its withdrawal and affirmed further that it had "not found based on this assessment [of the arguments put forward by national parliaments in their reasoned opinions] that the principle of subsidiarity has been breached."

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19 A. Gasparini, *The Early Warning System: People's indirect empowerment to reduce the democratic deficit*, "Innovation: The European Journal of Social Science Research" 11 May 2022.

20 European Commission, Proposal for a Council Regulation COM(2012) 130 final, 21.3.2012.

21 I. Cooper, *The story of the first yellow card shows that national parliaments can act together to influence EU policy*, LSE Blog, 23 April 2015.

3.2. Second yellow card (EPPO proposal)

The second yellow card procedure was triggered on October 28, 2013, in relation to the Commission's proposal for a regulation establishing the European Public Prosecutor's Office (EPPO).[22] The proposal from the Commission was based on Article 86 TFEU, which gives the Council the authority to create the EPPO to tackle crimes that harm the Union's financial interests. A special legislative procedure requiring unanimity in the Council and the approval of the European Parliament is set forth in Article 86(1) of the TFEU, while, in the absence of unanimity, it also foresees the possibility of enhanced cooperation.[23] The proposal attracted wide attention and provoked both objections as well as positive comments.[24] National parliaments transmitted 14 reasoned opinions to the Commission, representing a total of 18 votes. The main objection was that the Commission had not fully outlined how the EPPO plan was in accordance with the subsidiarity concept. Parliaments also asserted that the Commission had failed to show a clear necessity for an EU-wide solution for the policy objective of increasing the effectiveness of the fight against fraud throughout the EU.[25] Some raised the traditional argument that criminal investigations and prosecutions are primarily a matter of national sovereignty and that the establishment of a supranational EPPO would limit national competence in a disproportionate way, while others pointed out that many offenses affecting the financial interests of the EU are situated at a purely national level and are often linked to other types of fraud or criminality.[26] Nevertheless, only three weeks after triggering the yellow card, the Commission informed national parliaments of its decision to continue with the establishment of the EPPO without any modification as regards the original text of the proposal. However, the legislation's final approved version underwent significant revision, which suggests that during the legislative procedure EU institutions accepted important modifications of the initial proposal as a result of the national parliaments' analysis of the legislation.[27]

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[22] Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final, https://academic.oup.com/yel/article-abstract/35/1/5/2725281?redirectedFrom=fulltext [accessed: 2023.06.04].

[23] O.J. Gstrein, D. Harvey, *The Role of National Parliaments in the European Union, an extended version of published written evidence: The United Kingdom House of Lords European Union Selected Committee*, "Zeitschrift für europarechtliche Studien" 2014, Nr. 3, p. 348.

[24] D. Fromage, *The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?*, "Yearbook of European Law" 2016, Vol. 35, Issue 1, pp. 5–27.

[25] O. Pimenova, *National Parliaments in Subsidiarity Review: From Guardians to Partners*, "Statute Law Review" 2019, Vol. 40, No. 3, p. 291.

[26] V. Franssen, *National Parliaments Issue Yellow Card Against the European Public Prosecutor's Office*, European Law Blog, 4 November 2013, https://europeanlawblog.eu/2013/11/04/national-parliaments-issue-yellow-card-against-the-european-public-prosecutors-office/ [accessed: 2023.06.04].

[27] A. Cygan, *Participation by national parliaments in the EU legislative process*, "ERA Forum" 2021, Vol. 22, No. 3, p. 429.

3.3. Third Yellow Card (Posted Workers Directive)

The third yellow card dates back to May 2016 and was provoked by the European Commission proposal for a revision of the Posted Workers Directive[28] concerning workers sent by their employers to another country to work there temporarily.[29] The main focus of the criticism of the proposal was the principle of equal pay for equal work, which would apply to posted and local workers, though its primarily motivation seemed to be of political nature.[30] Namely, 14 parliamentary chambers (in total 22 votes) opposed the Commission's proposal to amend the Posted Workers Directive. It is interesting to point out that, with the exception of the Danish parliament, all reasoned opinions were from Central and Eastern Europe. In contrast, the plan enjoyed widespread support in Western Europe as a tool to combat social dumping and several Western European parliamentary chambers supported the directive during political dialogue. It seems therefore that the third activation of EWM also revealed an East-West rift in EU policies, especially since the parliaments mainly voiced national concerns previously raised by their governments. In the end, the Commission replied more than two months after receiving the yellow card. It rejected concerns raised by the national parliaments and decided to maintain the proposal in its original form.[31]

4. Proposals for reform – green card and red card

As already noted, national parliaments were ultimately involved in the European integration process when the Lisbon Treaty entered into force thanks to different possibilities it envisaged, i.e., through securing information rights, then thanks to the EWM, but also through political dialogue known as the Barroso initiative. While the EWM represents a more strict, formal mechanism of securing compliance with the principle of subsidiarity, political dialogue is a non-binding, more proactive, and collaborative channel of communication between national parliaments and the Commission.[32] The proposals for reforming existing mechanisms, called the green card and the red card,

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[28] Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of Services COM(2016) 128 final.

[29] These workers are covered by social security rules in their country of origin. In countries with high wages, employers can therefore usually pay lower wages to these posted workers than to local workers. The issue of posted workers has divided the EU between countries such as Germany and France – home to 230,000 posted workers in 2014, and Eastern European nations. M. De La Baume, *Countries flash yellow card at EU changes to cross border work rules posted workers work abroad Europe*, "Politico" 10 May 2016, https://www.politico.eu/article/countries-flash-yellow-card-at-eu-changes-to-cross-border-work-rules-posted-workers-work-abroad-europe/ [accessed: 2023.06.04].

[30] D. Fromage, V. Kreilinger, *National Parliaments Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive*, "European Journal of Legal Studies" 2017, Vol. 10, No. 1, pp. 125–160.

[31] For detailed analysis see *ibid.*

[32] L. Terrinha Heleno, *The legisprudential role of national parliaments in the European Union*, PE 583 133, European Parliament, Brussels 2017, p. 6 *et seq.*

focus on strengthening the role of national parliaments in overall legislative procedure at the European level.

4.1. Green Card

At the beginning of 2015, national parliaments started discussing the idea of introducing a green card, a mechanism that would enable a more efficient way of strengthening their role in EU policy-making through possibilities concerning legislative initiatives. Namely, following the idea based on a discussion paper prepared by the House of Lords and endorsed by multiple national parliamentary chambers,[33] the Dutch *Tweede Kamer* published a document laying out the scope and nature of the green card initiative.[34] Under the proposed procedure, national parliaments could make constructive suggestions for legislative proposals to the European Commission.[35]

To qualify as a green card, a proposal would have to gain a minimum number of one quarter (25%) of the votes allocated to national parliaments under the EWM and be delivered to the Commission within a time frame of six months from the date of the proposing chamber circulating the draft. After the required threshold was met, the proposing chamber would send the co-signed text to the Commission under the political dialogue framework, making it clear that the proposal is labelled as a green card by the co-signatories. The national chamber that launched the proposal could also decide to transmit it to the Commission as part of a political conversation even if it fell short of the necessary threshold, but then it would not be labelled a green card.[36] The Commission would then react to the green card by formally responding and stating whether it intended to consider the proposed action or not, offering reasons for its decision.

In order to test the green card idea, the EU Committee of the House of Lords put forward a proposal for a trial green card on the issue of food waste.[37] This was deemed a non-controversial topic suitable for testing the proposal, especially as it is estimated that 89 million tons of food is wasted each year in the EU. The plan received wide support at the 53rd COSAC conference held in Riga. It included the following five ele-

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33 House of Lords, European Union Committee, Towards a "green card," further discussion paper, 28 January 2015, pp. 5–6, https://www.parliament.uk/globalassets/documents/lords-committees/eu-select/COSAC/20150128-Letter-to-Chairpersons.pdf [accessed: 2023.06.04].

34 For detailed analysis see K. Borońska-Hryniewiecka, *From the Early Warning System to a 'Green Card' for National Parliaments: Hindering or Accelerating EU Policy-making?* [in:] *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, ed. D. Jančić, Oxford 2017.

35 C. Fasone, D. Fromage, *From Veto Players to Agenda-Setters – National Parliaments and Their Green Card to the European Commission*, "Maastricht Journal of European and Comparative Law" 2016, Vol. 23, No. 2, p. 309.

36 House of Lords, European Union Committee, Towards a "green card," further discussion paper, 28 January 2015, pp. 5–6, https://www.parliament.uk/globalassets/documents/lords-committees/eu-select/COSAC/20150128-Letter-to-Chairpersons.pdf [accessed: 2023.06.04].

37 UK Parliament, EU committee launches green card on food waste, 12 June 2015, https://committees.parliament.uk/committee/335/eu-energy-and-environment-subcommittee/news/93186/eu-committee-launches-green-card-on-food-waste/ [accessed: 2023.06.04].

ments: EU food donation guidelines, EU co-ordination mechanism, monitoring of the business-to-business cross border food supply chain, recommendations on the definition of food waste and on data collection, and the establishment of a horizontal working group within the Commission. In its response, the Commission thanked the 16 national parliaments and chambers that signed the green card and undertook to "pay particular attention to suggestions […] including on food donation and on data collection" while assessing their proposal as a "clear demonstration of their readiness to contribute in a proactive and constructive manner to the policy debate at EU level."[38]

One might therefore conclude that the green card mechanism was envisioned as yet another way of urging national chambers to collaborate and make suggestions for EU policy initiatives while also being and add-on to the already existing procedures (yellow and orange cards).

4.2. Red Card

A concession to add a red card to the EWM was part of the agreement negotiated with the British government in February 2016 in advance of the Brexit referendum. Former UK Prime Minister David Cameron negotiated an EU-UK deal and requested reform covering four key areas: economic governance, sovereignty, competitiveness, and immigration.[39] The proposal included a reform that would introduce a red card mechanism, under which national parliaments would be able to veto new EU legislation if 55% of parliament or chamber votes registered opposition to certain legislative proposals during the first three months after submission. The idea included a requirement to either reject the proposal or change the draft legislative act to reflect subsidiarity objections raised in reasoned opinions.[40] The UK prime minister also stated that the mechanism would enhance the sovereignty of national parliaments by enabling them jointly to "stop unwanted legislative proposals"[41] while also expressing his wish for the "EU's commitments to subsidiarity to be fully implemented."[42] Although the red card proposal was not originally Cameron's idea, as it had been proposed previously by Labour MPs, it sent a very strong political message. The red card would be a powerful instrument building upon the EWM with the yellow card as solely a warning rather than a veto.[43] In other words, the red card was primarily intended as a mechanism that

[38] European Commission C (2015) 7982 final, of 17.11.2015; see also: UK Parliament, European Commission responds to green card on food waste, 20 November 2015, https://committees.parliament.uk/committee/176/european-union-committee/news/92983/european-commission-responds-to-green-card-on-food-waste/ [accessed: 2023.06.04].

[39] The UK's EU Referendum, De Havilland Information Services, 2016, https://www.dehavilland.co.uk/PoliticalUploads/DHEU/Referendum/DraftRenegotiationDeal.pdf [accessed: 2023.06.04].

[40] D. Fromage, *Subsidiarity…*, p. 9.

[41] UK's draft EU deal: What do red and yellow cards mean? BBC News, 2 February 2016, https://www.bbc.com/news/uk-politics-eu-referendum-35471248 [accessed: 2023.06.04].

[42] Explaining the EU deal: The red card, Full Fact, 22 February 2016, https://fullfact.org/europe/explaining-eu-deal-red-card/ [accessed: 2023.06.04].

[43] I. Cooper, *How the 'red card' system could increase the power of national parliaments within the EU*, LSE Blog, 13 June 2016.

would give national parliaments the ability to veto or block draft legislative proposals when they asserted that they violate the principle of subsidiarity, thereby forcing the Commission to abandon proposals.

The red card proposal has also drawn significant criticism. Given that no proposal has yet to reach even the threshold for an orange card, a reasonable question is whether introducing a red card would make a difference. The current system is ineffective because of difficulties in reaching the threshold and because of the short timeframe of eight weeks.[44] In the end, introducing a new mechanism would make no difference as it would likely be used rarely or never, because of its high requirements, thus having no practical impact. Its scope is also very limited, meaning that it only applies to cases where parliaments can argue that a certain EU regulation would be better dealt with at the national level. On the other hand, despite not necessarily revolutionizing EU decision-making, it could still be regarded as positive progress and a step towards strengthening national parliaments' role. However, as the mechanism was negotiated prior to Brexit vote, the plan was never implemented. In 2019 Poland tried to revive the red card procedure plan, claiming that the yellow card mechanism proved to be "paper tiger […] offering only superficial influence" for national parliaments, but to date its status remains the same.[45]

Conclusions

Since its introduction in 2010, there have been multiple critiques of the EWM. Certain shortcomings regarding the functioning of the mechanism in practice are obvious. The EWM has been triggered in just three cases, only yellow cards were activated, and the Commission did not withdraw its proposal on any of these occasions. Some early critics pointed out that it is not a step in the right direction as regards alleviating democratic deficit and strengthening the role of national parliaments,[46] that the EWM generates only more institutional confusion and time consumption rather than simplifying the process that ultimately undermines people's trust in the EU and its efficiency.[47] Furthermore, its operation before the CJEU cannot be enforced directly by national parliaments.[48] National parliaments could use their right to urge their nation-

[44] V. Kreilinger, *David Cameron's proposal to give national parliaments a 'red card' over EU laws is deeply flawed*, LSE Blog, 17 November 2015.

[45] *Poland attempts to revive EU's red card procedure*, "Financial Times" 23 May 2019, https://www.ft.com/content/e60d6f78-7d48-11e9-81d2-f785092ab560 [accessed: 2023.06.04].

[46] P. De Wilde, *Why the Early Warning Mechanism does not alleviate the democratic deficit*, "OPAL Online Paper" 2012, No. 6, https://www.researchgate.net/publication/236024899_Why_the_Early_Warning_Mechanism_Does_Not_Alleviate_the_Democratic_Deficit [accessed: 2023.06.04].

[47] R. Ruiter, *Under the Radar? National Parliaments and the Ordinary Legislative Procedure in the European Union*, "Journal of European Public Policy" 2012, Vol. 20, No. 8, pp. 1196–1212.

[48] For deficiencies of the new mechanism see also A. Cygan, *National Parliaments within the EU*…, pp. 524–526; M. Zalewska, O.J. Gstrein, *National Parliaments*…, pp. 14–15.

al governments to launch a case before the EU Court of Justice, but they have simply never used this opportunity.[49]

On the other hand, while many believe the EWM to be a failed mechanism, some consider it useful and innovative, especially in the legislative process as a signaling device to the European Commission and other actors.[50] Concrete reform proposals of the EWM that could be considered include, among others, that the existing thresholds should be applied in a flexible manner, especially the eight-week deadline, and that the Commission should provide detailed answers to all reasoned opinions.[51] Insofar as the overall role of national parliaments in the law-making process is concerned, creating a green card is widely advocated as is the enhancement of the political dialogue procedure. The latter has already been proved to be an important channel of cooperation that might also be bolstered by adding certain features of the green or red cards, which, at the same time, would not require amending the treaties.[52]

There is absolutely no reason why national parliaments should not be considered as actors that could improve the law-making process at the European level, which would influence and promote its rationality, and focus on the justification and overall quality of EU legislation.[53] Increasing the influence of national parliaments on EU affairs in general would also contribute in achieving the further democratization of the Union as well as the much needed stronger connection with European citizens.

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[49] It is well worth noting though that the principle of subsidiarity has not been subject to intense judicial review; in fact, since the Lisbon Treaty entered into force, it has been considered only in 21 cases and no breach has ever been found. Therefore, it is obviously a "deterring factor for parliaments." D. Fromage, *Controlling subsidiarity…*, pp. 34–36.

[50] P. Van Gruisen, M. Huysmans, *The Early Warning System and policymaking in the European Union*, "European Union Politics" 2020, Vol. 21, No. 3, pp. 451–473.

[51] D. Fromage, *Controlling subsidiarity…*, p. 39.

[52] See L. Terrinha Heleno, *The legisprudential role…*

[53] *Ibid.* See also I. Cooper, *Is the Subsidiarity…*

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Summary

Petar Bačić, Nikolina Marasović

National Parliaments in the European Union – Toward a More Active Role?

The Lisbon Treaty created different possibilities for national parliaments to secure their greater involvement in the overall functioning of the EU and in the law-making process at the European level. Moreover, it was the first time that an EU Treaty specifically acknowledged the role of national parliaments in the EU. Among these novelties probably the most important concerned the Early Warning Mechanism that offers to national parliaments the possibility of examining new legislative proposals from the EU for compliance with the concept of subsidiarity through the so-called yellow card and orange card procedures. The possibility for national parliaments to make more active contributions at the European level also exists inside the informal political dialogue framework that is an important channel of cooperation among EU institutions.

Keywords: European Union, national parliaments, law-making process, early warning mechanism, political dialogue.

Streszczenie

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Parlamenty narodowe w Unii Europejskiej – w kierunku bardziej aktywnej roli?

Traktat lizboński stworzył różne możliwości dla parlamentów narodowych mające na celu zapewnienie ich większego zaangażowania w ogólne funkcjonowanie Unii Europejskiej, a także w proces stanowienia prawa na poziomie europejskim. Co więcej, po raz pierwszy w traktacie UE wyraźnie uznano rolę parlamentów narodowych w UE. Wśród tych nowości prawdopodobnie najważniejsza dotyczyła mechanizmu wczesnego ostrzegania, który oferuje parlamentom narodowym możliwość badania nowych wniosków legislacyjnych UE pod kątem zgodności z koncepcją pomocniczości w drodze procedury tzw. żółtej kartki i pomarańczowej kartki. Możliwość bardziej aktywnego udziału parlamentów narodowych na poziomie europejskim istnieje również w ramach nieformalnego dialogu politycznego, który okazuje się ważnym kanałem współpracy z instytucjami unijnymi.

Słowa kluczowe: Unia Europejska, parlamenty narodowe, proces stanowienia prawa, mechanizm wczesnego ostrzegania, dialog polityczny.

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Impact of European Integration on Substantive and Formal Constitutional Amendments in Spain in the Light of the Spanish Constitutional Court's Jurisprudence and Constitutional Practice

Introduction

The Constitution of Spain (*Constitución Española* – hereinafter referred to as CE)[1] is one of the constitutions of the member states of the European Union, in which the relationship between the state and the international organization is defined in the typical manner, that is, by means of the "European clause." However, it is clear that the process of integration of a member state into European structures and the implementation of EU law can take on a variety of formulas depending on the peculiarities of the constitutional systems of member states. It should also be borne in mind that European integration itself is a dynamic process based on two vectors: deepening, i.e., the permanent tightening of cooperation (the so-called "bicycle metaphor"), and widening, i.e., the opening of integration to more states. Thus, the impact of integration on member states, including Spain, is itself dynamic and challenging.

There is no doubt that EU law has behind it an effective system for guaranteeing its validity and effectiveness. In addition to the formal binding force based on the rules of international law, this system is based on two essential elements: the Court of Justice and national courts applying EU law. Thus, the Court of Justice, through its jurisprudential activity, has pushed through the principles of primacy of application and direct effect of the norms of European Community law, which must have resulted in the need for an appropriate arrangement of the relationship of Community law and, subsequently, EU law with the national law of individual member states, whose legal systems are based on the principle of the supremacy of their constitutions.

The purpose of the article is therefore to answer the question of how the process of European integration has influenced the Spanish constitutional system and what results this has produced. The subject of the research is, on the one hand, influences of

[1] BOE núm. 311, de 29 de diciembre de 1978.

a formal-legal nature, centered around the aforementioned European clause, but also, no less important, but perhaps even more important, influences of a substantive nature, projecting on the normative content of the Spanish Constitution. The analysis is carried out on the basis of normative material, that is, the provisions of the CE and the relevant organic laws, the jurisprudence of the Spanish Constitutional Court and the findings of the Spanish study of constitutional law. The ambition of this study is not, of course, to analyze in depth all the possible implications of EU law, but to verify the thesis of the multifaceted pressures of this law and the susceptibility of member state law to these influences.

Formal-legal impact

Referring to the influence of formal EU law on the content of the CE, it is important to keep in mind that it was already present at the stage of its creation, since Spain, emerging from political isolation after the Francoist era, needed a constitution that would allow it to join such international organizations as the European Communities and NATO. After all, in the case of Spain, it was not a matter of revising an already functioning constitution, but of enacting a new one that corresponded to the country's current needs.[2]

Therefore, even in the initial draft of the Constitution, Article 6 was devoted to this issue, establishing the possibility of a treaty or organic law to delegate the exercise of powers derived from the Constitution to institutions of international law on a parity basis (*en régimen de paridad*). Although the draft did not literally mention the European Communities, it was clear that Spain's inclusion in the integration process was one of the main reasons for this provision. Eventually, the issue was moved to Article 93 of the CE. It is therefore clear that the assessment of the impact of the European integration process on the Spanish constitutional system should be considered against the background of this provision, which is the equivalent of analogous provisions found in other EU member states referred to as "European clauses."[3]

The first sentence of Article 93 CE states that "by means of an organic law, authorization may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organization or institution." The second sentence, on the other hand, is devoted to the enforcement of obligations under treaties thus concluded. According to this provision, "it is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these

[2] J.Á. Camisón Yagüe, *La influencia del proceso de integración europeo en la Constitución española de 1978*, "Ivs Fvgit" 2017, Nº 20, pp. 167–170.

[3] C. Closa Montero, *La ratificación de la Constitución Europea: procesos y actors* [in:] *La Unión Europea en perspectiva constitucional*, ed. A.M. Carmona Contreras, Pamplona 2008, pp. 207–228; P. Cruz Villalón, *La cláusula general europea* [in:] *Hacia la europeización de la Constitución Española. La adaptación de la Constitución española al marco constitucional de la Unión Europea*, ed. *idem*, Bilbao 2006, pp. 51–74.

treaties and with the resolutions emanating from the international and supranational organizations in which the powers have been vested."[4] Regardless of the assessment of these arrangements, it can therefore be concluded that the process of European integration in Spain is being constitutionalized.[5] Thus, the wording of Article 93 CE did not include any *expressis verbis* indication of material limitations on the scope of competencies whose exercise could be transferred. It is worth noting, however, that the provision implied (and still only does because the provision has not been amended) the possibility of transfer in the exercise of certain competencies, not their disposal to another entity.[6]

The Constitutional Court has spoken on the issue of the European clause on several occasions, in particular in two declarations: DTC 1/1992, on the Treaty on European Union, and DTC 1/2004, on the (unsuccessful) treaty establishing a Constitution for Europe. It is noteworthy, however, that the first Constitutional Court ruling on European law (STCE 28/1991) already recognized that "the Kingdom of Spain is bound by the law of the European Communities, both primary and secondary, which, to use the words of the Court of Justice, constitutes its own legal system, integrated into the legal system of the Member States and binding their jurisdictional authorities." While the Constitutional Court recognized the primacy of European Community law over national law, it described Article 93 CE as having only an organic-procedural character (DTS 1/1992), implying the thesis that by being limited to regulating the manner in which certain types of international treaties are concluded, this means that European law will not have constitutional force and rank, but only subconstitutional.[7] It is further evident from the DTC 1/2004 declaration that the function of Article 93 CE is not only to establish a procedure for the adoption of treaties that delegate "the exercise of powers under the Constitution," but the significance of this provision is also that it provides the basis for the substantive constitutional value of supranational integration.[8] It should

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[4] "Mediante ley orgánica se podrá autorizar la celebración de tratados por los que se atribuya a una organización o institución internacional el ejercicio de competencias derivadas de la Constitución. Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los organismos internacionales o supranacionales titulares de la cession."

[5] A. López Castillo, *La Constitución y el proceso de integración europea* [in:] *La europeización del sistema político español*, ed. C. Closa Montero, Madrid 2001, pp. 126–161; P. Pérez Tremps, *Constitución española y Comunidad Europea*, Madrid 1994. Cf. B. Aláez Corral, *Globalización jurídica desde la perspectiva del Derecho constitucional español*, "Teoría y Realidad Constitucional" 2017, Nº 40, p. 259; M. Aragón Reyes, *La Constitución española y el Tratado de la Unión Europeala reforma de la Constitución*, "Revista Española de Derecho Constitucional" 1994, Nº 42, pp. 9–26; G. Ruiz-Rico Ruiz, *Experiencias de mutación constitucional en España*, "Revista Oficial Del Poder Judicial" 2020, Nº 11(13), pp. 241–283.

[6] On the deconstitutionalising potential of Article 93 CE and the threat of material subordination to a structure of imperial domination (estructura imperial de dominación) see: C. de Cabo Martín, *Constitución y reforma* [in:] *Constitución y democracia. 25 años de Constitución democrática en España*, ed. M.A. García Herrera, Bilbao 2015, p. 650.

[7] J.L. Prada Fernández de Sanmamed, *La integración europea y las garantías de la Constitución Española*, "Anales de la Facultad de Derecho. Universidad de La Laguna" 1996, Nº 13, p. 96.

[8] F.J. Matia Portilla, *Dos constituciones y un solo control: el lugar constitucional del estado Español en la Unión Europea (Comentario a la DTC 1/2004, de 13 de diciembre)*, "Revista Española de Derecho

also be noted that Article 93 CE, in addition to establishing the procedural requirement of an organic law, is also the starting point for the material limits of the integration process. Referring to these limitations, the Constitutional Court pointed out that, first and foremost, such a limitation on integration treaties is the text of the Constitution itself, whose supremacy means that European treaties cannot modify the content of the Constitution itself. The authority to amend the Constitution therefore cannot be ceded on the basis of the clause in Article 93 CE. The Constitutional Court has made it clear that under Article 93 CE, the *Cortes Generales* may cede or exercise "powers derived from the Constitution," but not dispose of the Constitution itself by contradicting or allowing its findings to be contradicted, since neither the power of constitutional revision is a "power" whose exercise is susceptible to cession, nor does the Constitution itself permit reform through any other channel than the procedure provided for in Title X, that is, through the procedures and guarantees established therein and by explicitly modifying its text.[9]

It is not without significance that the Constitution itself, from its very beginning, provided for a mechanism of preventive review of international treaties to safeguard against ratification of those that would be inconsistent with the CE (Article 95(2) CE). This procedure, which is carried out by the Constitutional Court, can only be requested by the government or the chambers; it is therefore ultimately up to these legislative and executive bodies to determine whether a treaty can be examined for compliance before ratification.[10] It is this procedure that was the basis for the Constitutional Court's issuance of the two declarations mentioned above (DTC 1/1992, DTC 1/2004).

Constitucional" 2005, Nº 74, p. 358; J.M. de Areilza Carvajal, *La inserción de España en la nueva Unión Europea: la relación entre la Constitución española y el Tratado constitucional. Comentario a la DTC 1/2004, de 13 de diciembre de 2004*, "Revista Española de Documentación Científica" 2005, Nº 73, p. 370.

[9] J.L. Prada Fernández de Sanmamed, *La integración europea*…, pp. 96–97; B. Aláez Corral, *Globalización jurídica*…, pp. 250, 258.

[10] Declaring in this manner in its 2004 opinion (DTC 1/2004) on the compatibility between the Spanish Constitution and the Treaty establishing a Constitution for Europe, the Constitutional Court stated that "the operation of ceding the exercise of powers to the European Union and the consequent integration of Community law with our own imposes unavoidable limitations on the sovereign powers of the State, acceptable only to the extent that European law is compatible with the fundamental principles of the social and democratic rule of law established by the national constitution. For this reason, the constitutional cession made possible by Article 93 CE also has substantive limitations that are imposed on the cession itself. These substantive limitations, which are not explicitly contained in constitutional provisions, but which are implicit in the Constitution and the meaning of its norms, result in respect for the sovereignty of the state, our basic constitutional structures and the system of fundamental values and principles enshrined in our Constitution, in which fundamental rights acquire their own substantive character." On this declaration, see inter alia F. J. Matia Portilla, *Dos constituciones*…, pp. 341–360; A. López Castillo, A. Saiz Arnaiz, V. Ferreres Comella, *Constitución española y Constitución europea: Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de diciembre*), Madrid 2005; A. Rodríguez, *¿Quién debe ser el defensor de la Constitución española? Comentario a la DTC 1/2004, de 13 de diciembre*, "Revista de Derecho Constitucional Europeo" 2005, Nº 3, pp. 327–356; R. Alonso García, *Estudios críticos- Constitución Española y Constitución Europea: Guión para una colisión virtual y otros matices sobre el Principio de Primacía*, "Revista Española de Derecho Constitucional (Nueva Época)" 2005, Nº 73, pp. 349–351.

It is considered one of the most important, if not the most important, guarantee of the Constitution in the context of EU law, and its limited use of the subject matter regarding the Maastricht Treaty has been severely criticized.[11] The aforementioned Article 93 of the CE became the basis for Spain's accession to the European Union in 1986. Since, with the accession, Spain became part of the integration process, taking the entire *aquis communataire* (Article 2 of the *Tratado de Adhesión*[12]) as binding, this was fundamental to the entire legal system, both formally and substantively.

Accession to the Communities was followed in 1992 by the first of the formal amendments to the Constitution, resulting from the need to correct Article 13(2) CE, as pointed out by the Spanish Constitutional Court. The amendment was prompted by the ratification of the Maastricht Treaty, which made it clear that part of the right of EU citizens is the right to stand for election in local elections for EU citizens in all member states. The Constitutional Court, acting pursuant to Article 95(2) CE, stated in its Declaration of July 1, 1992, that "the provision contained in the future Article 8B(1) of the Treaty establishing the European Economic Community, as amended by the Treaty on European Union, is contrary to Article 13(2) of the Constitution in granting the right to stand for election in local elections to non-Spanish citizens of the European Union." In addition, the Constitutional Court indicated that in terms of the constitutional reform procedure that should be applied in this case, Article 167, which provides for a simpler way to amend the Constitution, should apply. As a result of the aforementioned declaration by the Constitutional Court, an adjustment of the Constitution to the EU Treaty was made, which consisted of adding the phrase "and passive" (*y pasivo*) in the wording of Article 13(2) CE. The provision thus acquired the following wording: "Only Spaniards are entitled to the rights recognized in Article 23, except for what, in accordance with the criteria of mutuality, may be established by treaty or law with respect to active and passive electoral rights in local elections."[13] It is also worth noting that EU law, followed by a change in Spanish law, as in the laws of other member states, entails a real qualitative change in the concept of "municipal self-government," which abandons its anchorage in the old structures of state sovereignty to open up to the new structures of supranational integration, accepting not only the electoral participation of non-citizens, but also their right to representation.[14]

The second of the amendments to the Spanish Constitution, also with a cause in the process of European integration, took place in 2011 and concerned the state's fis-

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[11] J.L. Prada Fernández de Sanmamed, *La integración europea*…, pp. 101–105. The DTS 1/1992 declaration itself has also been the subject of doctrinal criticism. See R. Alonso García, *Estudios críticos-Constitución Española*…, p. 345 and the literature referenced therein.

[12] Ley Orgánica 10/1985, de 2 de agosto, de Autorización para la Adhesión de España a las Comunidades Europeas, BOE núm. 189, de 8 de agosto de 1985.

[13] It is worth bearing in mind, however, that in referring to this change, it has been commented in Spanish law studies that there are many other areas of the Treaty on European Union that can create antinomies of much greater weight, importance and depth between it and the CE than the issue of the passive electoral right. See J.Á. Camisón Yagüe, *La influencia del proceso*…, p. 172.

[14] P. Pérez Tremps, *Las reformas de la Constitución hechas y por hacer*, Valencia 2018, p. 33 *passim*.

cal stability.[15] Undoubtedly, the background for this reform was the global economic crisis that severely affected Spain, as well as the obligations associated with participation in the eurozone, which determined the need to limit the growth of the budget deficit and public debt to ensure the stability of the common currency and prices. Spain was no exception, as reforms to many member states' constitutions were the result of pressure from EU law to adopt measures taken to contain the crisis.[16] It should be noted in this regard that a number of legal solutions in this regard had already been adopted earlier under Law No. 18/2001, of December 12, 2001, General Law on Budgetary Stability[17] and Organic Law No. 5/2001, of December 13, supplementary to the General Law on Budgetary Stability.[18]

Again, the procedure under Article 167 CE was followed, noting that the entire procedure lasted only one month, a relatively short period of time given the importance of the changes made. A brief review of the process shows that there was no political doubt about the need for this reform. The procedure began in the Congress of Deputies on August 28, 2011, when, acting under Rule 146 of the Rules of Procedure of the Congress of Deputies, the two largest parliamentary groups (PSOE and PP), made a joint motion requesting that the draft be considered as a matter of urgency, in a single reading in plenary. After the mode was approved in plenary, amendments were submitted (with the exception of one, all were rejected), and the proposal to reform Article 135 of the CE was voted on (316 for, 5 against). The passed text was sent to the Senate, where it was also approved as proposed (233 for, 3 against). Thus, in both chambers, the three-fifths majority required by CE Article 167(1) was easily achieved. As no referendum was requested within 15 days (Article 167(3) CE), the King approved and promulgated the reform on September 27. On the same day, the text of the amendment was announced in the *Boletín Oficial del Estado* (BOE).

The introduction of the budgetary discipline solutions in question into the Constitution, which also took place in other member states (Slovakia, Slovenia, Italy and Hungary) was undoubtedly influenced by German solutions.[19] According to the new wording of Article 135 CE, all public administrations will conform to the principle of budgetary stability. It is beyond the scope of this paper to analyze the changes in detail, but it should be mentioned that the subsequent provisions of Article 135 CE allow for deviations from this principle, but within the limits set by the European Union, as well as the limits set by the organic law. In addition, Article 135(4) establishes a number of exceptions to these general rules. Thus, it is permissible to exceed the limits on

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15 BOE, núm. 233, de 27 de septiembre de 2011.

16 A. José Menéndez, *La mutación constitucional de la Unión Europea*, "Revista Española de Derecho Constitucional" 2012, Nº 96, pp. 41–98.

17 Ley 18/2001, de 12 de diciembre, General de Estabilidad Presupuestaria, BOE núm. 298, de 13 de diciembre de 2001.

18 Ley Orgánica 5/2001, de 13 de diciembre, complementaria a la Ley General de Estabilidad Presupuestaria, BOE núm. 299, de 14 de diciembre de 2001.

19 Ł. Kielin, *Constitutionalisation of fiscal rules in times of financial crises – a cure or a trap?*, "Financial Law Review" 2021, No. 22(2), p. 94.

the structural deficit and the amount of public debt in exceptional situations, such as natural disasters, economic recession or emergencies (*situaciones de emergencia extraordinaria*), which are out of the state's control and threaten its financial stability. The approval of an absolute majority of the Congress of Deputies is required to declare that these exceptional circumstances have occurred, which allow the established limits to be exceeded. The aforementioned 2001 finance laws were significantly modified in 2006, however, after the amendment of Article 135 CE, the current Organic Law 2/2012, of April 27, on Budgetary Stability and Financial Sustainability,[20] was adopted. This Organic Law has also already been modified several times, including by Organic Law 6/2015,[21] dated June 12.

Substantive impacts

However, the only two formal amendments to the Spanish Constitution to date, which were implied by the process of European integration, to which the previous section was devoted, do not deplete the issue of the impact of this process on Spanish constitutional law. As already mentioned in the introduction, this intensifying process has, moreover, resulted in a number of changes of a substantive nature that did not require formal CE amendment procedures. The phenomenon of substantive constitutional change, moreover, has a broader dimension and is not necessarily exclusively related to the integration process. As Benito Aláez Corral points out, Spanish constitutional law is experiencing a process of substantive globalization of the law, as reflected in the homogenization of some of the principles and values of constitutionalism, a consequence of the supranational and international openness that the CE provides and that allows for the integration of existing or future globalized regulations of certain constitutional issues. This is undoubtedly helped by the globalization of media and culture, which is leading to an understanding of the value of constitutionalism as part of humanism, not only among leading political elites, but also in civil society, with the subsequent pretension of legal systems to appear as humanistic as possible, emulating the achievements in law that are taking place in other democratic countries. This author cites as an example of the globalization process the recognition of the right to same-sex marriage, which has grown from just one country in 2001 (the Netherlands), to twenty-three in 2017.[22]

With regard to material pressures on the integration process, this phenomenon was already defined by the Constitutional Court in DTC Declaration 1/1992 as "modu-

[20] Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera, BOE núm. 103, de 30 de abril de 2012.

[21] Ley Orgánica 6/2015, de 12 de junio, de modificación de la Ley Orgánica 8/1980, de 22 de septiembre, de financiación de las Comunidades Autónomas y de la Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera, BOE núm. 141, de 13 de junio de 2015.

[22] B. Aláez Corral, *Globalización jurídica*…, pp. 261–262.

lation." The Court noted that Union law, although it cannot modify the Constitution, serves to modulate "the scope of application and not the wording of the (constitutional) principles that […] established and ordered" competencies. This concept, along with that of constitutional mutation (*mutacion constitucional*), has been accepted in Spanish constitutional law doctrine, where the presence of this process is demonstrated in many areas.[23]

One of the substantive changes concerned the constitutional principle expressed in Article 1(1) of the CE, according to which Spain is a social and democratic state governed by the rule of law. Meanwhile, the European Union's treaties are, in principle, an expression of the ideas of the neoliberal capitalist model, which thus causes serious violations of the form of the social state, which was particularly intensified in the face of the economic crisis that began in 2008 and the policies being implemented to address it, which were also embodied in the formal amendment of Article 135 of the CE.[24] The progressive influence of the market economy in the Community sense, referred to as European market constitutionalism, has thus led to a situation of contradiction between the Constitution and reality, characterized by the formal survival of the principle of the social state expressed in the text of the CE and the simultaneous material deconstitutionalization of its postulates.[25] In this sense, the primary law of the EU thus constitutes a constitution in the material sense, which affects national legal systems, including the Spanish system.[26]

As already mentioned, one of the areas of Spain's legal order that has been significantly affected by the integration process is the territorial organization of the state. This applies precisely to the substantive changes made by the modulation method, particularly in the division of competencies between the state and the autonomous communities.[27] As already mentioned, fundamental to this issue is the principle that EU law does not affect the internal division of competencies between the state and the autonomous communities (counter-limit clause, enshrined in Article 4.2 TEU), and therefore cannot modify this division.[28] As the Constitutional Court noted, community law in itself is not a direct criterion of constitutionality in constitutional processes, but "it cannot be ignored that the very interpretation of the system of division

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[23] R. Bustos Gisbert, *La Constitución red: Un estudio sobre supraestatalidad y Constitución*, Oñati 2005; A. López Castillo, *Constitución e integración. El fundamento constitucional de la integración supranacional europea en España y la RFA*, Madrid 1996; P. Pérez Tremps, *Constitución española y Unión Europea*, "Revista Española de Derecho Constitucional" 2004, Nº 71, pp. 103–121.

[24] J.Á. Camisón Yagüe, *La influencia del proceso…*, p. 176.

[25] Cf. A. José Menéndez, *La mutación constitucional…*, pp. 87–97; B. Aláez Corral, *Globalización jurídica…*, pp. 265–267.

[26] A. Bar Cendón, *La Constitución de la Unión Europea: contexto, reforma y virtualidad*, "Revista Valencia d'Estudis Autonòmics (Ejemplar dedicado a Europa en la encrucijada)" 2004, Nº 43–44, pp. 100–153; A. Lasa López, *La ruptura de la constitución material del estado socialla constitucionalización de la estabilidad presupuestaria como paradigma*, "Revista de Derecho Politico" 2014, Nº 90, p. 239.

[27] A.M. Caemona Contreras, *Las comunidades autónomas* [in:] *Hacia la europeización de la Constitución Española…*, pp. 175–216.

[28] DTC 1/1992, and in a number of other rulings, such as: STC 128/1999, STC 45/2001, STC 33/2005, STC 173/2005, STC 22/2018.

of powers between the state and autonomous communities does not take place in a vacuum (STC 102/1995)." However, while it may not be a formal influence, it turns out that the complexity of the integration process has an impact on the interpretation of the rules of this division of powers, particularly in situations of competency conflicts, where "paying attention to how an institution has been configured by a community directive can be not only useful, but even mandatory in order to correctly apply the internal system of division of powers to it."[29] As Pablo Pérez Tremps writes, in many cases the scope of the authority of the state and the autonomous community to carry out obligations arising from the integration process is determined in light of the nature of those obligations, depending primarily on whether they impose uniform goals to be achieved.[30] This was confirmed in the jurisprudence of the Constitutional Court as early as the aforementioned STC 252/1988 and confirmed in a number of others.[31]

EU law affects the Spanish legal system in a similar way also in the field of fundamental rights, an influence that has its basis primarily in Article 10(2) CE.[32] Evidence of this impact in the case of fundamental rights can be found in Article 2 of Organic Law 1/2008, authorizing the ratification of the Lisbon Treaty, which explicitly states that the principles relating to fundamental rights and freedoms recognized by the Constitution shall also be interpreted in accordance with the provisions of the Charter of Fundamental Rights. As enumerated by Aláez Corral, this applies precisely to those fundamental rights provided for by the CE, the subject matter and content of which fall more within the Union's competence, such as equality and non-discrimination, freedom of movement, freedom to conduct business, data protection, but also freedom of expression, the right to political association (insofar as European political parties exist), the right to political participation or access to public positions and functions.[33]

In the case of fundamental rights, therefore, the impact is through the determination of the content of a given constitutional right by the norms of EU law,[34] and sometimes in the case law of the CJEU itself, a spectacular example of which was the Melloni case, concerning the right to a fair trial in the field of criminal and judicial cooperation,

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29 STC 13/1998.

30 P. Pérez Tremps, *Articulo 93* [in:] *Comentarios a la Constitución Española*, eds. M. Rodríguez-Piñero y Bravo-Ferrer, M.E. Casas Baamonde, Madrid 2018, p. 300. This author gives examples of matter in which the modulation method has found its application and confirmation in the decisions of the Constitutional Court. See also Á. Sánchez Legido, *El Tribunal Constitucional y la garantía interna de la aplicación del Derecho Comunitario en España (A propósito de la STC 58/2004)*, "Derecho Privado y Constitución" 2004, Nº 18, pp. 403–404.

31 STC 79/1992, STC 117/1992, STC 29/1994, STC 213/1994, STC 148/1998, STC 128/1999, STC 21/1999, STC 235/1999, STC 45/2001, STC 95/2001, STC 38/2002. See also A. Ruiz Robledo, *Las implicaciones constitucionales de la participación de España en el proceso de integración europeo*, "Revista Jurídica de Asturias" 1998, Nº 22, p. 105.

32 B. Aláez Corral, *Globalización jurídica*…, pp. 261–262. This author considers Article 10(2) CE as the second of the gateways, along with Article 93 CE, that allow for the substantive globalization of Spanish constitutional system.

33 *Ibid.*, p. 268.

34 STC 64/1991, STC 130/1995, STC 224/1999, STC 53/2002. Cf. J.L. Prada Fernández de Sanmamed, *La integración europea*…, p. 100; Á. Sánchez Legido, *El Tribunal Constitucional*…, pp. 404–405.

in which the Constitutional Court requested a preliminary ruling that led to the CJEU's judgment, which was fully addressed in STC 26/2014.[35] As Josu de Miguel Bárcena notes, fundamental rights leave little room for normative autonomy for particular state or regional legislatures, and therefore little room for differentiation. Sooner or later, as recent CJEU jurisprudence shows, there will be unification in conceptual and cultural terms, leading to the prevalence of a more general catalog over a more specific, territorially limited ones.[36] It seems, therefore, that Spain is an excellent example of the realization of this trend.[37]

The modulating effect can also be spoken of in other fields. In this context, Pérez Tremps reports on the impact on the system of sources of law, in terms of which the harmonization of Spanish law with EU law has gone quite smoothly, with such influences appearing, as in other member states, as restrictions on the use of decree-law to implement EU law or the use of legislative delegation techniques for the same purpose.[38] Another level is economic issues, especially the provisions of Title VII of the Constitution, which are today interpreted in light of EU law (the concept of public service, restrictions on monopolies, the principle of fiscal stability).[39] Other examples, moreover, are the adaptation of public administration to the requirements of EU law and the perception of the role of the national judge as an EU judge.

Conclusions

The most significant conclusion that can be drawn from the above considerations is that EU law based on the principles of "direct applicability" and "direct effectiveness" substantially influences Spanish constitutional law, and it is the strongest factor influencing the Spanish legal order since the enactment of the CE in 1978.[40] It is a rather

35 F.J. Matia Portilla, *Primacía del derecho de la Unión y derechos constitucionales. En defensa del Tribunal Constitucional*, "Revista Española de Derecho Constitucional" 2016, Nº 106, pp. 479–522. See also STC 145/1991 and STC 12/2008 on the principle of equality between men and women or STC 138/2005 and STC 273/2005 regarding the protection of minors.

36 J. de Miguel Bárcena, *Justicia constitucional e integración supranacional: cooperación y conflicto en el marco del constitucionalismo pluralista europeo*, "Revista Iberoamericana de Derecho Procesal Constitucional" 2008, Nº 9, p. 109; M. Fondevila Marón, *El control de convencionalidad por los jueces y tribunales españoles. A propósito de la STC 140/2018, de 20 de diciembre*, "Anuario Iberoamericano de Justicia Constitucional" 2019, Nº 23(2), p. 454.

37 On recent CT case law, including the use of preliminary questions to the CJEU on fundamental rights see X. Arzoz, *Avoiding the rain or learning to dance in it: The hesitations of the Spanish Constitutional Court*, Preprints Series of the Center for European Studies Luis Ortega Álvarez and the Jean Monnet Chair of European Administrative Law in Global Perspective, 2023, No. 1, pp. 14–17.

38 R. Alonso García, *El juez español y el Derecho Comunitario*, Valencia 2003.

39 J.L. García Guerrero, *La desconstitucionalización de la Constitución Económica española* [in:] *Constitución española e integración europea. Tendencias del Derecho Constitucional de la integración*, ed. L. Gordillo Pérez, Valencia 2018, pp. 261–309; B. Aláez Corral, *Globalización jurídica*…, pp. 265–266; P. Pérez Tremps, *Las reformas*…, p. 71 and the literature cited therein.

40 The paradox is that the only explicit mention of the European Union in the Constitution is indirect, and was only found in Article 135 after it was amended in 2011.

aggressive impact imposing changes in the Constitution of both a formal and substantive nature, which is not altered by the fact that the supremacy of Community law may be subject to certain limitations under the national Constitution.[41] In view of the fact that there were only two amendments, it can be concluded that the substantive impact is more significant, and with and overcoming the economic crisis, the integration process will continue to progress.[42] Of course, it should not be forgotten that this is happening *de jure* with the consent of Spain expressed in respect of the principle of state sovereignty, on the basis of the provisions contained in Article 93 of the CE and taking into account the material limits of this influence. Hence the positive verification of the thesis of the constitutionalization of this process.[43]

On the other hand, the substantive modifications of the Constitution presented in the article prove the thesis of the europeanization of Spanish law, and, consequently, one cannot lose sight of the danger of the actual subordination of constitutional content to EU law and, consequently, the erosion of the Constitution.[44] According to some Spanish scholars, the substantive modifications on the socio-economic field concerning the introduction of Community law, which have been made without a formal change, are inconsistent with it, and not in the sense of the so-called constitutional mutations (*mutación constitucional* – which is the term used for legitimacy purposes, often to describe constitutional irregularities), but as actual violations of the Constitution in material and formal terms, as it is inappropriate to argue that it is "the European Union's exercise of competences derived from the Constitution," when the Constitution establishes something quite different and even the opposite.[45]

Spanish constitutional/legal scholarship already includes claims that in the clash with the Union Treaties, it is the national constitutions that give way, in such a manner that they are effectively subordinate to the Treaties, and thus cease to be "supreme principles."[46] The resulting rigidity of the Constitution is therefore of little significance here in the face of the breadth of changes of a substantive nature.[47] Thus, while the Spanish Constitution in the formal sense remains a rigid constitution, when viewed in the category of a substantive constitution it has proven to be a flexible constitution and susceptible to external influences, which can be considered even in the format of a crisis of state sovereignty.[48] In this sense, the protection of the constitution provided by the Spanish Constitutional Court appears to be ineffective.[49]

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41 Cf. A. López Castillo, A. Saiz Arnaiz, V. Ferreres Comella, *Constitución española*…, p. 70.

42 P. Pérez Tremps, *Las reformas*…, p. 88.

43 Cf. A. López Castillo, A. Saiz Arnaiz, V. Ferreres Comella, *Constitución española*…, p. 70.

44 J.Á. Camisón Yagüe, *La influencia del proceso*…, p. 179.

45 C. de Cabo Martín, *Teoría Constitucional de la Solidaridad*, Madrid 2006, pp. 90–92; J.Á. Camisón Yagüe, *La influencia del proceso*…, p. 176.

46 See also L. Peña y Gonzalo, *No es la Constitución la norma suprema* [in:] *Conceptos y valores constitucionales*, eds. L. Peña, T. Ausín, Madrid 2016, pp. 261–398.

47 C. de Cabo Martín, *Capitalismo, democracia y poder constituyente* [in:] *Teoría y práctica del poder constituyente*, ed. R. Martínez Dalmau, Valencia 2014, p. 19.

48 Cf. B. Aláez Corral, *Globalización jurídica*…, p. 259.

49 Cf. A. Rodríguez, *¿Quién debe ser el Defensor*…, pp. 327–356; X. Arzoz, *Avoiding the rain*…, pp. 17–19.

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Summary

Andrzej Jackiewicz, Anna Rytel-Warzocha

Impact of European Integration on Substantive and Formal Constitutional Amendments in Spain in the Light of the Spanish Constitutional Court's Jurisprudence and Constitutional Practice

The purpose of the article is to answer the question of how the process of European integration has influenced the Spanish constitutional order. Taking the European clause set out in Article 93 of the Spanish Constitution as a starting point, it analyzes both impacts of a formal-legal nature,

but also influences of a substantive nature affecting the normative content of the Spanish Constitution. The study demonstrates that EU law, based on the principle of "direct applicability" and "direct effect," intensively influences Spanish constitutional law and has been the strongest factor influencing the Spanish legal order since the enactment of the Spanish Constitution in 1978. Thus, while the Spanish Constitution in the formal sense remains a rigid constitution, when viewed in the category of a substantive constitution, it has proved to be flexible and susceptible to external influence, despite the fact that this occurs *de jure* with the consent of Spain expressed in respect of the principle of state sovereignty, on the basis of the provisions contained in Article 93 of the Spanish Constitution.

Keywords: Spanish constitution, European Union law, hierarchy of norms, European integration.

Streszczenie

Andrzej Jackiewicz, Anna Rytel-Warzocha

Wpływ integracji europejskiej na materialne i formalne zmiany konstytucji w Hiszpanii w świetle orzecznictwa hiszpańskiego Trybunału Konstytucyjnego i praktyki ustrojowej

Celem artykułu jest udzielenie odpowiedzi na pytanie, w jaki sposób proces integracji europejskiej wpłynął na hiszpański porządek konstytucyjny. Przyjmując za punkt wyjścia klauzulę europejską zawartą w art. 93 hiszpańskiej konstytucji, przeanalizowano zarówno zmiany o charakterze formalno-prawnym, jak i materialno-prawnym, wpływające na treść normatywną hiszpańskiej konstytucji. Przeprowadzone badania pokazują, że prawo UE, oparte na zasadzie „bezpośredniego stosowania" oraz „bezpośredniego skutku", intensywnie wpływa na hiszpańskie prawo konstytucyjne i jest najsilniejszym czynnikiem wpływającym na hiszpański porządek prawny od czasu uchwalenia hiszpańskiej konstytucji w 1978 r. O ile zatem konstytucja hiszpańska w sensie formalnym pozostaje konstytucją sztywną, o tyle rozpatrywana w kategorii konstytucji materialnej okazała się konstytucją elastyczną i podatną na wpływy zewnętrzne, mimo że następuje to *de iure* za zgodą Hiszpanii wyrażoną w poszanowaniu zasady suwerenności państwowej, na podstawie przepisów zawartych w art. 93 konstytucji hiszpańskiej.

Słowa kluczowe: konstytucja Hiszpanii, prawo Unii Europejskiej, hierarchia norm, integracja europejska.

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Mechanisms for Control of the Executive by the *Bundestag*

In modern, democratic states, the most common system of government is the parliamentary system of government.[1] Naturally, in view of the specific political system, traditions and experiences, this system has been modified in individual states, and this modified form is also found in the Federal Republic of Germany. Furthermore, the system of government of the German state has its own peculiar name, and the literature on the subject uses the term "chancellor system." An analysis of the solutions of the Basic Law of 1949 allows one to accept the thesis that it is a rationalised version of the parliamentary system, the essence of which is to strengthen the position of the head of government.[2] As Michał Domagała emphasises that, in addition to the initial features characteristic of a parliamentary system, the chancellor system is defined by a mixed electoral system for the *Bundestag*, the strong position of the Federal Chancellor, the lack of accountability of federal ministers to the *Bundestag* and the state of legislative emergency.[3]

It is beyond the scope of this paper to analyse and evaluate the assumptions of the chancellor system, an issue to which much space has been devoted in the literature. The focus of this paper is on a segment of the relationship between the legislature and the executive – the legislative control function and the instruments that allow the *Bundestag* to control the federal government. Indeed, the scrutiny function of the parliament is an immanent element of parliamentary systems, and the manner in which it is exercised, the instruments and the possibility of its use, particularly by opposition groups, can be regarded as one of the pillars of a democratic state.

Article 20(2) of the Basic Law of the Federal Republic of Germany[4] adopted in 1949 expresses the principle of separation of powers. Power in the German state comes

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[1] See M. Wallner, *Podziały i typologie systemów parlamentarnych: zagadnienia metodologiczne*, "Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia" 2014, Sectio K, Vol. 21, No. 2, pp. 85–86.

[2] See M. Domagała, *Recepcja niemieckich rozwiązań ustrojowych w polskim prawie konstytucyjnym* [in:] *Aktualne problemy polskiego i litewskiego prawa konstytucyjnego*, ed. D. Górecki, Łódź 2015, p. 17; B. Dziemidok-Olszewska, *Konstruktywne wotum nieufności w Republice Federalnej Niemiec i III Rzeczypospolitej Polskiej*, "Środkowoeuropejskie Studia Polityczne" 2011, No. 2, p. 106.

[3] M. Domagała, *Recepcja niemieckich rozwiązań*…, p. 18.

[4] http://biblioteka.sejm.gov.pl/konstytucje-swiata-niemcy/ [accessed: 2023.09.10].

from the people, who exercise it through elections, votes and through the separate bodies of the legislature, the executive and the judiciary. The legislature is made up of the *Bundestag* and the *Bundesrat*, while with regard to the executive, the legislature has adopted its dualism or even, as Paweł Sarnecki argues, its trialism.[5] The organs of executive power are the President of the Republic and the federal government with the Federal Chancellor. Without going into the detailed relations between the head of state and the government, whose position in the state is differentiated,[6] it should be stated that the core of executive power belongs to the federal government headed by the Chancellor. As Jan Wiktor. Tkaczyński points out, the importance of the government in the system of organs of the German state stems from the range of competences assigned to it, some of which are exercised under the government's own responsibility, the consequence of which is that they are excluded from parliamentary control.[7] This does not contradict the classical assumption of the parliamentary system and the submission of the activities of the government and the chancellor to parliamentary control. Control is understood as checking the state as it is (the actual state) and comparing it with the state that should be (the required state). At the same time, the broader scope of parliamentary control is related to the fact that it serves the purpose of obtaining information on the activities of the government, allows for the formulation of opinions, conclusions and postulates, but it may also lead to the activation of procedures for the enforcement of political responsibility.[8]

Analysing German solutions, one notices that in their essence they are in line with the characteristic control mechanisms present in other countries, including Poland. Analogous to the divisions used by the representatives of the Polish doctrine of constitutional law, among the instruments present in German parliamentary law one identifies those used by the entire chamber, by committees and those belonging to the individual rights of members. It must be emphasised that the distinction above is of a purely doctrinal nature, as regardless of which group a particular instrument of scrutiny falls into, similar purposes are associated with it: obtaining information, making an assessment and drawing conclusions.

Undoubtedly among the classic, but also the oldest, mechanisms of parliamentary control is the right to control public accounts (Article 114 of the Basic Law). The disposal of public funds falls within the competence of the executive – the federal government. However, it does not have complete freedom in this respect, but is bound by the regulations of the Budget Act, which determines state revenues and expenditures.

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5 P. Sarnecki, *Ustroje konstytucyjne państw współczesnych*, Warszawa 2008, p. 170.

6 For more on the position of the President of the Republic, read: J.W. Tkaczyński, *Prawo ustrojowe Niemiec*, Kraków 2015, pp. 271–280. See also M. Pach, *Możliwość i celowość recepcji na grunt polski współczesnych niemieckich regulacji prawnokonstytucyjnych w zakresie władzy wykonawczej*, "Kultura i Polityka" 2010, No. 8, p. 108.

7 J.W. Tkaczyński, *Prawo ustrojowe Niemiec*…, p. 281.

8 See M. Stębelski, *Kontrola sejmowa w polskim prawie konstytucyjnym*, Warszawa 2012, p. 63 *et seq.*; J. Juchniewicz, *Instrumenty realizacji funkcji kontrolnej Sejmu – próba oceny skuteczności*, "Przegląd Prawa Konstytucyjnego" 2013, No. 1, p. 18.

For this reason, it is generally accepted that the adoption of a Finance Act by the *Bundestag* gives the chamber the right, indeed the obligation, to monitor the implementation of the budget by the government.[9] The duration of the Finance Act, which is limited to one year, determines the frequency of the audit. It is carried out annually, after the Federal Minister of Finance has submitted his financial report, which includes information on all income, expenditure, assets and debts for the period of the following financial year. The Federal Court of Auditors is also involved in the audit process and examines the report submitted and the economy and regularity of budgetary and economic activities. Budgetary control ends with the granting of discharge to the government.[10] The Basic Law does not stipulate the legal consequences of not discharging the government, but the importance of this instrument of control manifests itself in the opportunity to discover all aspects of the financial side of the state's functioning and the government's performance. The granting of discharge can also be seen as an expression of approval of the government's financial policy, whereas if discharge is refused, the federal government receives a clear signal from the *Bundestag* that its activities are subject to critical evaluation.

Whilst scrutiny of the implementation of the Finance Act is a systematic exercise carried out once a year and is limited to the financial sphere of state activity, parliament can also take other measures, for example, by initiating debates in the plenary chamber to obtain information on the work of the government. Above all, however, scrutiny is carried out by committees of the *Bundestag* and by the members themselves.[11]

The committees of the *Bundestag* are part of its internal bodies. Under the Basic Law, the *Bundestag* has to appoint a European Committee, a Defence Committee, a Foreign Affairs Committee and a Petitions Committee.[12] The number, names and terms of reference of the other committees are left to the discretion of the *Bundestag* and may vary from term to term.[13] Each standing committee of the *Bundestag* receives reports on the activities of the appropriate *Bundestag* departments as it sees fit and may also request reports on current issues from representatives of ministries. This scrutiny is continuous in the sense that the committees can call on the relevant ministries at any time, making this method of scrutinising the executive branch an important part of its constitutional function.

In addition to committees of a permanent nature, i.e. committees appointed at the beginning of a *Bundestag* term and remaining in office until the end of that term, the House may also appoint so-called committees of inquiry (*Untersuchungsausschüsse*,

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[9] Read: https://www.bundestag.de/parlament/aufgaben/haushalt_neu/haushalt/haushalt-212614 [accessed: 2023.09.10].

[10] The *Bundesrat* (the second chamber of parliament) also has the right to scrutinise the implementation of the budget law, and it also has a say on the discharge of the federal government.

[11] See https://www.bundestag.de/parlament/aufgaben/regierungskontrolle_neu/kontrolle/grem-255458 [accessed: 2023.09.10].

[12] See 45, 45a, 45c the Basic Law.

[13] https://www.bundestag.de/parlament/aufgaben/regierungskontrolle_neu/kontrolle/grem-255458 [accessed: 2023.09.10].

or committees of inquiry).[14] They are a particularly important instrument, as their activities focus solely on the conduct of investigative activities. The regulations for German commissions of inquiry are contained in three normative acts: the Basic Law (Article 44), the Law of 19 June 2001 on the Regulation of the Rights of Committees of Inquiry of the German *Bundestag*[15] and the Rules of Procedure of the *Bundestag*.[16] Under Article 44 of the Basic Law, committees of inquiry are set up to collect necessary evidence, and in the light of the current arrangements, there are committees of inquiry in the German constitutional system that are appointed on a mandatory basis and committees that are appointed on an optional basis. This duality is due to the formal requirements for the request to set up a commission of inquiry. A motion can be tabled by a group of members accounting for at least 5% of all members of the *Bundestag* or by a parliamentary group. If less than a quarter of the members of the *Bundestag* sign the motion, it is up to the House to decide whether a committee should be set up. If a majority of members vote in favour of setting up a committee, it will be set up, whereas if the motion does not receive the required majority, the committee will not be set up. The situation is somewhat different if a group of at least a quarter of the members requests it, in which case the *Bundestag* is obliged to set up a committee.[17] In the case of the obligatory appointment of a committee, the *Bundestag* may not interfere with the scope of the matter to be investigated, whereas in the case of optional committees, the House is not bound by the contents of the motion and may amend the committee's remit.[18]

A key solution for the possibility of implementing scrutiny measures and influencing the opposition's ability to actually get involved is the way in which the composition of the committee is shaped. In setting up a committee, the *Bundestag* determines the number of members and an equal number of substitute members. All parliamentary factions must be represented on the committee; in addition, the composition must reflect the majority relationship in the chamber, which is done using the St. Lague/Schepers algorithm. The appointment of members to the committee (as well as deputy members) is at the discretion of the parliamentary factions, which can also dismiss a member or deputy member at any time.

The range of matters that committees of inquiry may deal with is not unlimited and must remain within the sphere of competence of the *Bundestag*.[19] Hence, as Tkaczyński

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[14] More: M. Godlewski, *Charakter prawny komisji śledczej niemieckiego Bundestagu*, "Ius Novum" 2017, No. 1, pp. 181–199; P. Czarny, *Komisje śledcze niemieckiego Bundestagu*, "Przegląd Sejmowy" 1999, No. 3, pp. 55–71.

[15] Gesetz zur Regelung des Rechts der Untersuchungsausschüsse des Deutchen Bundestages BGBl. I, p. 1142.

[16] https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/go_btg [accessed: 2023.09.10].

[17] Article 44.1 the Basic Law.

[18] J. Juchniewicz, *Status i rola opozycji parlamentarnej niemieckiego Bundestagu – zagadnienia wybrane*, "Przegląd Prawa Konstytucyjnego" 2010, No. 1, pp. 228–229. The Act on the Regulation of the Rights of Commissions of Inquiry provides in Section 2(1) that the right to change the subject matter of the investigation is granted only to applicants.

[19] Paragraph 1 section 3 Act on the Regulation of the Rights of Commissions of Inquiry provides.

points out, the limitations on the possibility of setting up commissions of inquiry are the maintenance of the inviolability of the division of powers between the Federation and the *Länder*, the impermissibility of encroaching on the exclusive competences of state organs and on the decision-making process undertaken by the organs.[20] The overriding principle of the commissions of inquiry is the principle of openness. This not only serves to maintain the transparency of the committee's work, but above all allows the public to be informed of the proceedings. The openness of the committee's work may be excluded, and the decision in this matter rests with the committee itself. The effectiveness of the work of the committees is also guaranteed by the application of the rules of criminal procedure in the proceedings, in addition, the courts and public administration bodies are obliged to provide the necessary assistance to the committees.[21]

The *Enquette Komissionen* are not the only committees whose powers allow them to carry out actions of a controlling nature *vis-à-vis* the executive. Under § 56 of the Rules of Procedure of the *Bundestag*, the chamber can appoint so-called *Enquette Komissionen* to "prepare decisions on extensive and important questions." As a rule, their activities are related to the legislative activity of the chamber, but this does not preclude activity in the area of scrutiny either.[22] The provisions for the establishment of commissions are similar to those for the establishment of commissions of inquiry. On a motion tabled by at least a quarter of its members, the *Bundestag* is obliged to set up a committee. If a smaller number of members take the initiative, the *Bundestag* has the option of appointing a committee. The committee may consist of no more than nine members, who shall be appointed by the President of the *Bundestag* with the agreement of the parliamentary groups. Only when such agreement cannot be reached is the composition determined on a proportional basis so as to reflect the political forces in the *Bundestag*. The committees may request documents and information, but not on the basis of a request but on a voluntary basis.[23] The work of the committees shall culminate in a report which the *Bundestag* shall receive in time for debate before the end of the term. If it is not possible to present a final report, the committee presents a so-called interim report on the basis of which the *Bundestag* decides whether or not to continue the committee's work.

In the doctrine of constitutional law, a distinction is made within the framework of control mechanisms between the so-called instruments of individual parliamentary control. In light of contemporary developments, this distinction may be somewhat misleading, as in addition to the instruments that can be used by individual members, there are also instruments that can be used by groups of members, both informal and formalised. In German parliamentary law, among these mechanisms we distinguish

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20 J.W. Tkaczyński, *Prawo ustrojowe Niemiec…*, p. 248.

21 B. Banaszak, *Komisje śledcze we współczesnym parlamentaryzmie państw demokratycznych*, Warszawa 2007, pp. 48–49.

22 *Ibid.*, p. 51.

23 *Ibid.*

between large questions, small questions, questions, individual questions, written questions and the government questionnaire.[24]

Parliamentary procedures allow two types of enquiry to be made, the so-called large questions and "small questions." What they have in common is the written form required for answers to be given by the addressee, which may be the Federal Government. Large questions, which must be concise and specific and may contain a statement of reasons, may be tabled by a parliamentary group or by members (at least 5% of the members of the chamber) and may relate to important political issues. They are submitted to the President of the *Bundestag*, who asks the government to declare if and when it will answer the question. The *Bundesrat* answers the question in writing, but if the Federal Government refuses to answer or delays its reply for at least three weeks, it is also possible to hold a debate on the matter if a faction or group of at least 5% of the members requests it.

A similar group of members and a parliamentary group can submit so-called small questions, i.e. requests for answers from the Federal Government on specific facts. They are forwarded via the President of the *Bundestag* and, in accordance with the rules of procedure of the House, must not contain biased statements or assessments. Small questions also require a written answer, and this answer must be provided to the inquirer within 14 days. Unlike large questions, small questions do not lead to a debate in the *Bundestag*.

In addition to questions, members of the *Bundestag* may also put questions to the Federal Government in writing or orally.[25] This right is exercised during Question Time, which takes place every week of the session. Up to two questions may be put by a member of the *Bundestag*; the President of the *Bundestag* and the government must be notified in advance.[26] The Rules of Procedure of the *Bundestag* require that questions should be concise and enable a brief answer to be given; they also rule out the possibility of questions containing biased statements and assessments. Questions should deal with matters for which the Federal Government is responsible. However, should a question be tabled on matters of a local nature, the President of the *Bundestag* shall forward it to the Federal Government for a written answer. The questions put are answered orally at Question Time, but the rules allow additional questions to be put (a maximum of two) if the answers given by the Federal Government are considered inadequate. The President of the *Bundestag* may also allow other members to pose a supplementary question, provided this does not disrupt the normal course of the sitting. Question Time shall not exceed 45 minutes. In addition to oral questions during the sitting, members may ask so-called single questions. The number of ques-

[24] https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/erlaeuterungen_geschaeftsordnung/gescho11-244678 [accessed: 2023.09.10].

[25] See Geschäftsordnung des Deutschen Bundestages – Annex 4 Richtlinien für die Fragestunde und für die schriftlichen Einzelfragen.

[26] The President of the *Bundestag* must be notified of the question by no later than 10:00 on the Friday preceding the week in which the *Bundestag* meets; the Government must be notified by no later than 12:00 on the Friday preceding the week in which the *Bundestag* meets.

tions is limited as a member may ask up to four questions in one month. They are answered in writing and must be answered within one week of the question being posed. If the government does not provide an answer within the specified time limit, questions may be posed during Question Time. The answers given each week are compiled and published in print by the *Bundestag*.

A special form of questioning is the government question time, also known as the government survey.[27] The procedure primarily serves the purpose of obtaining information from members about the current activities of the government, but the subject of the questions may also be plans for the future of the federal government. During parliamentary session, on Wednesdays after cabinet meetings, for 90 minutes, members can spontaneously ask questions about matters being worked on during cabinet meetings. Answers are usually given by two members of the Cabinet, providing information on Cabinet work covered by the agenda. This item of business may also include topics to be debated by the government in the future. Three times during the year: in the last week of the session before Easter, in the last week before the summer recess and in the last week before Christmas, information is provided by the Federal Chancellor as part of the survey.

Undoubtedly, the control function is one of the key spheres of activity of the representative body and an important element of the rule of law based on the accountability of the authorities. The manner in which it is carried out also determines the level of democratisation of the state. At the same time, it should be borne in mind that the effectiveness of control mechanisms depends not only on the adopted normative solutions, but is largely determined by extra-legal factors, in particular political ones. An analysis of German regulations allows the assertion that the *Bundestag*, chamber committees and members have instruments at their disposal to obtain information on the activities of the federal government and thus conduct effective control over it. This is also evidenced by the ability of the parliamentary opposition to actively initiate scrutiny measures and thereby strengthen its effective position in parliament.

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[27] See Geschäftsordnung des Deutschen Bundestages – Annex 7 Richtlinien für die Befragung der Bundesregierung.

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Summary

Joanna Juchniewicz

Mechanisms for Control of the Executive by the *Bundestag*

One of the functions of the representative body, alongside the legislative function, is the control function. It is a very important element of parliamentary-cabinet rule, and the way it is carried out, the instruments of scrutiny and the possibility for opposition factions in particular to use them are one of the pillars of a democratic state. Among the control mechanisms found in German law, are, among others, discharge, committees of enquiry, big and small questions, and questions to the government. The wide range of scrutiny instruments and the procedural arrangements that allow opposition representatives to use them enable the *Bundestag*, committees and members of the legislature to exercise effective scrutiny of the federal government's activities.

Keywords: government, control, *Bundestag*.

Streszczenie

Joanna Juchniewicz

Mechanizmy kontroli władzy wykonawczej przez Bundestag

Jedną z funkcji organu przedstawicielskiego, obok funkcji ustawodawczej, jest funkcja kontrolna. Stanowi ona bardzo ważny element rządów parlamentarno-gabinetowych, a sposób jej realizacji, instrumenty kontroli i możliwość ich wykorzystania w szczególności przez frakcje opozycyjne stanowią jeden z filarów państwa demokratycznego. Wśród mechanizmów kontroli występujących w prawie niemieckim można wskazać m.in. absolutorium, komisje śledcze, duże i małe pytania, zapytania do rządu. Szeroka gama instrumentów kontroli oraz rozwiązania proceduralne umożliwiające korzystanie z nich przedstawicielom opozycji pozwalają Bundestagowi, komisjom czy deputowanym na prowadzenie skutecznej kontroli działalności rządu federalnego.

Słowa kluczowe: rząd, kontrola, Bundestag.

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Deputies as Subjects of Parliamentary Accountability – Means of Action[1]

Introduction

Parliamentary-cabinet systems of government, irrespective of the manner and degree of arrangement (such as prime ministerial government in the UK or the chancellor system in Germany), are based on relations of dependency between parliament (or its first chamber) and government. Fundamental to these relationships is the multi-stream flow of information and associated assessments. The flow of information occurs at three levels: parliament (the lower house), the internal bodies of parliament (essentially parliamentary committees) and members of parliament (MPs). We are interested in this last dimension, particularly the accountability between MPs and government.[2] We also answer the question of how the process of MPs posing questions and members of government responding to them is shaped.

1. Interpellation procedures as tools for accountability – the historical dimension

The doctrines of legal studies and political sciences treat interpellation procedures as one of the most distinctive, established, key institutions of parliamentary law.[3] They are

[1] This article was written as part of the project "Accountability as a category of constitutional law", funded by NCN, UMO 2018/29/B/HS5/01771.

[2] For more on the institution of parliamentary accountability see e.g. *Democracy, Accountability, and Representation*, eds. A. Przeworski, S.C. Stokes, B. Manin, New York 1999; K. Strøm, W.C. Müller, D.M. Smith, *Parliamentary Control of Coalition Governments*, "Annual Review of Political Science" 2010, Vol. 13; Z. Machelski, *Rozliczalność jako element jakości procesu demokratycznego w systemie instytucjonalnym III Rzeczypospolitej*, "Przegląd Sejmowy" 2018, No. 1(144).

[3] See M. Kruk, *Funkcja kontrolna Sejmu RP*, Warszawa 2008, p. 63; L. Garlicki, *Komentarz 3 do art. 25* [in:] *idem* [*et al.*], *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom III*, Warszawa 1997, p. 1; J. Kuciński, *Sejmowa kontrola działalności rządu z perspektywy prawnoustrojowej i praktyki politycznej*, Warszawa 2017, p. 347 *et seq*.

activities in which information, explanations and justifications are obtained. The nature of the principal-agent relationship as in the relationship characteristic of members of parliament (MPs) and government is fully revealed in interpellation procedures.[4]

Through the process of evolution, which has taken place primarily based on English parliamentarism and that of the French Third Republic, to which legal regulations adopted in other countries refer, interpellation procedures have assumed different forms and perform slightly different functions.

In England, from the 1880s onwards, the practice of MPs asking for information on cabinet business, to which the cabinet would briefly respond, and then the speaker moving on to the next item on the agenda reduced to a minimum the importance of interpellation as a means of controlling cabinet policy. The stable and predictable balance of party forces in the House of Commons meant that, regardless of the content of the government's response to an MP's question, there was no change in the balance of power in parliament. There was therefore no need to attribute to them a significance that they did not have and, at the same time, there was no mechanism capable of giving them more significance.

By contrast, in continental European states, including France of the Third and Fourth Republics and Belgium, the debate on an answer to an interpellation and the related criticism of a government or minister could lead to a request to change the composition of the government and its reconstitution. Since the debate on an interpellation could lead to a change of political alignment in parliament or even to the fall of a cabinet, there was a rationalisation of parliamentary proceedings in the form of a restriction on the use of this instrument. Unlike in England, from which it originated, the interpellation, and the subsequent submission of a report by a government minister on key issues of state, became a lever for triggering political accountability, containing a powerful charge of influencing the composition of the personnel of and the public policies implemented by the government. Care had to be taken, therefore, to ensure that a fortuitous voting pattern, often triggered by specific and non-recurring events, such as the absence of several government majority MPs, did not lead to the downfall of a minister or government. For this reason, for example, during the founding of the Fifth French Republic, a deputy presenting an interpellation was obliged to accompany it with a motion of censure signed by at least $^1/_{10}$ of the members of the National Assembly.[5] According to Section 122 of the 1938 Constitution of Lithuania, at least ¼ of the members of the *Seimas* could move a motion to declare the prime minister's response to an interpellation unsatisfactory. If such a motion was supported by at least $^1/_4$ of the MPs, then the president of Lithuania either dismiss the prime minister or dissolved parliament.[6] Thus, the evolution of interpellation procedures as

[4] R. Serban, *The practice of accountability in questioning prime ministers: Comparative evidence from Australia, Canada, Ireland, and the United Kingdom*, "British Journal of Politics and International Relations" 2021, Vol. 25(1).

[5] J. Stembrowicz, *Rząd w systemie parlamentarnym*, Warszawa 1982, p. 215.

[6] Verfassung des Litauischen Staates vom 12. Februar 1938, https://www.verfassungen.eu/lt/verf38-i.htm [accessed: 2023.09.21].

instruments of government accountability corresponded rationally with the evolution of parliamentary-cabinet systems themselves.

2. Interlocutory procedures as tools for accountability – the present day

The addressees of interpellation procedures are governments, as executive authorities, and their members. They are, in turn, concerned with issues within the remit of the interpellated bodies, the powers they have and how they exercise them. The subject matter of interpellation procedures depends on the scope of the government, its constituent persons, subordinate bodies or bodies otherwise connected with the government. They can only be matters that are directly or indirectly the responsibility of the government or its agencies.

Formally, in principle, MPs acting either individually or collectively are the exclusive holders of interpellation instruments. In exercising their representative mandate,[7] MPs may use these instruments at their own discretion and for a variety of reasons.[8] However, this formal freedom to use interpellation procedures must be superimposed on conditions resulting from the political organisation of MPs into political factions.[9] Thus, in Germany, for example, an interpellation can only be requested by a group of MPs in the number required to form a parliamentary faction (at least 26 MPs). The government replies to an interpellation in a plenary session of the *Bundestag*. If the number of MPs required to form a parliamentary group so requests, the government's reply is debated.

Given the politically fundamental division of MPs in parliament into MPs of the parliamentary majority and the parliamentary opposition, interpellation procedures are instruments of accountability used mainly by the opposition. They are means of gathering knowledge about the activities of the government and its agencies in order to verify the regularity and expediency of these activities. An important feature is the openness of the proceedings, both with regard to MP's speech and the reply they receive. In particular, it is important with regard to another form of accountability, namely that of MPs to the sovereign power – the people.

Questions and interpellations are the classic instruments of accountability used by MPs (either individually or collectively) *vis-à-vis* the government in a parliamentary-cabinet system. They have developed as basic forms of relations between MPs and

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[7] For an extensive discussion of the representative mandate see, e.g. *Mandat przedstawicielski w teorii, prawie i praktyce poselskiej*, ed. M. Kruk, Warszawa 2013 and the imperative mandate as its negation: P.-H. Zaidman, *Le mandat impératif. De la Révolution française à la Commune de Paris*, Paris 2008.

[8] For more on interpellation procedures as a form of communication between MPs and their constituents, see, for example, S. Bailer, *People's Voice or Information Pool? The Role of, and Reasons for, Parliamentary Questions in the Swiss Parliament*, "The Journal of Legislative Studies" 2011, Vol. 17, Issue 3.

[9] See L. de Winter, *Parliament and Government in Belgium: Prisoners of Partitocracy* [in:] *Parliaments and Governments in Western Europe*, ed. P. Norton, London 2004, p. 111; S. Otjesa, T. Louwerseb, *Parliamentary questions as strategic party tools*, "West European Politics" 2018, No. 41(2), p. 1.

the executive. In this relationship, MPs seek to know what the government is doing within the scope of its powers. The essence of enquiries is to request information from the government on its activities and those of its agencies. But parliaments, in addition to their legal law-making function, also perform political functions by articulating the political preferences of citizens. Hence, in addition to the question of what the government and its agencies are doing, another question is posed by MPs: whether governments are pursuing the right policies and hold them to account for these policies.

MP interpellations are used to make manifest the executive's accountability for its policies and often to question them. They are an instrument for triggering a discussion in parliament about the policies pursued by the government and for evaluating these policies. This tool is regulated separately in many orders and often limited legally by the realities of political factions and their strengths. For example, according to Article 90 of the Bulgarian Constitution of 12 July 1991, deputies of the national assembly have the right to interpellate the council of ministers or individual ministers. At the request of at least $^1/_5$ of the deputies, an interpellation is discussed and a resolution is adopted.[10] In individual cases, votes of confidence in the government or ministers are linked to the discussion of the answer to the interpellation. According to Section 43 of the Constitution of the Republic of Finland of 11 June 1999, a group of at least twenty MPs may submit an interpellation to the government or a minister on matters within the competence of the government or the minister. The interpellation is answered in the plenary session of the *Eduskunta* within fifteen days of its receipt by the government. The debate on the interpellation is followed by a vote of confidence in parliament for the government or minister, unless a motion of no confidence in the government or minister is tabled during the debate.[11] In turn, according to Article 80 of the Constitution of the Slovak Republic of 1 September 1992, a deputy may submit an interpellation to the government, a member of the government or the head of another central state administrative body on matters within their competence. The MP should receive an answer within 30 days. The answer to the interpellation is debated in the national council of the Slovak Republic, which may be combined with a vote of confidence.[12]

3. Interpellation procedures – distinction

In the historical development of parliamentary-cabinet systems, interpellation procedures were subject to modification (e.g. in Poland, interpellation took the form of writ-

[10] Конституция на Република България в сила от 13.07.1991 г., https://www.justice.government.bg/home/normdoc/521957377 [accessed: 2023.09.21].
[11] Suomen perustuslaki, https://www.finlex.fi/fi/laki/ajantasa/1999/19990731 [accessed: 2023.09.21].
[12] Ústava Slovenskej Republiky z 1. septembra 1992, https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/ [accessed: 2023.09.21].

ten questions on issues of importance for state policy[13]) and supplementation. Today we can aggregate them into written interpellation procedures and oral interpellation procedures in the forum of parliaments or their committees.

The first are typical requests submitted to governments or individual ministers for information on specific areas of government or minister activities or actions. These are of general application. Exceptions include some of the presidential systems of government where, because of the strict separation of powers, no provision is made for MPs to ask questions of the government (Mexico and Nicaragua).

Within the framework of the questions, and within a legally stipulated timeframe, members of governments report on an area of interest to MPs concerning the competences of the governments. In addition to its informative purpose, the potential to inspire governments to take specific actions, in particular concerning events of a concrete or local nature, is important, thus such questions acquire the status of an intervention. At the request of citizens or their associations, MPs address governments on issues of interest to them, and in the response they receive information about the governments' attitudes to issues of interest to citizens or their associations.[14]

A written question from an MP is usually answered in writing. In some countries, the answer is given in writing or orally, whereby the choice of the form of answer is decided by the MPs in some countries and by the addressee of the question in others. In contrast, in some countries (the Philippines, Lithuania), a member of the government responds orally to a written question. In Bulgaria, on the other hand, a member of the government answers in writing or orally, unless the deputy has stipulated the written form, in which case it is mandatory to answer in writing. From the point of view of receiving a report from the principal, the form in which the answer is given is not irrelevant. The oral form, by its very nature, is more ephemeral, non-formalised. It is difficult to recall the source material with which the response is presented. It is also less effective when there is a disagreement between the principal and the agent about the content of the answer given. A written answer is devoid of such inconveniences and, as such, has a higher utility value for deponents than an oral answer.

In an interpellation, the essence of an MP's question is to obtain a response from the government. Given the multifarious nature of interpellations, what most often distinguishes them from MP questions is the procedure for asking them, their content and their implications. In modern states, an interpellation, more often than an MP's question, is a collegial right of MPs or their factions. More often than questions, it deals with issues relevant to state policy and more often than questions, the answer to an interpellation may lead to a parliamentary debate (e.g. Estonia) or, as in Sweden, where there is a cyclical parliamentary debate on interpellations. In this way, the interpellation takes on partisan significance. It becomes a form of government reporting not so

[13] We share M. Kruk's view that in this way the interpellation has been "ripped out the teeth" and made similar to a question. M. Kruk, *Funkcja kontrolna Sejmu RP*…, p. 67.

[14] L. de Winter, *Parliament and Government in Belgium*…, p. 111.

much to individual MPs or groups of MPs, but to parliamentary factions, in their political diversity and differing perceptions of government activity.

Formally, replying to an interpellation is not only a political obligation, but also a legal one. If an answer is not provided, inaction or ostensible activity of the addressee of the speech may be stated, and thus a violation of the applicable legal provision (e.g. in Poland – committing a constitutional tort). However, given the pragmatics of political action, in practice, such far-reaching consequences are not drawn from an unsatisfactory assessment of the submitted report or its failure to present it. More often than not, the failure to provide a written answer to an MP's question results in parliament being able to demand an oral answer.

In the practice of countries such as Poland and South Africa, there has been a kind of explosion in MPs using various types of interpellation procedures. Below we show the quantitative development of interpellation procedures by juxtaposing two terms of the Polish *Sejm*: *Sejm* IV term (19 October 2001 – 18 October 2005) and *Sejm* VIII term (12 November 2015 – 11 November 2019). During the IV *Sejm*, 10,660 parliamentary interpellations,[15] 4,386 parliamentary questions, 710 questions on current affairs[16] and 57 requests for current information[17] were submitted. In contrast, in the VIII *Sejm*, 34,043 parliamentary interpellations, 9,955 parliamentary questions, 835 questions on current affairs and 76 requests for current information were submitted.[18] This is similar to the Parliament of South Africa. During its fifth term (2014–2019), MPs asked 18,823 written questions.[19] In comparison, for example, in the twelfth term of the National Assembly of Kenya (2017–2022), MPs asked the government only 1,941 questions.[20]

To avoid the excessive use of interpellation procedures, some countries limit the right of MPs to request information from the government. In these, interpellation is

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[15] In Poland, parliamentary interpellations are similar to parliamentary questions. They differ in that, according to *Sejm* rules of procedure, parliamentary interpellations are to be tabled on matters of a fundamental nature and relating to problems of state policy, while parliamentary questions are to be tabled on other matters relating to the activities of the government or individual ministers. In practice, the distinction between the subject matter of interpellations and queries is not respected: parliamentary questions on secondary issues are titled by MPs as "interpellations," and vice versa: questions on issues relevant to government policy are sometimes referred to as "queries." The failure to distinguish in practice between "interpellations" and "queries" is of little relevance to the government's accountability, since in each of these two forms ("parliamentary interpellations" and "parliamentary queries") the same circle of actors (members of the Council of Ministers) are asked by the same actors (MPs), in the same form (written) and with the same consequences (obligation to reply in writing within 21 days).

[16] They are raised orally by Members during each sitting of the *Sejm* and require a direct response from a member of the Government. They relate to current government issues.

[17] Current information is presented orally by members of the government at a sitting of the *Sejm*. A parliamentary discussion shall be held on the information presented. *Sejm Rzeczypospolitej Polskiej: IV kadencja. Informacja o działalności Sejmu (19 października 2001 r. – 18 października 2005 r.)*, Warszawa 2006, pp. 35–36.

[18] https://www.sejm.gov.pl/sejm8.nsf/page.xsp/prace_sejmu [accessed: 2023.09.21].

[19] https://pmg.org.za/parliament-review/statistics/questions [accessed: 2023.09.21].

[20] *The National Assembly. Report of the Affairs of the National Assembly of the 12th Parliament (31st August 2017 – 8th August 2022)*, p. 33.

not an individual MP's right, but one that is exercised collectively. In Austria, the government can be asked a question by at least five members of the National Council, similarly in Latvia. In some parliaments, quantitative limits have been adopted for putting questions to the government. In Germany, for example, a member of the *Bundestag* is entitled to ask the government no more than four questions per month.

In Poland, the quantitative growth of MP interpellations and queries has generated the material problem of responding to them within the legal deadline. Despite the employment in individual ministries and in the Prime Minister's Office of additional staff specialised in preparing replies to MP interpellations and queries,[21] it has become common practice not to reply on time. At the same time, the multiplicity of MP queries has become an excuse for some ministers not to answer interpellations or queries that are problematic for them because of the work overload of individual ministers. In response to such behaviour, MPs have started to make use of the generally applicable provisions on access to public information and the court action provided for, under them, for the failure of a public authority to act in providing public information. Thus, in parliamentary practice, the use of specialised mechanisms of accountability of executive bodies (interpellation procedures) is mixed with general mechanisms of accountability of public authorities (general access to public information).

4. Question hour, news hour – clearing hour

A key institution of accountability used by MPs in parliament is the "question hour," based on English solutions (Question Time in the British parliament, *Questions au gouvernement* in the French parliament or *Frågestund* in the Swedish *Riksdag*). It is a tool for ongoing communication between MPs and the government, typically carried out at every parliamentary sitting, which is a permanent flow of information necessary for properly shaping decision-making processes, both parliamentary and governmental. It is realised with varying frequency, from once a month (Tunisia) to every working day of parliament (Australia). With that said, the predominant frequency today in many countries is to conduct the question hour once a week in which parliament is in session. As a rule, the question is called by proclamation. In most countries, the questioner has the right to ask a supplementary question when he or she considers the answer to be incomplete. Holding the government to account requires taking into account the political organisation of MPs. For this reason, it is prevalent to maintain factional parity when asking questions. In parliaments with a tradition of bipartisanship, such as Australia's, MPs from the ruling and opposition parties take turns asking questions.

In the UK, when a question relates to government policy, the Prime Minister answers. Other questions are answered by other members of the Cabinet. They typically do this on a rotating basis. Each minister answers MP questions approximately once

[21] The occurrence of a similar process in the UK is indicated by P. Giddings, H. Irwin, *Objects and Questions* [in:] *The Future of Parliament. Issues for a New Century,* ed. P. Giddings, New York 2005, p. 76.

a month. In Bulgaria, on the other hand, the National Assembly listens to questions and answers during the last three hours of the session every Friday. The prime minister is the first to answer, followed by the deputy prime ministers and ministers, with the ministers' answers rotating. Questions to members of the government are asked in the order in which they are received. A prime minister, deputy prime minister or minister who fails to provide an answer is obliged to appear in person before the National Assembly within 10 days and give an explanation for failing to fulfil his or her duty. In addition, under Rule 107a of the Rules of Procedure for the organisation and activities of the National Assembly,[22] during the last two hours of the session on the first Thursday of every month, the prime minister and deputy prime ministers (but not ministers) appear before the National Assembly and answer orally topical questions on general government policy posed by MPs directly to the parliament. With a view to maintaining a level playing field and not reducing the question hour to a questioning exercise, the questions asked must not ask for specific figures. Each parliamentary group is entitled to two topical oral questions and MPs who are not members of a parliamentary group are entitled to a total of two questions.

According to Article 48 of the French Constitution, at least one meeting per week is reserved for questions from MPs and replies from the government. They are not combined with a vote as an expression of formal assessment of the answers given.

In some countries, a so-called "news hour" (in Germany *Aktuelle Stunde*) is known to discuss the current activities of the government. In Austria, it is conducted at the request of at least five deputies.[23] In Poland, there is a similar procedure, called current information; the request for which is submitted by 21:00 on the day before the beginning of the sitting of the *Sejm*, together with a justification and an indication of its addressee. The Bureau of the *Sejm*, after consulting the Council of Seniors, determines which of the information proposals submitted will be taken into account and considered at the next sitting of the *Sejm*. The Presidium of the *Sejm* is guided by its importance and topicality, but it also takes into account the size of the club or circle proposing the question. In the absence of a unanimous opinion of the Council of Seniors, the *Sejm* decides by a majority of votes (or by an absolute majority if there are more than two requests for information. The formula adopted in Poland does not guarantee the parliamentary opposition (as the main entity predestined to request the government to submit activity reports) the ability to provoke discussion in the *Sejm* on key issues of the government's current policy. In a parliament with an established government majority, it determines not only the content of the decisions to be taken, but also the space for parliamentary discussion. It has the tools to prevent demands for information and discussions of events that are problematic for the government and unfavourable to it.

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[22] Правилник за организацията и дейността на Народното събрание в сила от 2.05.2017 г., https://parliament.bg/bg/rulesoftheorganisations [accessed: 2023.09.21].

[23] In Austria, the so-called 'European hour' is convened independently of the 'news hour'. It deals with questions from MEPs on Austria's EU membership and related European policy priorities of the country.

At each sitting of the Polish *Sejm*, a maximum of 90 minutes is devoted to government information. The *Sejm* holds a time-limited discussion on the information presented, while no resolution is foreseen on either taking note of the information or on the *Sejm* approving the conduct of the government or individual ministers. The relatively extensive timeframe for current information requests of up to 90 minutes and the discussion factor make the information a convenient platform for the flow of information and its assessment between the government and its parliamentary support and the opposition. Following the English model, it can serve the bipolar construction of the political scene, with its division into majority and minority government. The procedure for so-called current affairs questions is carried out in a similar way, except that they are tabled orally and not debated. There can be a maximum of 11 such questions, with the Bureau of the *Sejm* deciding which questions are posed and which are not. Questions which have not been posed lapse. This competence is often of a nature to limit the ability of the parliamentary minority to ask the government about matters which are inconvenient for it.

Conclusions

An essential feature of interpellation procedures is providing information on government actions. The addressee of the question is obliged to provide an answer and this answer must be complete, i.e. it must take into account the essence of the addressee's knowledge of the issues about which he or she is being asked. In the case of written interpellations, if the answer is considered unsatisfactory, the interpellant may ask the speaker of parliament to request additional explanations in writing, and to provide reasons for not accepting the answer.[24] The accompanying current information discussion allows cabinet members to provide additional explanations. These instruments are therefore the primary form of receiving highly detailed accounts of the authority exercised.

The analysis conducted of interpellation procedures renders it possible to ascertain their extensive and varied nature. To a large extent, they facilitate receiving a report from an agent – ministers or governement as a whole. In terms of accountability mechanisms, interpellation procedures are well established and anchored in the constitutional practice of modern states. On the legal level, MPs have extensive instruments for obtaining a report from an agent, while in practice the effectiveness of its application, although subject to variation, is high. It is relatively rare that agents fail to report to deputies.

At the same time, it should be borne in mind that the mechanism for providing information and reporting on activities is distinct from the practice of using it.

[24] In Poland, such a request may be made only once, no later than within 30 days of receiving an unsatisfactory reply. Additional explanations shall be provided by the addressee within 21 days of receipt of the request for additional explanations.

The general conclusion that emerges from the analysis of the implementation of accountability by MPs concerns the dependence of the effectiveness of the instruments cited here on the will of the parliamentary majority. The ruling majority may prevent MPs from requesting information, as, among others, the Polish example of topical questions and the French restrictions on questioning show.

Importantly, however, from the point of view of accountability mechanisms, the conclusions reached by the principal upon receipt of the report and the possible sanctions against the agent (being held legally or politically responsible) must be separated from the agent's report to the principal.

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Summary

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Deputies as Subjects of Parliamentary Accountability – Means of Action

The article presents the most important issues in the accountability relationship between MPs and governments and their members. The various instruments of accountability at the disposal of MPs are comparatively identified and characterised. On this basis, the article argues that MPs have the instrumentality to hold the government and its agendas to account. They have tools at their disposal to obtain information on specific events concerning governments and their agencies, individual policies pursued by governments and their agencies, as well as the overall activities of governments.

Keywords: MPs, interpellation procedures, accountability, government.

Streszczenie

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Deputowani jako podmioty rozliczalności parlamentarnej – środki dzialania

Celem artykułu jest przedstawienie najważniejszych zagadnień związanych z problematyką rozliczalności pomiędzy parlamentarzystami a rządem (jego członkami) z perspektywy porównawczej. Autorzy zidentyfikowali i scharakteryzowali różne instrumenty odpowiedzialności, którymi dysponują parlamentarzyści, dochodząc do wniosku, że są to narzędzia pozwalające im rozliczać rząd i jego agencje. Dzięki tym instrumentom parlamentarzyści mogą uzyskać informacje na temat konkretnych wydarzeń dotyczących rządu (jego agend), konkretnych polityk realizowanych przez rząd (ministrów), a także ogólnych działań rządu.

Słowa kluczowe: odpowiedzialność, parlamentarzyści, procedury interpelacji, rząd.

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EU Association Agreement with Ukraine and Unrecognized Territories

1. Status of Ukrainian Territories and International Law

In the modern international system sovereign states co-exist along with unrecognized territories. Sovereign states can also be called recognized states. Currently, unrecognized territories constitute quite a number of political entities. They have appeared mainly as the result of armed conflicts and often have de facto control of their territory. To become a part of the international community as de jure sovereign states, they usually require diplomatic recognition. However, other states are not obliged to recognize these new claimants to statehood.

On the other hand, diplomatic recognition of unrecognized territories by other states and their integration in the world community may become a problem for them and the states that supported them because of the doctrine of the U.S. Secretary of State Henry Stimson regarding the non-recognition of situations created as a result of aggression.[1]

With regard to Ukraine, territories in which the change of status was the result Russia's gross violation of international law[2] include Crimea and the so-called Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR).[3]

After the Association Agreement (AA) between the EU and Ukraine was signed in 2014, Crimea was invaded by Russia and annexed to it. An illegal "referendum" was held and a so-called Declaration of Independence was adopted, and Crimea became

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[1] D. Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, "Chinese Journal of International Law" 2003, Vol. 2, Issue 1.

[2] UN Charter Art. 2.4.

[3] United Nations General Assembly Resolution 3314 (XXIX). See also Responsibility of States for Internationally Wrongful Acts. Article 40 United Nations, International Law Commission, *Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)*, Official Records of General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf [accessed: 2023.02.04].

a part of Russia.[4] This act of accession or inclusion was not recognized by the international community.[5] Thus, in fact, for the international community Crimea remains a territory that is outside legal jurisdiction having been annexed by another state.[6]

On the other hand, parts of the Donetsk and Luhansk areas have broken away from Ukraine as the result of the military conflict between Russia and Ukraine, and the so-called DPR and LPR have been created in these territories. Despite the fact that the legal status of the unrecognized states must be determined solely from the standpoint of international law and in accordance with the national law of Ukraine, the so-called DPR and LPR held "presidential" and "parliamentary" elections called by the self-appointed authorities, which were gross violations of Ukrainian legislation. These territories fall to a large extent under the common name of the regions that have declared themselves sovereign states and possess such attributes of statehood, as their names, state symbols, population, territorial control, system of authorities and law (i.e., some legal acts and others organizational documents). However, they do not have diplomatic recognition by UN Member States, and their territories, as a rule, are seen by UN Member States as being under the sovereignty of Ukraine.

1.1. International Community's Position and Sanctions Against Russia

Since all this happened in brutal violation of the principles and norms of international law, these actions on behalf of Russia have been condemned by the international community and international sanctions have been introduced against Russia and the territories.[7]

United Nations General Assembly Resolution No. 68/262, which was supported by 100 United Nations Member States, affirmed the General Assembly's commitment to the territorial integrity of Ukraine within its internationally recognized borders and called upon all states, international organizations, and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol based on the above-mentioned referendums and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[8] The adoption of the resolution was preceded by unsuccessful attempts of the Unit-

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4 R. Slyvka, I. Zakutynska, *How Do State and Military Borders Divide the Urban Spaces of Donbas? Cases of Milove/Chertkovo and Zolote* [in:] *Spatial Conflicts and Divisions in Post-socialist Cities*, ed. V. Mihaylov, Cham 2020.

5 K. Ivaschenko-Stadnik, *What's Wrong with the Donbas? The Challenges of Integration Before, During and After the War* [in:] *Ukraine in Transformation*, eds. A. Veira-Ramos, T. Liubyva, E. Golovakha, Cham 2020.

6 J. Bering, *The Prohibition on Annexation: Lessons from Crimea*, "New York University Journal of International Law and Politics" 2017, Vol. 49, No. 3, pp. 748–832.

7 A. Alì, *The Parliamentary Assembly of the Council of Europe and the Sanctions Against the Russian Federation in Response to the Crisis in Ukraine*, "The Italian Yearbook of International Law" 2018, Vol. 27, Issue 1, pp. 77–90.

8 Resolution adopted by the General Assembly on 27 March 2014, https://www.securitycouncilreport.org/atf/cf/_res_68_262.pdf [accessed: 2019.12.24].

ed Nations Security Council, which convened seven sessions to address the Crimean crisis, because Russia vetoed draft resolution S/2014/189, which was sponsored by 42 countries.[9]

The European Union did not recognize either the annexation of Crimea and Sevastopol to the Russian Federation or attempts to separate the so-called DPR and LPR from Ukraine. In the European Council Conclusions of 23–24 October 2014 the EU underscored that the holding of "presidential" and "parliamentary" elections called by the self-appointed authorities of the so-called DPR and LPR should not be recognized and that they expected the Russian Federation to respect Ukraine's national sovereignty and territorial integrity and to contribute to the political stabilization and economic recovery of Ukraine. The European Council reiterated that it will not recognize the illegal annexation of Crimea.[10]

1.2. EU-Ukraine Association Agreement and Unrecognized Territories

The annexation of Crimea and the unrecognized status of so-called DRP and LPR largely determines the effect of the AA between the EU and Ukraine on these territories.

With this regard, it might be underlined that the association is a form of collaboration, a kind of international organization, based on a free trade area.

By concluding the AA, the EU develops around itself an area of stability and economic, political, and legal cooperation.[11] The Eastern Partnership policy proclaimed by the European Union in 2008 foresees a substantial upgrading of the level of political engagement with eastern partners, including the prospect of a new generation of Association Agreements, far-reaching integration into the EU economy, easier travel to the EU for citizens providing that security requirements are met, enhanced energy security arrangements benefiting all concerned, and increased financial assistance.[12]

The AA with Ukraine is of this kind.[13] A very important aspect of this association is that it was established after the Lisbon agreements on the EU and the functioning of the EU came into force. This means that new association agreements cover many new areas of collaboration and are aimed at forming deep, comprehensive free trade areas. The new developing free trade areas with associated states are based on extending to them four freedoms of the internal market.

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[9] Draft Resolution UN Doc. S/2014/189, https://undocs.org/pdf?symbol=en/S/2014/189 [accessed: 2019.12.24].

[10] European Council (23 and 24 October 2014), Conclusions, https://www.consilium.europa.eu/media/24561/145397.pdf [accessed: 2019.12.24].

[11] M. Cremona, G. Meloni, *The European Neighbourhood Policy: A Framework for Modernization*, "LAW EUI Working Paper" 2007, No. 2, pp. 129–135.

[12] Communication from the Commission to the European Parliament and the Council (2008), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008DC0823 [accessed: 2019.12.24].

[13] Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part (2014), https://eur-lex.europa.eu/legal-content/801%29 [accessed: 2019.12.24].

The AA with Ukraine comprises all Ukrainian territory, including Crimea and the Donetsk and Luhansk areas separated from Ukraine. Article 483 of the AA stipulates that this Agreement shall apply, of the one part, to the territories in which the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty establishing the European Atomic Energy Community are applied, under the conditions laid down in those Treaties, and, of the other part, to the territory of Ukraine.

The Final Act to the AA states that the Agreement shall apply to the entire territory of Ukraine as recognized under international law and shall engage in consultations with a view to determine the effects of the Agreement with regard to the illegally annexed territory of the Autonomous Republic of Crimea and of the City of Sevastopol in which the Ukrainian Government currently does not exercise effective control.[14]

As the AA implies, such consultations should be conducted with the understanding that the principle of territorial integrity is enshrined in the text of the agreement, in particular, in Articles 2, 4, and 7.

The introduction of sanctions by the EU, the USA, and other states against Crimea and the so-called LPR and DPR has created very unfavorable conditions for their existence. The AA cannot be implemented with regard to these unrecognized territories. They are not able to maintain normal economic relations with other states, with the exception of Russia. Neither Ukrainian nor Russian legislation extend to the so-called LPR and DPR. The only state that helps them is Russia, which bears the full responsibility for the creation of this situation.

One should bear in mind that the territories of Crimea and the so-called LPR and DPR are subsidized regions. Formerly, Ukraine donated to these areas far more than it earned from them for the Ukrainian budget.

Crimea has always been a subsidized region. In general, before the Russian invasion, the Autonomous Republic of Crimea was only 34% financially independent and Sevastopol only 20%.[15] The rest, approximately three billion hryvnias annually, was provided from the Ukrainian state budget.[16] This was one of the reasons why Crimea was transferred to Ukraine in 1954. Ukraine also supplied Crimea with water, electricity, food, etc. The very short resort season together with the old infrastructure and the Soviet-minded mentality of the majority of the people were not able to alter the Crimean economic situation for the better. Crimea needs investment urgently. Turkey has demonstrated the role investment in resort businesses can play; however, sanctions are hampering investment.

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[14] Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:278:FULL&from=FR [accessed: 2019.12.24].

[15] A. Zanuda, *Crimea: No one can afford 7 March 2014 BBC Ukraine*, https://www.bbc.com/news/world-europe-26483818 [accessed: 2023.02.04].

[16] O. Tischuk, *Krim subsidized: The peninsula annually costs Ukraine 3 billion hryvnias*, 1 March 2014, https://fakty.com.ua/ru/ukraine/ekonomika/20140301-1506238 [accessed: 2023.02.04].

Since the AA was concluded before the beginning of the Russian invasion of Crimea and Donetsk and Luhansk areas, the status of these territories and their populations were not specifically mentioned in the agreement. This created some legal problems as to the territorial application of the agreement. At the same time, some provisions of the AA are applicable to these territories and their populations.

Trade in goods for these territories has been stopped, and there is no chance for it to be renewed until the economic sanctions imposed by the EU in 2014 are lifted. International and Ukrainian sanctions exclude any possibility of trade between these territories and the EU. If goods from the unrecognized territories enter Ukraine, they cannot in any instance go further to the EU since they require certificates of origin obtained from the Ukrainian Ministry of Economic Development and Trade. Goods that have certificates of origin issued by the authorities of the unrecognized territories are not accepted by the EU.[17]

The same applies to the free movement of services, which cannot be extended to these territories because of sanctions.

As far as the free movement of people is concerned, the situation in this area is different to some extent. Many Ukrainians living in the occupied territories still have Ukrainian passports despite the pressure exerted on them to change their citizenship. Ukrainian citizens can use the visa-free regime to travel to the EU as is foreseen by Articles 17–19 of the AA. The only problem for them is that they must go to their motherland, Ukraine, and apply for a biometric passport in Kyiv.

Those who do not have a Ukrainian passport and are thus unable to confirm their Ukrainian citizenship, have no a chance of obtaining biometric passports to travel to the EU. This is why people who changed their Ukrainian citizenship even against their will to do so have lost the chance to enjoy the visa-free regime between the EU and Ukraine.

Although the AA contains a few provisions on the free movement of capital, some provisions of the Lisbon consolidated Treaty on European Union and the Treaty on the Functioning of the European Union prohibit all restrictions on the free movement of capital between the EU member-states and third countries (Article 63).

However, there are many exceptions from this regime in the AA with Ukraine. Therefore, capital movement in the AA is practically reduced to investments. One can easily surmise that investments in the unrecognized territories are banned by sanctions. So one can speak mainly about the protection of foreign investments that were made before the annexations.

The question is who will protect foreign investments in these territories. Ukraine cannot do it, since its legislation is not valid there. This could mean that Russia is in charge of protecting these investments if they were not withdrawn, of course. So, there is also no free movement of capital to or from these unrecognized territories.

[17] Case C-432/92, The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others, 1994, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0432 [accessed: 2019.12.24].

The annexation of Crimea and the so-called DPR and LPR will not be recognized in the foreseeable future. They can only survive with Russia's military and economic support. They will cease to exist as soon as Russia ceases supporting them.

However, the AA opens up some prospects for them in the future. When the Russian army leaves these territories, they will be reintegrated gradually into the Ukrainian economy. This will not take a lot of time since the economies of these territories and the economy of Ukraine are very closely integrated.

1.3. Legal Regulation of Temporarily Occupied Territory of Ukraine

Ukraine has taken some legal steps for the integration of such territories. On April 15, 2014, the *Verkhovna Rada* of Ukraine enacted the Law of Ukraine on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine.[18]

By adopting the law, the Ukrainian parliament confirmed that the territory of the Autonomous Republic of Crimea and the City of Sevastopol are integral parts of the territory of Ukraine (Article 1).

The law sets forth a special legal regime for the territory of Crimea and Sevastopol, specifically: the definition of temporarily occupied territory of Ukraine; the activity of unlawful bodies and/or their officials; entry to and exit from temporarily occupied territory; property rights and economic activity; compensation for material and moral damages.

As far as the unrecognized territories of Donetsk and Luhansk are concerned, on January 18, 2018 Ukraine's *Verkhovna Rada* passed a law on the Peculiarities of State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories of the Donetsk and Luhansk Regions (the so-called law on Donbass reintegration).[19]

The bill classifies the self-proclaimed DPR and LPR as "occupied territories," labels Russia the "occupier," and officially introduces the notion of "Russian aggression."

Parts of Ukrainian territory where armed formations of the Russian Federation and the administration of the Russian occupation forces have been established and exercise general, effective control have been designated as temporarily occupied areas in the Donetsk and Luhansk regions.

The law says that the activities of the armed formations of the Russian Federation and the administration of the Russian occupation forces in the Donetsk and Luhansk regions contradict international humanitarian law and are illegal.

The law confirms that the legal status of the temporarily occupied territories in the Donetsk and Luhansk regions, the autonomous Republic of Crimea and the city

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[18] Law of Ukraine "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine", 2014, http://search.ligazakon.ua/l_doc2.nsf/link1/T141207.html [accessed: 2019.12.24].

[19] Law of Ukraine "On Peculiarities of the State Policy on Ensuring the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions", 2018, https://zakon.rada.gov.ua/laws/show/2268-19 [accessed: 2019.12.24].

of Sevastopol, and the legal regime in these territories is determined by this law, the law of Ukraine on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine, other laws of Ukraine, and international treaties, and the consent to be bound that is provided by the *Verkhovna Rada* of Ukraine and principles and norms of international law (Article 2).

Despite the worldwide crisis of legitimacy, Russia's practice was based on the recognition of civil status acts and other documents affecting the legal status of persons which have been issued to authorities in the so-called DPR and LPR. In June 2019, Russia started issuing Russian passports to inhabitants of the self-proclaimed DPR and LPR under a simplified procedure allegedly on "humanitarian grounds."

From 2014, Russia began using the unrecognized territories as bridgeheads for the large-scale aggression with the aim of conquering all of Ukraine. To start with, Russia formed military contingents from the local populations and resorted to military provocations against Ukraine.

On February 21, 2022, Russia recognized the self-proclaimed DPR and LPR as sovereign states within their administrative borders, which violated Ukraine's sovereignty and territorial integrity. On the same day, Russian President Putin approved decrees recognizing the DPR and LPR, and signed agreements on friendship, cooperation, and assistance with the self-proclaimed republics.

On February 22, 2022, the Federation Council of Russia authorized the use of military force, and Russian military forces openly advanced into the territories of the so-called DPR and LPR.

The large-scale Russian military invasion of Ukraine began on February 24, 2022, when Putin announced a "special military operation" to "demilitarize and denazify" Ukraine. On September 30, 2022, Putin announced the annexation of the so-called DPR and LPR.

On October 12, 2022, the United Nations General Assembly voted for Resolution ES-11/4 on the territorial integrity of Ukraine,[20] in which the body condemned the organization by the Russian Federation of the illegal so-called referendums in regions within the internationally recognized borders of Ukraine and the attempted illegal annexation of the Donetsk, Kherson, Luhansk, and Zaporizhzhia regions of Ukraine, following the organization of the referendums mentioned above.

Conclusions

The world community of states does not recognize the secession of Crimea and some parts of the Donetsk and Luhansk areas from Ukraine. These territories seceded from Ukraine as the result of the military invasion and the annexation of Crimea by Russia

[20] Resolution ES-11/4 by the General Assembly on 12 October 2022 "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations", https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/630/66/PDF/N2263066.pdf?OpenElement [accessed: 2023.03.04].

and military support by Russia of the pro-Russian separatists that seized power in parts of the Donetsk and Luhansk regions. Although all the territorial changes were made through the gross violation of international law, the legal status of them is not similar. Russia proclaimed Crimea an integral part the Russian Federation, while the so-called DPR and LPR proclaimed themselves to be independent states.

The AA between the EU and Ukraine shall apply to the entire territory of Ukraine as recognized under international law, defined by the Constitution of Ukraine, the laws of Ukraine, and international agreements. However, the Ukrainian government currently does not exercise effective control over Crimea or the separated parts of the Donetsk and Luhansk regions. Therefore, Ukraine and the EU decided to engage in consultations with a view to determine the effects of the agreement with regard to the illegally annexed and separated territories. At the time of their occupation and annexation by Russia, these territories did not fall within the purview of the AA.

Russia's recognition of the independence of the self-proclaimed DNR and LNR states within its administrative borders, which went far beyond the existing lines of demarcation with Ukraine on that day, became one of the pretexts for Russia's military aggression against Ukraine, that Russia began on February 24, 2022.

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Summary

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EU Association Agreement with Ukraine and Unrecognized Territories

The focus of this article is a legal analysis of the status of Crimea and the so-called Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) that are parts of the Ukrainian territory that was annexed and separated as a result of the Russian invasion. The authors state that Russia brutally violated the principles and norms of international law and that Russia's military invasion has been condemned strongly by the international community. Moreover, international sanctions have been introduced against Russia and these territories. Russia's annexation of Crimea and the unrecognized status of the so-called DPR and LPR largely determines the effects of the Association Agreement (AA) between the EU and Ukraine regarding these territories. The formation of a free trade area stipulated in the AA cannot cover Crimea or the so-called DPR and LPR. These territories and their populations cannot enjoy to the full extent the preferences obtained by Ukraine after the AA came into force. Ukrainian legislation concerning the legal status of Crimea and the so-called DPR and LPR is also analyzed in detail.

Keywords: EU associate agreement, Ukraine, unrecognized territories, sanctions against Russia.

Streszczenie

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Umowa stowarzyszeniowa między Unią Europejską a Ukrainą i terytoriami nieuznawanymi

Artykuł jest poświęcony analizie prawnej statusu Krymu oraz tzw. Donieckiej Republiki Ludowej i Ługańskiej Republiki Ludowej jako części ukraińskich terytoriów, które zostały zaanektowane i oddzielone od Ukrainy w wyniku rosyjskiej inwazji. Autorzy wskazują, że Rosja brutalnie naruszyła zasady i normy prawa międzynarodowego, a rosyjska inwazja wojskowa została zdecydowanie potępiona przez społeczność międzynarodową, czego wyrazem było wprowadzenie międzynarodowych sankcji przeciwko Rosji i tym terytoriom. Aneksja Krymu przez Rosję i nieuznawany status tzw. Donieckiej Republiki Ludowej i Ługańskiej Republiki Ludowej w dużej mierze determinują skutki umowy stowarzyszeniowej między UE a Ukrainą na tych terytoriach. Utworzenie strefy wolnego handlu przewidzianej w umowie stowarzyszeniowej nie może obejmować powyższych terytoriów, w związku z czym terytoria te i ich ludność nie są w stanie w pełni korzystać z preferencji uzyskanych przez Ukrainę po wejściu w życie umowy stowarzyszeniowej. Przedmiotem analizy jest również ukraińskie ustawodawstwo dotyczące statusu prawnego Krymu oraz tzw. Donieckiej Republiki Ludowej i Ługańskiej Republiki Ludowej.

Słowa kluczowe: umowa stowarzyszeniowa z Unią Europejską, Ukraina, terytoria nieuznawane, sankcje wobec Rosji.

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The Court of Justice of the European Union as the Creator of a Protective Standard Against Discrimination on the Basis of Sexual Orientation: A Critical Analysis[1]

Introduction

Sexual orientation is one of more recent legally-protected characteristics under EU law. The Union acquired the competence to legislate EU anti-discrimination law with regard to it (as well as the other grounds of prohibited discrimination listed in Article 19 of the Treaty on the Functioning of the European Union (TFEU),[2] in addition to gender) by the Treaty of Amsterdam (TA).[3] Indeed, it introduced Article 13 into the Treaty establishing the European Community,[4] which expanded the possibility of the adoption of anti-discrimination measures at the EU level. Prior to the entry into force of the TA, the legislative competence of the EU in this regard was limited to the prohibition of discrimination on grounds of nationality and, as mentioned above, gender.[5] With respect to sexual orientation, the Union exercised this competence in the form of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[6] Currently, the prohibition of discrimination on the basis of sexual orientation is also expressed in the Charter

[1] Funded by the EU under the project "Between Hate and Equality: The EU as a guardian of human rights and non-discrimination" (EUHatEq), project number 101047948. The views and opinions expressed are solely those of the author(s) and do not necessarily reflect those of the European Union or the European Executive Agency for Education and Culture (EACEA). Neither the European Union nor the EACEA is responsible for them.

[2] Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26.10.2012, p. 47, hereinafter: TFEU.

[3] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997, p. 1, hereinafter: TA.

[4] Treaty establishing the European Community (consolidated version 1997), OJ C 340, 10.11.1997, p. 173.

[5] Attention to this is drawn by A. Zawidzka-Łojek, *Sources of antidiscrimination law of the European Union* [in:] *Antidiscrimination law of the European Union*, eds. *eadem*, A. Szczerba, Warsaw 2021, p. 47.

[6] OJ L 303, 2.12.2000, p. 16.

of Fundamental Rights of the European Union (CFR or Charter)[7] and remains a component of the principle of equal treatment as a general principle of EU law. The normative dimension of the principle of equality in the EU legal order is the result not only of lawmaking activity, including legislation, but also of jurisprudence. Indeed, the Court of Justice of the European Union (CJEU) plays a major role in raising the level of protection of homosexual persons from discrimination both in the spheres covered by EU anti-discrimination law and in other areas of EU law. The CJEU's most recent jurisprudence on this subject-matter relates to the freedom of movement of persons, which indicates a progressive synergy between the regime of anti-discrimination law based on Article 19 TFEU and Article 18 TFEU.

The purpose of this article is to analyse the activity of the CJEU in relation to the protection of the rights of persons of non-heteronormative sexual orientation against discrimination. The starting point of this analysis will be the identification of EU law stipulating the prohibition of unequal treatment on the basis of sexual orientation. The analysis concentrates on selected judgments of the CJEU, which will permit tracing the development of the CJEU's case law in relation to the prohibition of discrimination against homosexual people. These considerations will be enriched by an attempt to analyse critically the conditions and course of this development, as well as to anticipate its future directions.

The object and purpose of the analysis determined the research methods used, which consist of the dogmatic-legal method, the theoretical-legal method, and a kind of legal hermeneutics that takes into account the socio-cultural context of the judicial application of EU anti-discrimination law.

1. Sources of EU law on the protection against discrimination based on sexual orientation

1.1. Equality as a general principle of EU law[8]

The CJEU began the process of decoding the general principle of equal treatment with the Defrenne III judgment, in which it confirmed that respect for human rights – which undoubtedly includes the prohibition of discrimination on the basis of sex – is one of the general principles of EU law that it is obliged to ensure.[9] It is now an established jurisprudential standard – confirmed by the wording of Article 6(3) TEU – that the principle of equal treatment is a general principle of EU law, derived from various international instruments and the common constitutional traditions of the Member States.

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[7] OJ C 326, 26.10.2012, p. 391, hereinafter CFR or Charter.

[8] Cf. A. Szczerba-Zawada, *Equality as the foundation of the European Union. Study of the criteria of equal treatment in the construction of the internal market*, Warsaw 2019, p. 36 *et seq.*

[9] Judgment of the CJ of June 15, 1978 in Case C-149/77, Defrenne III, EU:C:1978:130, paragraphs 26–27.

The general principle of equal treatment, guaranteed by Articles 20 and 21 of the CFR, requires that comparable situations are not treated differently, and that different situations are not treated equally, unless such treatment is objectively justified.[10] As a general principle of EU law, equality sets an overarching standard of fairness and rationality.[11] Moreover, it is sufficient in itself to confer on individuals a right upon which they may rely in disputes between them in a field covered by EU law.[12] The scope of the general principle of equal treatment is not limited to the spheres covered by the equality directives. Moreover, it also affects areas not covered by EU law, namely those that fall within the exclusive competence of the Member States.[13] The prohibition of discrimination on the basis of sexual orientation has similar consequences, as indicated by the judgments of the CJEU which are discussed later in this article, although so far it has not confirmed the status of the prohibition of discrimination on the basis of sexual orientation as a general principle of EU law.

1.2. The CFR as a foundation for protection against discrimination based on sexual orientation

The CFR was adopted in 2000 as a non-legally binding instrument. By virtue of the Lisbon Treaty[14] its status was changed and the Charter became part of EU primary law.[15] As a result, Member States are obliged to abide by it, and individuals – including non-heteronormative persons – have a new instrument to protect their rights. Insofar as regards the beneficiaries, the rights guaranteed by the Charter are the rights of every person, unless the Charter's provisions specify otherwise. This means that in principle any person can challenge any EU legislation or national legislation implementing EU law if he or she finds it incompatible with the provisions of the CFR, including the prohibition of discrimination based on sexual orientation expressed therein. At the same time, national courts may seek guidance from the CJEU on the correct interpretation of the Charter under the preliminary ruling procedure set out in Article 267 TFEU.[16]

The material scope of the impact of the prohibition of discrimination on the basis of sexual orientation under the CFR refers to those provisions that establish the tasks and competences of the EU (with respect to its institutions and bodies) or have

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[10] This is how the CJEU defined the general principle of equal treatment in its May 22, 2014 judgment in Case C-356/12, Glatzel, EU:C:2014:350, para. 43.

[11] M. Bell, *The Principle of Equal Treatment: Widening and Deepening* [in:] *The evolution of EU law*, eds. P. Craig, G. de Búrca, Oxford 2011, p. 626.

[12] CJEU judgment of January 22, 2019 in Case C-193/17, Cresco Investigation, EU:C:2019:43, para. 76.

[13] A. Szczerba-Zawada, *Equality as a foundation*…, p. 57.

[14] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on December 13, 2007, OJ C 306, 17.12.2007, p. 1.

[15] See Article 6 of the Treaty on European Union (Consolidated Version), OJ C 326, 26.10.2012, p. 13: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

[16] *Handbook of European Non-Discrimination Law*, Luxembourg 2011, p. 16.

a connection with EU law (with respect to the Member States). In view of this, the EU is bound by the Charter while exercising of its treaty-established tasks and competencies, while the Member States are bound by it to the extent to which they implement EU law (Article 51(1) of the Charter). As a result, the Charter applies when, *inter alia*, the subject matter of national legal measures is straightforwardly subject to the provisions of EU law, as in the judgment in Case C-148/13 to C-150/13,[17] in which the CJEU assessed the legality of means of verifying non-heteronormative sexual orientation as a prerequisite for applying for asylum in a Member State. The CJEU confirmed that the assessment of the accuracy of this verification should be done, among other things, in a manner consistent with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity (Article 1 of the Charter), or the right to respect for private and family life (Article 7 of the Charter). The CJEU has clarified that EU law precludes an assessment through interrogations based solely on stereotypical notions of homosexual behaviour;[18] detailed interrogations about an asylum seeker's sexual practices; tests to prove an asylum seeker's homosexuality; or the submission of video recordings of sexual activities by an asylum seeker. Thus, although the CJEU did not define sexual orientation as a prerequisite for asylum – such a definition has also not been developed under anti-discrimination law by either the EU legislature or the judiciary – it did point out those criteria which cannot be applied – according to EU law – to verify it. Since the specificity of this premise lies in its strong connection with the intimate sphere of life of the individual, in assessing the legitimacy of invoking the protection associated with it, the right to respect for private life and other rights guaranteed by the CFR must be respected. This standard, *per analogiam*, should also be applied to protection against discrimination.

The right to non-discrimination on the basis of sexual orientation is expressed in Article 21(1) of the Charter, according to which: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." Sexual orientation is therefore a characteristic legally protected under the Charter against both discriminatory acts and omissions. The *signum specificum* of Article 21 of the Charter as a source of protection against discrimination on the basis of sexual orientation is its hybrid-law nature and the manner in which this provision is implemented, as set forth in Article 52(2) of the Charter.

Article 52(2) of the Charter helps define the relationship between rights under the CFR and the identical ones subject to the regulations of the Treaties and the provisions

[17] The relevant EU act therein was Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, pp. 12–23.

[18] The role of stereotypes in sexual orientation discrimination is emphasized by J. Maliszewska-Nienartowicz, *Discrimination based on religion, disability, age or sexual orientation. Directive 2000/78 and the jurisprudence of the CJ UE. Commentary*, Warsaw 2013, p. 13.

adopted pursuant to them, indicating that: "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." This requires that the anti-discrimination clause contained in Article 21 of the CFR must be viewed through the prism of those provisions of EU law that express the prohibition of discrimination (including in the case of discrimination on the basis of sexual orientation), and not in an autonomous manner. The hybrid nature of the prohibition of discrimination is confirmed by the doctrine claiming that "reducing the nature of the prohibition of discrimination to a principle within the meaning of Article 52 of the Charter would mean a significant weakening of the function of this provision, since the principle can be invoked only to interpret and control certain facts."[19] This leads to the conclusion that Article 21(1) of the Charter implies the right to non-discriminatory treatment[20] with the attribute of direct effect.[21] Consequently, protection against discrimination on the basis of sexual orientation on the grounds of the CFR might be invoked by anyone before EU bodies and institutions, as well as before national authorities, including the courts, which can and even must apply the Charter directly. Unfortunately, the potential of the Charter as a source of protection against discrimination *in genere*, and in particular against discrimination on the basis of sexual orientation, is not fully exploited, as evidenced by the judgments of the CJEU analysed in the next section of this article.

1.3. Directive 2000/78/EC as an instrument of EU law on protection against discrimination on the basis of sexual orientation

At the level of secondary law, the most important act of protection against discrimination against homosexual people is Directive 2000/78/EC. Under this act, protection from discrimination on the basis of sexual orientation extends to heterosexuals (experiencing sexual desire and affection for persons of the opposite sex); homosexuals (experiencing sexual desire and affection for persons of the same sex); and bisexuals (experiencing sexual desire and affection for persons of either sexes).[22] In the reality of social life, as is reflected in the CJEU case law cited below, the problem of discrimination on the basis of sexual orientation primarily affects the second indicated group.

At the same time, it should be borne in mind that the scope of protection against discrimination based on sexual orientation has expanded thanks to the Court's jurisprudence, and now also includes less favourable treatment of certain forms of same-sex relationships,[23] although Directive 2000/78 does not address issues related to fam-

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19 A. Wróbel, *Article 21 of the Charter of Fundamental Rights of the European Union. General issues* [in:] *Charter of Fundamental Rights of the European Union. Commentary*, ed. *idem*, Warsaw 2013, p. 717.

20 A. Zawidzka-Łojek, *Sources*…, p. 53.

21 Which the CJEU confirmed in its April 17, 2018 judgment in Case C-414/16, Egenberger, EU:C:2018:257.

22 J. Maliszewska-Nienartowicz, *Discrimination due to*…, p. 25.

23 More extensively, see A. Szczerba-Zawada, *Equality as a foundation*…, pp. 292–293 *et seq.*

ily status and the benefits arising therefrom (recital 22), leaving such issues to national legislation.

The prohibition of discrimination on the basis of sexual orientation established by Directive 2000/78 applies to conditions for access to employment, self-employment, or to occupation; including selection criteria and recruitment conditions, regardless of the branch of activity and at all levels of the professional hierarchy, including promotion (Article 3(1)(a)). Thus, the scope of this directive covers all professional activities, regardless of their nature or characteristics, as the CJEU confirmed in its judgment in Case C-356/21, J.K. v. TP S.A.[24] This refers, in the first instance, to persons having the status of an employee within the meaning of EU law, i.e. any person performing actual and effective work for and under the direction of another person, regardless of the amount of full-time employment. In addition, the concept of employee includes a person seeking employment in the territory of another member state, as well as a person whose employment relationship has been terminated under circumstances governed by EU law, such as a person who is temporarily unable to work as a result of an accident. The directive applies to any employee, whether in the public or private sector.[25] However, the EU legislator did not intend to limit the scope of Directive 2000/78 only to positions held by an "employee" within the meaning of Article 45 TFEU. Consequently, protection against discrimination on the basis of sexual orientation covers a wide range of professional activities, including those carried out by self-employed persons for the purpose of making a living, provided that they are genuine in nature and are carried out within the framework of a professional relationship characterized by a certain stability.[26]

The directive prohibits various forms of discrimination against non-heteronormative people,, i.e. those that are more easily associated with unequal treatment (direct discrimination (Article 2(2)(a)); indirect discrimination (Article 2(2)(b) of Directive 2000/78) and those that give rise to greater public debate – harassment (Article 2(3)) and/or an instruction to discriminate (Article 2(4)). "The concept of harassment includes manifestations of homophobia consisting of pejorative or negative comments, suggestions or name-calling, or insults to persons who are gay, lesbian or bisexual by an employer or co-workers."[27] These can be either words, insults, or gestures, as long as they meet the criteria with which the law associates the existence of harassment. At the same time, revealing one's orientation, or coming out, is not a justification for discrimination. An instruction to discriminate, on the other hand, consists not only of direct acts that constitute discrimination, but also of management giving orders. "This concept should include situations in which one is forced to discriminate or an

[24] CJEU judgment of January 12, 2023, in Case C-356/21, J.K. v. TP S.A., EU:C:2023:9.

[25] T. Romer, *Prohibition of discrimination against employees based on sexual orientation* [in:] *Counteracting discrimination on the basis of sexual orientation in the light of Polish law and European standards*, ed. K. Śmiszek, Warsaw 2006, p. 81.

[26] See CJEU judgment J.K. v. TP S.A., paragraphs 36, 37, 44 and 45.

[27] D. Pudzianowska, *Sexual Orientation* [in:] *Anti-discrimination Law of the European Union*, eds. A. Zawidzka-Łojek, A. Szczerba, Warsaw 2021, p. 286.

expressed preference to treat people worse because of their sexual orientation."[28] It is worth noting that the parameters of this form of discrimination may evolve in the future thanks to case law, including that of the CJEU.

Not all differential treatment based on sexual orientation will constitute discrimination. Directive 2000/78 envisages certain exceptions to the prohibition of discrimination, accepting differences in treatment that are based on, for example, relevant and determinative occupational requirements (Article 4(1)); however, the purpose of such differentiation must not be unlawful or disproportionate.

2. The principle of equality on the grounds of sexual orientation in the case law of the CJEU

2.1. Protection of same-sex registered partnerships against wage discrimination – judgment in Case C-147/08, Römer

The judgment under review concerns the social security system in which the plaintiff in the main proceedings, Mr. Römer, who was in a registered partnership, applied for a supplementary pension benefit, which was reserved for married persons under German law.

The CJEU, in response to a preliminary question,[29] compared the legal regime of registered partnerships and marriages. It concluded that the two are similar, among other things, in terms of the obligations imposed on partners and spouses, including to contribute adequately to the common needs of the partnership by their work and from their property, which the benefit at issue in the case in the main proceedings was intended to ensure. Indeed, it was intended to provide a replacement income at the time of retirement, which should directly benefit the person concerned and indirectly those living with him or her.[30] Accordingly, such benefits constitute pay within the meaning of Article 157 TFEU. Taking into account the economic criteria, the CJEU stated that Directive 2000/78 precludes "a provision of national law […] under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if in the Member State concerned marriage is reserved to persons of different gender and exists alongside a registered life partnership, which is reserved to persons of the same gender, and there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension."[31] The CJEU left

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28 *Ibid.*, p. 287.

29 See CJEU judgment of May 10, 2011, in Case C-147/08, Römer, EU:C:2011:286, para. 28.

30 See *ibid.*, para. 47.

31 *Ibid.*, para. 52. From the preliminary question, it is possible to read the position of the national court, which stated that there are no differences between marriage and civil unions in relation to their rights.

the assessment of this comparability to the national courts in the case under review, considering it to be within its competence. This decision might be considered a manifestation of a conservative attitude on the part of the Luxembourg court, which may be deserving of criticism, especially when one considers the greater willingness of the CJEU to shape protection against discrimination on the basis of sex, for example.[32]

In fact, this judgment is criticized by the doctrine,[33] even though the CJEU confirmed in it the possibility for same-sex couples to seek protection from discrimination under Directive 2000/78 also in spheres that are related to the exclusive competence of the Member States (marital status). It is criticised for several reasons. Firstly, the CJEU's method of comparing registered partnerships and marriages to identify unequal treatment on the basis of sexual orientation led it to limit the scope of the protection it established only to the Member States that legally sanctioned same-sex unions in a manner similar to the institution of marriage. In states that do not provide for same-sex registered partnerships at all, or that have adopted a different legal model of partnerships as compared to marriage, people in same-sex partnerships will be (or at least may be) deprived of such protection. Secondly, the CJEU did not clarify whether the principle of non-discrimination on the basis of sexual orientation could be considered a general principle of EU law, although the structure of the Court's reasoning remained consistent with those judgments in which it qualified as such discrimination based on different grounds. Thirdly, the CJEU failed to analyse the prohibition of discrimination as a fundamental right under the CFR, missing an opportunity to emphasize the importance of the Charter as the main source of fundamental rights. Fourthly and finally, it also failed to clearly answer the question of how to balance the circumstances in which, on the one hand, Member States are obliged to respect the principle of equal treatment, including on the basis of sexual orientation, and on the other – by virtue of constitutional solutions – extend special protection to marriage and family. This would be particularly helpful for protection of non-heteronormative persons in Member States such as Poland.[34]

2.2. Protection against homophobic recruitment policy – judgment in Case C-81/12, Asociația Accept

The prohibition of discrimination on the basis of sexual orientation also protects people at the stage of access to employment. It therefore covers recruitment criteria for

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[32] The Court had no reluctance to give the provision of Article 119 of the Treaty establishing the European Economic Community, http://www.hri.org/MFA/foreign/treaties/Rome57/BH343.txt, obliging the Member States to ensure equal treatment of men and women with regard to renumeration, the value of direct effect also horizontally. See CJEU judgment of April 8, 1976 in Case C-43/75, Defrenne II, EU:C:1976:56.

[33] Cf. L. Pech, *Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in Römer and Dominguez*, "Common Market Law Review" 2012, Vol. 49, No. 6, p. 1842 *et seq.*; and J. Maliszewska-Nienartowicz, *Prohibition of Discrimination*…, p. 44 *et seq.*

[34] More extensively on the criticism of this judgment, see A. Szczerba-Zawada, *Equality as a foundation*…, pp. 307–308.

a specific position, including in sports. According to the case law of the CJEU, the domain of sports is subject to EU law to the extent that it falls under the scope of a professional activity.[35] The protection of athletes from discrimination on the basis of sexual orientation was confirmed by the CJEU in the Asociația Accept judgment.[36]

The case pending before the national court concerned an interview given by an FC Steaua shareholder, in which he publicly considered the potential transfer of a player to that sports club, stating that instead of hiring a footballer with a homosexual orientation, he would prefer to close the club or appoint a junior player. FC Steaua did not distance itself from the statement, and in fact confirmed it in a lawyer's communiqué, claiming that the presence of a homosexual player would create tensions within the team and among spectators.

The CJEU, in response to a preliminary question from the national court,[37] ruled that an employer cannot deny the existence of facts that it is potentially pursuing a discriminatory employment policy by merely claiming that statements suggesting the existence of a homophobic recruitment policy came from a person who, while having an important role in the management of the club, is not legally capable of binding it in recruitment matters. Indeed, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of its overall appraisal of the facts.[38]

Thus, it was confirmed by the CJEU that facts such as those in the case before it must be interpreted as a presumption of discrimination under Articles 2(2) and 10(1) of Directive 2000/78. This also applies to situations in which the presence of a legally-protected characteristic is only presumed. This means that the directive also protects those people who do not possess the trait in question – for example, a non-heteronormative sexual orientation – but are nevertheless presumed not to be heteronormative and suffer less favourable treatment because of this presumption. Thus, with this judgment the CJEU confirmed that EU law prohibits discrimination by assumption[39] in addition to discrimination by association, the unacceptability of which, under the same directive, the CJEU pointed out in the Coleman judgment.[40] An important implication of the Asociația Accept judgment is also that in certain circumstances an employer may be liable for the discriminatory behaviour of a third party.[41] Finally, it should be borne in mind that a manifestation of direct discrimination may also consist of, in light of the judgment in question, homophobic hate speech. This may compensate for the lack of protection against it in Polish criminal law for example. The judgment thus un-

35 *Ibid.*, p. 298.
36 CJEU judgment of April 25, 2013 in Case C-81/12, Asociația Accept, ECLI:EU:C:2013:275, para. 25.
37 *Ibid*., para. 35.
38 *Ibid.*, paragraphs 49 and 50.
39 D. Pudzianowska, *Orientation*…, p. 259.
40 CJEU judgment of July 17, 2008 in Case C-303/06, Coleman, EU:C:2008:415.
41 As noted by D. Pudzianowska, K. Śmiszek, *Combating Sexual Orientation Discrimination in the European Union*, Luxembourg 2015, p. 48.

doubtedly represents a strengthening of protection against discrimination on the basis of sexual orientation in EU law, and by extension in national law.

2.3. Similarity of the position of same-sex relationships and marriages for the purposes of protection against discrimination on the basis of sexual orientation in terms of remuneration – judgment in Case C-267/12, Hay

The ruling in question relates to employee benefits arising from the fact of employment. This is another CJEU ruling addressing the prohibition of discrimination on the basis of sexual orientation in terms of same-sex relationships. Frédéric Hay had been employed at Crédit agricole since 1998. On July 11, 2007, he entered into a civil solidarity pact, known as PACS, with a person of the same sex. On that occasion, Mr. Hay applied for days of special leave and a marriage bonus granted to employees who marry under the national collective agreement. His request was denied on the basis that the beneficiary of these entitlements could only be married persons.

Given the broad scope of the concept of remuneration, which includes "any consideration, whether in cash or in kind, whether immediate or future, provided that the employee receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis,"[42] the CJEU classified the case pending before the national court as falling under Directive 2000/78. The CJEU's practice of a broad interpretation of the concept of "pay" – known from gender-based wage discrimination cases and applied in the Römer case – once again led to the situation in which the prohibition of discrimination on the basis of sexual orientation protected the rights of non-heteronormative persons in a situation that is within the exclusive competence of the Member States.

In examining whether there was direct or indirect discrimination in the case pending before the national court, the CJEU relied on settled case law concerning restrictions on the rights of partners in registered same-sex unions. The application of the comparative method,[43] known, among others, from the Römer judgment, led the CJEU to conclude that same-sex couples unable to marry and therefore opting for PACS are in a comparable situation to married couples in terms of benefits related to remuneration and additional benefits, such as in the case at hand. It should be mentioned however that this CJEU ruling is considered by some to be an over-interpretation with regard to the significant factual differences between these institutions.[44] However, since

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42 CJEU judgment of December 12, 2013 in Case C-267/12, Hay, EU:C:2013:823, para. 28.

43 For more on the CJEU's use of this method, see K. Lenaerts, K. Gutman, *The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic*, "American Journal of Comparative Law" 2016, Vol. 64, p. 848.

44 See M. Łączkowska, *Glosa to the judgment of the Court of Justice of the European Union of December 12, 2013 in the case of Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, "Legal Forum" 2014, No. 4, pp. 49–50; and A.N. Schulz, *The marital status of homosexuals and the principle of non-discrimination in the jurisprudence of the CJEU against the background of the answer to the preliminary question in Case C-267/12 – Frederic Hay v. Credit agricole mutuel de Charente-Maritime et des Deux-Sevres*, "Legal Studies" 2015, No. 2, p. 95.

a finding of comparability of situations, which implies the obligation of equal treatment, does not require the sameness of all aspects analysed, the differences identified between the two unions do not preclude the possibility of establishing the similarity of the position of the parties to both of them for the purposes of protection against discrimination on the basis of sexual orientation in terms of remuneration. With regard to the existence of discrimination itself, the Court found that the Member State's regulations that limit salary-related benefits constitute direct discrimination on the basis of sexual orientation against employees in same-sex relationships under PACS.[45] The Court thus went further than in Römer, where it left the assessment of the existence of direct discrimination to the national court.

This judgment, which undoubtedly strengthens protection against discrimination on the basis of sexual orientation, nevertheless has limited effects with regard to the rights of non-heteronormative persons being in relationships. This is because, in its light, the obligation to treat persons in such relationships equally as compared to married couples applies only to those Member States that have similarly-constructed institutions of civil partnership and marriage. The Court thus perpetuated the permissibility under EU law of less favourable treatment in terms of protection against discrimination based on sexual orientation of unions of homosexual persons in those Member States whose national legislation does not recognize such a relationship, i.e. when the need for this type of protection by the EU legislation seems most desirable. The judgment in question thus indicates that the CJEU has stopped halfway when it comes to the progressiveness of its approach to protection against discrimination on the basis of sexual orientation.

2.4. A missed opportunity to strengthen the protection of LGBT+ persons – judgment in Case C-443/15, Parris

In the Parris judgment, the CJEU had to evaluate Irish regulations on the right of surviving civil partners of program members to receive a survivor's benefit. A prerequisite for obtaining such a benefit was that the program member had entered into a registered partnership before the age of 60. In the case of the plaintiff in the main proceedings, and other homosexual people of comparable age, this requirement was impossible to meet, since domestic law did not allow a non-heteronormative sexual orientation member of the complainant's age to enter into a registered partnership before that caesura.

Advocate General of the CJEU, Juliane Kokott, observed in her opinion that "there is no doubt that the requirement to enter into a marriage or civil partnership before the employee's 60th birthday constitutes an apparently neutral criterion which, as indicated above, bears no direct relation to the sexual orientation of the employee […] On closer examination, however, it emerges that the 60-year age limit affects a large number of homosexual employees in Ireland more severely and more deleteriously

[45] Hay Judgment, para. 41.

than their heterosexual colleagues."[46] Indeed, while heterosexual employees were free to choose whether to marry before their 60th birthday, homsexual employees could not do so until 2011, due to the lack of a legal regulation. This legal impossibility was, in the Advocate's General opinion, sufficient grounds for a finding of indirect discrimination under Directive 2000/78.[47]

However, the CJEU took a different view, stating that no discrimination on the basis of sexual orientation (neither indirect nor direct) occurred in the case at issue.[48] The Court compared the situation of heterosexual spouses and homosexual partners in terms of access to the benefit, when the marriage or registered union was not concluded before the parties' age of 60. As a result of such a comparison, it saw no sign of less favourable treatment of persons of homosexual orientation, as it found that both unions were equally excluded from access to the benefit. Thus, the choice of such and not another comparator affected the CJEU's decision. As in the earlier judgment in Grant,[49] the criterion of the "equal misery" of both heterosexual spouses and homosexual partners applied by the Court in the Parris case did not allow the Court to find differences in the treatment of homosexuals and heterosexuals with respect to access to the benefit in question. It should be borne in mind that the CJEU is sometimes inclined to be more creative in its choice of a comparator, as evidenced by the P. judgment.[50] In its narrow comparative perspective in the judgment at stake, the CJEU also failed to take into account the differentiation between homosexual and heterosexual couples in the form of the lack of legal possibility for homosexual persons born before 1951 to marry before the age of 60, which was related to another characteristic legally protected under EU law – age.

Referring to the criterion of marital status, the CJEU concluded that this issue and the related benefits fall within the competence of the Member States, within which they are free to introduce forms of legal recognition of same-sex relations and to determine the moment from which such forms will have effect. Union law, in particular Directive 2000/78, does not oblige either the introduction of marriage or other

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46 Opinion of Advocate General Juliane Kokott delivered on June 30, 2016 in Case C-443/15, Parris, EU:C:2016:493, paragraphs 55 and 57.

47 See also F. Staiano, *(In)Comparable Situations: Same-Sex Couples' Right to Marriage in European Case Law*, "federalismi.it. Rivista di Diritto Pubblico Italiano, Comparato, Europeo" 2017, No. 6, p. 6.

48 CJEU judgment of November 24, 2016 in Case C-443/15, Parris, EU:C:2016:897, paragraphs 49–56 and 61.

49 Judgment of the CJEU of February 17, 1998 in Case C-249/96, Grant, EU:C:1998:63. For a critical discussion of this approach of the CJEU in the *Grant case*, see P. Pogodzinska, *The EU principle of equal treatment and freedom of movement of workers with regard to the situation of sexual minorities in employment*, "Problems of Contemporary International, European and Comparative Law" 2004, Vol. 2, p. 84 *et seq.*

50 Judgment of the CJEU of April 30, 1996 in Case C-13/94, P., EU:C:1996:170. In it, the Court compared the applicant in the main proceedings, who underwent gender reassignment, with the gender to which she belonged before the correction, in essence the same gender, but in a different time frame, bringing protection on the basis of gender identity into EU law.

forms of relationship for same-sex couples, or the retroactive recognition of such a relationship.[51]

Against exactly the same character of the competence of the Member States in matters of marital status, the CJEU in the Parris judgment, unlike in the Römer or Hay judgments analysed above, but also unlike in the judgments on discrimination against same-sex couples in a cross-border situation discussed below, refused to grant protection to same-sex couples. It also missed the opportunity to introduce the notion of intersectional discrimination, i.e. discrimination based on more than one characteristic interacting in an inseparable manner, into EU law. Since – in the CJEU's view – there was no violation of the prohibition of discrimination based on sexual orientation or age taken in isolation, there could not have been discrimination based on the combined effect of sexual orientation and age either.[52] It seems that the direction of development of EU legislation, which has already recognized discrimination due to the combination of several legally protected characteristics,[53] may contribute to a change in the CJEU's approach to different forms of multiple discrimination.

2.5. Protection of same-sex marriages in cross-border situations – judgment in Case C-673/16, Coman *et al.*

The Coman et al. ruling is a breakthrough for homosexual spouses, opening up the possibility for them to invoke the freedom of movement of persons guaranteed by Directive 2004/38.[54] This was the first such unequivocal judgment interfering in the sphere of family law and the legal orders of Member States because of the need to protect the rights of homosexuals, although interestingly without viewing this issue from the perspective of the prohibition of discrimination based on sexual orientation.[55]

Romanian and U.S. citizen Relu Adrian Coman and U.S. citizen R.C. Hamilton began their acquaintance in June 2002 in New York. Coman then moved to Brussels, where he took a job at the European Parliament. On November 5, 2010, they got married in Brus-

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51 CJEU judgment in Parris, para. 60.

52 *Ibid.*, para. 82.

53 See e.g. directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, OJ L 132, 17.5.2023, p. 21.

54 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, p. 77.

55 For a critical view, see A. Szczerba-Zawada, *Derived right of residence of the spouse of a citizen of the European Union of the same sex – gloss on the judgment of the Court of Justice of 5.06.2018, C-673/16, Relu Adrian Coman et al. v. Inspectoratul General pentru Imigrări i Ministerul Afacerilor Interne*, "European Judicial Review" 2018, Vol. 11, pp. 41–47. An analysis of this judgment in the perspective of anti-discrimination law is also offered by A. Szczerba in: *Free Movement of Same-Sex Marriages: The CJEU and the (Troublesome) Protection of EU Citizens Regardless of Their Sexual Orientation in the Light of the Coman Judgment*, "State and Law" 2022, No. 8, pp. 38–54.

sels. In December 2012, they asked the Romanian inspectorate for information on the procedures for obtaining Hamilton's right to legally reside in Romania for more than three months as a family member of a EU citizen.[56] In response, they were informed that the right to stay could be a maximum of three months, as same-sex marriage is not recognized in the Romanian Civil Code.

Responding to a preliminary question from the Romanian Constitutional Court,[57] the CJEU interpreted the term "spouse," stressing that under Directive 2004/38 it is gender-neutral and may therefore cover the same-sex spouse of the Union citizen.[58] Moreover, in the judgment in question, the CJEU agreed that, under Directive 2004/38, a same-sex marriage that was lawfully entered into under the law of one of the Member States results in the necessity of recognizing the persons concerned as spouses in other Member States. However, this does not detract from the exclusive competence of a Member State to regulate marital status, including the decision whether or not to allow marriage for persons of the same sex. Nevertheless, it is well-established case law that, in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom of movement conferred on all Union citizens.[59] For these reasons, according to the CJEU "a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state."[60]

A Member State's refusal to recognize a marriage lawfully entered into by a Union citizen in another EU Member State would impinge on the effectiveness of the freedom of movement and residence within the territory of a Member State, granted to citizens of the Union by Article 21(1) TFEU. Indeed, it would have far-reaching consequences, including discouraging such a person from returning to his or her place of nationality with his or her spouse. In the opinion of the CJEU, such a restriction on the free movement of EU citizens is not justified on grounds of public policy or respect for the national identity of the Member States.[61]

This judgment has eliminated the legal uncertainty regarding the ability of same-sex couples to invoke the provisions of Directive 2004/38 for the purposes of exercising their EU freedom of movement. Access to this right, hitherto differentiated on the basis of sexual orientation, has also been unified in all Member States.[62] On the other hand, the CJEU's reasoning was based on the EU provisions stipulating freedom of movement of EU citizens, not anti-discrimination legislation. The failure to invoke the prohibition of discrimination on the basis of sexual orientation in the judgment at

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56 CJEU judgment of June 5, 2018 in Case C-673/16, Coman, EU:C:2018:385, para. 11.
57 *Ibid.*, para. 17.
58 *Ibid.*, para. 35.
59 *Ibid.*, paragraphs 37 and 38.
60 *Ibid.*, para. 36.
61 A. Szczerba-Zawada, *Equality as a foundation*…, p. 316.
62 A. Szczerba-Zawada, *Derived right of residence*…, p. 44.

stake indicates the CJEU's conservative attitude towards sexual orientation as a legally protected characteristic, and its tendency to replace this socially sensitive criterion with a more neutral one, namely "gender." Despite this, it should be highlighted that the CJEU's approach in Coman et al. indicates the progressiveness of the interpretation of the relevant provisions of Union law by the Court in Luxembourg, as compared to the European Court of Human Rights' (ECtHR's) rulings under the European Convention on Human Rights with regard to the obligation to recognize a same-sex marriages concluded in a member state, The CJEU"s ruling also indicates a certain autonomization of the concept of "marital status," unlike in the Parris judgment. This trend continues in Luxembourg's jurisprudence on so-called rainbow families.

2.6. Rainbow families and the freedom of movement – order in Case C-2/21, Rzecznik Praw Obywatelskich

The Court has also issued a ruling via the preliminary ruling procedure on the conformity with EU law of national regulations preventing the transcription of a foreign birth certificate of a child – a citizen of the Union – on the grounds that same-sex parenthood is inadmissible under national law. It ruled on this subject, among others, in its decision in the case C-2/21, Rzecznik Praw Obywatelskich.[63] The case before the national court grew out of the Polish Ombudsman's complaint about the impossibility of obtaining travel documents – an identity card and a passport – due to the lack of the legal possibility of transcribing the foreign birth certificate of a minor Polish citizen, in which two women were indicated as her parents.

In the order at issue, the CJEU concluded that under Article 4(3) of Directive 2004/38, Polish authorities are obliged to provide such a child with an identity card or passport, regardless of the transfer by transcription of that child's foreign birth certificate to the Polish civil status register. Thus, insofar as Polish law requires the birth certificate to be transcribed before a Polish identity card or a Polish passport is issued, that Member State cannot invoke its national law as a justification for refusing to issue such an identity card or such a passport.[64] This does not however make the institution of transcription as such inadmissible under EU law. In pointing out the need to protect various rights guaranteed by the CFR, including respect for family life (Article 7) and the rights of the child (Article 24 of the CFR), the CJEU affirmed the obligation of all Member States to recognize the parent-child relationship – biological or legal – established by law in another Member State between a child being a citizen of the Union and his or her parents, regardless of their sex, for the purpose of permitting that child to exercise – without impediment, with regard to each of his or her two parents – the rights which that child derives from EU law. Thus, on the basis of Article 21 TFEU, all Member States should recognize the right of two men or two women designated as parents of a minor Union citizen and over whom they have de facto custody to ac-

63 CJEU order of June 24, 2022 in Case C-2/21, Ombudsman, EU:C:2022:502.
64 *Ibid.*, para. 39.

company them in exercising their rights to move and reside freely within the territory of the Member States.[65]

Therefore, by the order at issue the CJEU formulated two obligations of Member States with regard to children of same-sex couples. The first is the obligation to issue an identity card and/or passport to such child, who is a citizen of that Member State born in another Member State and whose birth certificate issued by the authorities of that other Member State designates two persons of the same sex as his or her parents. The second is the obligation to recognize the parent-child relationship between that child and each of those two persons for the purpose of exercising of that child's rights derived from EU law. However, this does not imply that the Member State of which the child in question is a national is obliged to provide for same-sex parenthood in its national law.

As in Coman et al., the CJEU's ruling was based on and limited to the freedom of movement of EU citizens within the EU. Unlike in Coman et. al. however, it did so by invoking the prohibition of discrimination on the basis of sexual orientation. It did so however not by directly invoking Article 21 of the CFR, but by invoking Article 2 of the Convention on the Rights of the Child, which must be applied when interpreting Article 24 of the CFR and which introduces, with respect to a child, the principle of non-discrimination and the consequent requirement that the rights set forth in the aforementioned Convention – among which is the right to have a birth certificate drawn up immediately after the child's birth, the right to be given a name, and the right to obtain citizenship – are guaranteed to that child without discrimination, including without discrimination based on the sexual orientation of his or her parents.

Conclusions

The CJEU has played and continues to play a major role in defining the legal status of individuals in EU law. In its role as the guardian of human rights, the CJEU has not only contributed to strengthening the position of the individual in relation to the Member State, but also to the development of the system of EU law as a supranational organization, with competences that include the protection of human rights. It has done this by successively developing the principle of primacy of EU law; the principle of its direct effect; and finally by recognizing fundamental rights as general principles of EU law.[66] The relevance of the CJEU's jurisprudence to the protection of fundamental rights is also revealed in its judgments on the prohibition of discrimination on the basis of sexual orientation. As the analysis in this article has indicated, it is undoubtedly thanks to this that the prohibition includes homophobic hate speech, and the need to recognize

[65] *Ibid.*, paragraphs 42 and 45.

[66] More extensively on the role of the CJEU for the protection of fundamental rights, see A. Szczerba-Zawada, *Protection of human rights in the European Union* [in:] *European Union: Essence, opportunities, challenges*, eds. E. Latoszek, M. Proczek, A. Szczerba-Zawada, A. Masłoń-Oracz, K. Zajączkowski, Warsaw 2018, p. 115 *et seq*.

in all Member States – including those whose legislation does not envisage such solutions – same-sex marriages or parenthood of same-sex couples, even if limited to the freedom of movement.

Nevertheless, the jurisprudence of the CJEU on the protection of the rights of persons of non-heteronormative sexual orientation reveals a certain minimalism when it comes to cases involving controversial or ambiguous issues, which undoubtedly include protection against discrimination based on sexual orientation. Against this background, there is a notable tendency on the part of the CJEU to sacrifice the sustainability of its case law – the principle of legal certainty or the legal security of individuals – for the sake of public support for the judgments it issues.[67] A tangible manifestation of this is the granting of protection to registered same-sex partners only when their status is comparable to that of spouses under national law, or the refusal to recognize multiple discrimination, which could substitute for the lack of protection against discrimination on the basis of sexual orientation in the event of the overlap of this legally protected characteristic with others in areas where the latter would be protected (e.g. gender or ethnic origin). A less conservative stance is taken by the CJEU in those cases where the given circumstances also require the safeguarding of other fundamental individual rights, such as freedom of movement, implying an increasing level of synergy between the two regimes of EU anti-discrimination law.

The analysis of the CJEU's case law contained in this article allows for another conclusion – namely about the relevance of the level of protection of the rights of non-heteronormative persons in a given Member State to the CJEU's willingness to progressively interpret EU law in favor of strengthening their legal status. The order in Case C-2/21, Rzecznik Praw Obywatelskich, in a situation in which the CJEU has already resolved an analogous legal issue, seems to confirm this hypothesis. The CJEU's decision to contextualise the interpretation of analogous EU law in the so-called "Baby Sara case"[68] to the Polish circumstances, one may connect to the homophobic actions of public authorities in the form of so-called anti-LGBT resolutions to some local government units in Poland.

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[67] See M. Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT*, "European Law Journal" 1999, Vol. 5, No. 1, p. 74; or R. Kownacki, *Interference of the Charter of Fundamental Rights in the scope of implementation by member states of sensitive topics (euthanasia, homosexual unions, abortion) – propaganda bogeyman or real perspective?* [in:] *The Charter of Fundamental Rights in the European and National Legal Order*, ed. A. Wróbel, Warsaw 2009, p. 391.

[68] Judgment of 14 December 2021 in Case C-490/20, Stolichna obshtina, rayon Pancharevo, EU:C:2021:1008.

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Summary

Aleksandra Szczerba, Mateusz Suszko

The Court of Justice of the European Union as the Creator of a Protective Standard Against Discrimination on the Basis of Sexual Orientation: A Critical Analysis

Sexual orientation is one of the characteristics legally protected under European Union law. The normative dimension of the principles of equal treatment and non-discrimination in the EU order – not limited to this issue only – is the result not only of lawmaking activity, in particular legislative, but also of jurisprudence. Indeed, the Court of Justice of the European Union (CJEU) plays a major role in raising the level of protection of persons of non-heteronormative sexual orientation from discrimination, both in the spheres covered by EU anti-discrimination law and in other areas of EU law. The purpose of this article is to analyse the activity of the CJEU vis-à-vis the protection of homosexual persons from discrimination. The analysis is enriched by an attempt to critically evaluate selected Luxembourg jurisprudence and to anticipate the direction of its development. The object and purpose of the analysis determined the research methods used, which consist of the dogmatic-legal method, the theoretical-legal method, and a kind of legal hermeneutics.

Keywords: prohibition of discrimination, sexual orientation, Court of Justice of the European Union.

Streszczenie

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Trybunał Sprawiedliwości Unii Europejskiej jako kreator standardu ochronnego przed dyskryminacją ze względu na orientację seksualną – analiza krytyczna

Orientacja seksualna jest jedną z cech prawnie chronionych na gruncie prawa Unii Europejskiej. Normatywny wymiar zasad równego traktowania i niedyskryminacji w porządku unijnym – także, ale nie wyłącznie ze względu na tę przesłankę – jest wynikiem nie tylko działalności prawotwórczej, w tym w szczególności – prawodawczej, ale także orzeczniczej. Trybunał Sprawiedliwości Unii Europejskiej odgrywa bowiem ogromną rolę w podnoszeniu poziomu ochrony osób o nieheteronormatywnej orientacji seksualnej przed dyskryminacją zarówno w sferach objętych unijnym prawem antydyskryminacyjnym, jak i w innych dziedzinach prawa UE. Celem niniejszego artykułu jest przeanalizowanie aktywności orzeczniczej TSUE w przedmiocie ochrony osób homoseksualnych przed dyskryminacją. Analizę wzbogacono o próbę krytycznej oceny wyselekcjonowanego orzecznictwa luksemburskiego oraz antycypacji kierunku jego rozwoju. Przedmiot i cel analizy determinują wykorzystane metody badawcze, na które składają się: metoda dogmatyczno-prawna, teoretyczno-prawna oraz pewien rodzaj hermeneutyki prawniczej.

Słowa kluczowe: zakaz dyskryminacji, orientacja seksualna, Trybunał Sprawiedliwości Unii Europejskiej.

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Protection of Personal Data Processed in Artificial Intelligence Systems

Introduction

European legal reality is on the eve of significant change. In European Union (EU) law, there is talk of a "fourth industrial revolution," which is driven by massive data resources linked to powerful algorithms and powerful computing capacity.[1] The above is closely linked to technological developments in the area of artificial intelligence (AI), which has prompted an analysis covering both the legal environment as well as the economic and social impact, also from an ethical perspective.[2]

The discussion on the regulation of artificial intelligence is one of the most serious and widely held at both EU and Member State level. The literature expects legal solutions to guarantee security for fundamental rights, including privacy, in AI systems.

There is no doubt that personal data have been increasingly processed in recent years. It would be impossible for AI to function without processing large amounts of data (both personal and non-personal[3]). Artificial intelligence is a collection of technologies that combine data, algorithms, and computing power. The main driving force behind the current development of AI is advances in computing, but also the increasing availability of data. High-quality data are crucial to the effectiveness of many AI systems, particularly when using techniques involving model training.[4] The

[1] See European Parliament resolution of 3 May 2022 on artificial intelligence in a digital age (2020/2266(INI)), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0140_EN.html [accessed: 2023.08.31].

[2] The most important ethical guidelines for AI are considered to be: transparency, justice and fairness, non-maleficence, responsibility, and privacy. A. Jobin, M. Ienca, E. Vayena, *The global landscape of AI ethics guidelines*, "Nature Machine Intelligence" 2019, No. 1(9), pp. 389–399.

[3] As an aside, it should be pointed out that distinguishing personal data from non-personal data can cause significant difficulties in practice. The capabilities of AI systems - using data flows, combining data from different sources, aggregating or creating datasets - are pushing the boundary between personal and non-personal data. More extensively on this topic: B. Fischer, *Prawne uwarunkowania wykorzystania danych nieosobowych przez sztuczną inteligencję – zagadnienia podstawowe* [in:] *Prawo sztucznej inteligencji i nowych technologii 2*, eds. *idem*, A. Pązik, M. Świerczyński, Warszawa 2022, p. 181.

[4] Recital 45 of the draft AI Act further indicates that in order to develop and assess high-risk AI systems, certain actors, such as suppliers, notified bodies and other relevant entities, including digital

use of computers and AI technology allows for an increase in the speed and efficiency of the actions taken, but also creates security risks of an unprecedented magnitude for the data processed.

The proposed regulation in the field of AI requires analysis in terms of its impact on the regulation of personal data protection. It is necessary to determine what the mutual relationship between these regulations is and what areas are particularly important in the personal data protection regulation for processing personal data in AI systems. The axis of considerations adopted is a preliminary assessment of two issues: 1) what principles of data protection should be applied in particular during processing personal data in AI systems; 2) what regulation on liability for personal data breaches is in such systems. However, only after EU regulation on AI comes into force and the use of AI systems is widespread, will it be possible to outline the exact legal problems. The need to change the regulations regarding the rights and obligations of data subjects and entities processing personal data cannot be excluded. It is possible that changes will be required in the provisions regarding the assignment of liability for a breach of personal data protection processed in AI systems, which is discussed in more detail in the last point of this article.

Given the relatively short experience of European countries in the application of AI and the absence – at the time of writing – of a binding legal instrument dedicated to AI issues and case law in this area, the present study will be of a contributory nature, prompting further discussion. The research process in this case concerns the identification of areas in the field of personal data protection that are particularly important (and may require re-regulation) as a result of the introduction of the proposed legal regulation regarding AI. The main question this article seeks to answer is how EU regulation against data protection breaches in AI systems is shaping up.

1. Artificial intelligence regulation assumptions

The EU has taken steps to regulate the European approach to artificial intelligence issues in, inter alia, the White Paper on Artificial Intelligence "A European Approach to Excellence and Trust" (hereinafter referred to as the White Paper).[5] This policy paper identifies the European Commission's main intentions for structuring legislation in the area of artificial intelligence. In particular, it has been pointed out that the White Paper creates: 1) a policy framework outlining measures to combine efforts at European, national, and regional levels; 2) key elements of a future regulatory framework for AI in Europe that will create a unique "ecosystem of trust."

innovation centres, test and experiment centres and researchers, should be able to access and use high-quality datasets in their areas of activity.

[5] European Commission, White Paper on Artificial Intelligence. A European Approach to Excellence and Trust, COM(2020) 65 final, Brussels, 19.02.2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0065 [accessed: 2023.08.31].

The areas of action presented in the White Paper complement the plan presented in parallel in the European Strategy for Data.[6] It has been pointed out that improving access to data and data management are a critical issue, as without data, AI development is not possible. The importance of investment in computing technology and infrastructure has also been also highlighted. As part of the Digital Europe programme, the European Commission has proposed more than EUR 4 billion to support large-scale and quantum computing, including grid edge computing and artificial intelligence, data infrastructure, and cloud computing.

The European Commission has stressed the importance of shaping the European approach to AI in such a way that it is characterised by the implementation of appropriate safeguards to respect fundamental rights and freedoms, the development of trustworthy and secure AI and respect for the values underlying the EU, including the principle of privacy. Highlighting these aspects of AI systems within the EU shows a desire to counter the approaches of the other two major global players in the field of artificial intelligence: China and the USA.[7]

The most important piece of legislation in the area of artificial intelligence is the draft regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) (hereinafter referred to as the draft AI Act[8]) published on 21 April 2021.[9] Among other things, the draft introduces a legal definition of artificial intelligence. According to the original wording in Article 3(1) of the draft AI Act, an AI system was defined as "software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with." In turn, Annex I indicates that AI may include:

1) machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;
2) ogic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;
3) statistical approaches, Bayesian estimation, search and optimization methods.

After changes to the draft AI Act, adopted by the European Parliament, an AI system is defined as "machine-based system that is designed to operate with varying levels of autonomy and that can, for explicit or implicit objectives, generate outputs

[6] European Strategy for Data, https://digital-strategy.ec.europa.eu/en/policies/strategy-data [accessed: 2023.08.31].

[7] As pointed out in the White Paper, investment in research and innovation in Europe represents a small proportion of public and private investment compared to other regions of the world. In 2016, around EUR 3.2 billion was invested in AI in Europe, while around EUR 12.1 billion was invested in North America and around EUR 6.5 billion in Asia.

[8] The European Parliament adopted the draft AI Act in March 2024 and the Council followed with its approval in May 2024. The regulation was published on July 12, 2024 and is waiting to come into force.

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0206 [accessed: 2023.08.31].

such as predictions, recommendations, or decisions, that influence physical or virtual environments."[10] The EU legislator abandoned the definition focused on listing specific techniques that can be used by AI (e.g. machine learning) in favor of defining the basic features that characterize AI (e.g. autonomy).

This definition covers a wide set of AI systems that will be subject to the proposed regulation, which is intended to reduce the chance of its becoming obsolete. However, the proposed solution poses the risk of over-regulation, which will hinder the use or development of artificial intelligence applications, which is likely to further strengthen the technological leadership position of Chinese and US corporations.[11]

However, it should be emphasised that providing such a comprehensive definition serves to better guarantee the safe operation of AI systems within the EU. The technological capabilities and the willingness of the authorities of some states, including authoritarian states, to make the widest possible use of advanced technology have led to a point where possible abuses can only be analysed on the basis of human rights regulations. The human rights protection system often remains an inadequate tool, too general and failing to provide adequate compliance mechanisms.[12] The draft AI Act has the potential to become the first legal tool to give EU citizens better protection of their rights and interests.

2. Guidelines for personal data protection in AI systems

One of the main problems noted when analysing AI regulation is the issue of the potential for infringement of the right to privacy. The European Parliament has rightly pointed out that some AI technologies enable the automation of information processing on an unprecedented scale, paving the way for mass surveillance and other unlawful interference and threatening fundamental rights, in particular the right to privacy and data protection.[13]

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[10] Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html [accessed: 2024.02.07].

[11] P. Glauner, *An Assessment of the AI Regulation Proposed by the European Commission* [in:] *The Future Circle of Healthcare. Future of Business and Finance. AI, 3D Printing, Longevity, Ethics, and Uncertainty Mitigation*, eds. S. Ehsani, P. Glauner, P. Plugmann, F.M. Thieringer, Cham 2022, pp. 119–127.

[12] "In a world where new technologies fundamentally change social relations and practices, it is not always clear what human rights and the rule of law actually mean, and how respect for human rights can be safeguarded" – F. Bosco, N. Creemers, V. Ferraris, D. Guagnin, B.-J. Koops, *Profiling technologies and fundamental rights and values: regulatory challenges and perspectives from European Data Protection Authorities* [in:] *Reforming European Data Protection Law*, eds. S. Gutwirth, R. Leenes, P. de Hert, Dordrecht 2015, pp. 3–33.

[13] European Parliament resolution of 3 May 2022 on artificial intelligence in a digital age (2020/2266(INI)), Report on Artificial Intelligence in a Digital Age, https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1703188&t=d&l=en [accessed: 2023.08.31].

In view of the above, it is necessary to analyse the regulations applicable in this respect. Recital 41a of the draft AI Act indicates that "a number of legally binding rules at European, national and international level already apply or are relevant to AI systems today, including […] EU secondary law (such as the General Data Protection Regulation […]." Thus, the AI Act is intended to be a supplementary regulation to the General Data Protection Regulation (GDPR),[14] which is to remain the basis for the horizontal compatibility assessment of AI systems in the area of personal data.[15]

Several provisions can be found in the draft AI Act that address the issue of handling personal data processed in AI systems. Article 10 of the AI Act sets out rules for the handling of training, validation and testing data sets used by high-risk AI systems. It is pointed out that "to the extent that it is strictly necessary for the purposes of ensuring negative bias detection and correction in relation to the high-risk AI systems, the providers of such systems may exceptionally process special categories of personal data […] subject to appropriate safeguards for the fundamental rights and freedoms of natural persons, including technical limitations on the re-use and use of state-of-the-art security and privacy-preserving" (Article 10(5) of the draft AI Act).

In turn, Article 53 of the draft AI Act, relating to so-called AI regulatory sandboxes, guarantees national data protection authorities, or in cases referred to in Article 53(1b) the European Data Protection Supervisor, access to the activities of such a regulatory sandbox (Article 53(2) of the draft AI Act).

In contrast, Article 60 of the draft AI Act indicates what personal data will be processed in EU databases for high-risk AI systems (primarily the names and contact details of the individuals who are responsible for registering the system and have the authority to represent the provider or the deployer, which is a public authority or EU institution, body, office or agency, or a deployer acting on their behalf, or a deployer which is an undertaking referred to in Article 51(1a)(b) and (1b), without defining specific rules for their protection.

The EU legislator has not separately regulated data protection in any of the above cases. One of the key issues requiring in-depth analysis is, therefore, the potential collision of AI systems with privacy and data protection. The GDPR regulates profiling and automated forms of decision-making in individual cases, which are forms of processing that are also part of many AI-based models.[16] There is no doubt that the EU's data

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ EU L 119, p. 1).

[15] D. Lubasz, A. Szkurłat, *Relacja aktu o sztucznej inteligencji i ogólnego rozporządzenia o ochronie danych*, "Monitor Prawniczy" 2022, No. 21, p. 28. Significantly, the European Parliament stated that "GDPR does not seem to require any major change in order to address AI." European Parliament, *The impact of the General Data Protection Regulation (GDPR) on artificial intelligence*, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf [accessed: 2023.08.31].

[16] More extensively on this topic: M. Jędrzejczak, *Automatyzacja wydawania rozstrzygnięć administracyjnych – nieprecyzyjność przepisów jako zagrożenie dla ochrony danych osobowych* [in:] *Ochrona danych osobowych w prawie publicznym*, ed. *eadem*, Warszawa 2021, pp. 61–75.

protection standard, as set by the GDPR legislation, is one of the most stringent in the world. Despite this, the development of AI-based technologies raises legal questions. In this context, the compatibility of AI models with the GDPR regulation needs to be verified, and directions for potentially required modifications to the legal environment need to be set, taking into account processing principles that correlate with the basic tenets of the development of trustworthy AI.

The principles relating to the processing of personal data are regulated in Article 5 of the GDPR and include the principles of lawfulness, fairness, and transparency, the principle of purpose limitation, data minimisation, accuracy, limitation of storage, integrity and confidentiality, and the principle of accountability. The principles override and form the core of the interpretation of the other provisions of the GDPR. They also aim to ensure the least possible interference with fundamental rights.

From the perspective of the design of AI systems, it will be important to ensure compliance with the processing principles that set the general framework for the permissibility of data use in the design of AI solutions.[17] In this respect, the principles of lawfulness, transparency, data minimisation, and confidentiality are particularly relevant.[18] Due to the framework of the study, those principles were selected that may cause the most difficulties for entities using AI-based mechanisms in their activities. At the same time, these are principles that correspond to the basic assumptions of constructing trustworthy AI, indicated in the documents of the Organisation for Economic Co-operation and Development (OECD)[19] or the High-Level Expert Group on AI.[20]

2.1. Principle of lawfulness and transparency (Article 5(1)(a) of the GDPR)

The principle of lawfulness (legality) is an overarching principle that applies as a universal limit to all actions, including discretionary actions[21] (the operation of AI systems, even for developers, is not fully understood and therefore remains difficult to control, as does discretion). This principle has a broad material scope – it is a question of compliance with all provisions that may be applicable to the case (not only the provisions of the GDPR). Processors of personal data have certain obligations that they should comply with and data subjects are guaranteed certain rights that should be respected.[22]

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[17] Also: D. Lubasz, *Zasady legalności, przejrzystości i minimalizacji danych w ogólnym rozporządzeniu o ochronie danych osobowych w kontekście sztucznej inteligencji* [in:] *Prawo sztucznej inteligencji*, eds. L. Lai, M. Świerczyński, Warszawa 2020, p. 180.

[18] The CJEU's view that all principles relating to the processing of personal data shall apply cumulatively should be shared. Judgment of the CJEU of 20 October 2022 in Digi Távközlési és Szolgáltató Kft. v. Nemzeti Adatvédelmi és Információszabadság Hatóság, C77/21, ECLI:EU:C:2022:805.

[19] OECD, *Recommendation of the Council on Artificial Intelligence*, OECD/LEGAL/0449, https://oecd.ai/en/assets/files/OECD-LEGAL-0449-en.pdf [accessed: 2024.02.07].

[20] High-Level Expert Group on AI, *Ethics guidelines for trustworthy AI*, https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai [accessed: 2024.02.07].

[21] M. Jędrzejczak, *Władza dyskrecjonalna organów administracji publicznej*, Warszawa 2021, p. LVIII.

[22] P. Fajgielski, *Komentarz do rozporządzenia nr 2016/679 w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia*

Analysis by those creating or using AI systems should be directed not only to the application of a legal basis appropriate to the source of data acquisition, but also to the design of AI algorithms or systems in such a way as to ensure the correctness and non-discriminatory nature of the processing and the effect of such operations, in particular biased adjudications, affecting the rights and freedoms of data subjects.[23] The AI system should ensure that the data are processed in a way that the data subject can expect the result to be. In addition, such technical measures should be implemented as to ensure the correction of irregularities and the safeguarding of personal data.

On the other hand, the transparency principle, also expressed in Article 5(1)(a) of the GDPR, stresses an obligation to ensure that data subjects have the fullest possible knowledge of the purpose, scope, and context of the processing, as well as the possibility of exercising control over their own data. In the context of AI systems, an essential condition for compliance with this principle is to communicate that it is the AI-based system that will process personal data. It is not advisable, and sometimes not possible, to explain in detail the technical intricacies involved in the operation of a given AI system (especially if it is based on deep learning).[24] It is important to ensure awareness of being subjected to such forms of processing in order to be able to fully exercise rights of control over one's own data.

2.2. Principle of data minimisation (Article 5(1)(c) of the GDPR)

The data minimisation principle states that only personal data which are necessary for the purposes for which they are processed may be processed by the controller. The amount and scope of the data to be collected and processed must be adequate and appropriate to achieve the purpose of the processing. This demonstrates the close relationship between the principle of minimisation and the principle of purpose limitation, which determines the adequate scope of the data to be collected. This is because it is the purpose of the processing that will determine what data are necessary to achieve it. This relationship must be able to be demonstrated and justified by the controller.

This principle will apply to AI systems in both the learning processes and their applications. The main difficulty at the learning stage is that at the data acquisition stage, AI developers cannot always predict how much data will be required to achieve a satisfactory learning outcome. At the application stage of the algorithm, it can be problematic to achieve a sufficient threshold of comparable data to allow comparison with, for

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dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych) – Komentarz do art. 5 [in:] *idem*, *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 2022.

[23] D. Lubasz, M. Namysłowska, *Zasady dotyczące przetwarzania danych osobowych a sztuczna inteligencja w kontekście europejskim* [in:] *Sztuczna inteligencja, blockchain, cyberbezpieczeństwo oraz dane osobowe. Zagadnienia wybrane*, eds. K. Flaga-Gieruszyńska, J. Gołaczyński, D. Szostek, Warszawa 2019.

[24] This is also what the CJEU pointed out in a recent judgment, emphasising that "the principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used." Judgment of the CJEU of 12 January 2023 in RW v. Österreichische Post, C154/21, ECLI:EU:C:2023:3.

example, a statistical model in order to draw a valid conclusion, which will indirectly overlap with the requirements under the principle of accuracy.

In both of the above cases, it can be extremely difficult to draw the line between adequate and inadequate data, and it can be even more difficult to demonstrate this relationship based on measurable criteria.

2.3. Principle of confidentiality (Article 5(1)(f) of the GDPR)

In accordance with the principle of confidentiality and integrity, data must be processed in a manner that ensures adequate security. Data security – both technical and organisational – is an important aspect of data protection in its broadest sense.

Ensuring adequate security requires that appropriate (proportionate) data security measures are taken. These do not have to be the best possible measures (e.g. the most technologically advanced), but they should be appropriate to the risks and allow effective protection.

In AI systems, compliance with the principle of confidentiality is particularly important, as the EU legislator explicitly emphasises. The draft AI Act refers to this principle several times (see, inter alia, Article 10, Article 30(6) and Article 70(1) of the draft AI Act). It is emphasised that cooperation between competent authorities at EU and national level should be based on respect for the principle of confidentiality of information and data obtained in the performance of their tasks (recital 83 of the draft AI Act).

Undoubtedly, maintaining an appropriate level of security, particularly technical security, for data processed in AI systems will be key to building trust in this technology with its users. However, it seems that controlling the correct implementation of this principle in practice, for technological reasons, may be difficult.

3. Liability for data breaches by AI

The issue of liability for breaches of data processed in AI systems also requires separate analysis. The comprehensive regulation of the GDPR provides for civil liability (compensation), administrative liability (administrative fines), and criminal liability (for unlawful processing of personal data) for breaches of personal data protection. The above should also apply to data processed in AI systems.

Some data protection breaches are closely linked to the use of modern information processing technologies. This includes, among others, the lack of adequate technical safeguards or the breaking of these safeguards. It is necessary to ensure the security and control of not only the AI algorithm itself, but also, among other things, Internet connectivity services, IoT end devices, and the security of the cloud used. Algorithmic accountability cannot be static; it must be looked at in dynamic terms, as many factors affecting security are subject to change, including in real time.[25]

[25] D. Szostek, *To nie takie proste. System odpowiedzialności za algorytmy, w tym AI, z perspektywy prawa unijnego* [in:] *Prawo sztucznej inteligencji*…, p. 125.

However, the most important task in this regard is to determine who (what entity) is liable for any data breach in AI systems.[26] Under the GDPR, it is the controller – the entity that alone or jointly with others determines the purposes and means of the processing of personal data – that bears the ultimate responsibility, whereas if a processor has been appointed, the responsibility should be apportioned in a manner proportionate to the degree of fault between the controller and the processor.

In this regard, the predecessor act to the draft AI Act was a European Parliament resolution with recommendations to the Commission on a civil liability regime for artificial intelligence.[27] It proposes to make the individuals who create, maintain, or control AI risks, in particular AI system operators, liable.

In the draft AI Act, "operator" means supplier, user, authorised representative, importer, and distributor. In this respect, the draft is in line with the recommendations of the resolution, as the main entity with assigned liability for the AI system is the supplier (one of the operators), i.e. the natural or legal person, public authority, agency, or other entity that develops the AI system or that has it developed with a view to placing it on the market or putting it into service under its own trade name or its own trademark; whether in return for payment or free of charge (Article 3(2) of the draft AI Act).

Recital 53 of the draft AI Act indicates that a specific natural or legal person identified as a supplier should be held liable. For high-risk AI systems, manufacturers (Article 24 of the draft AI Act), importers (Article 26(4) of the draft AI Act), and distributors (Article 27(3) of the draft AI Act) are also liable. In the cases set out in Article 28(1) of the draft AI Act, obligations equivalent to those of the supplier are also imposed on the user or other third party. Thus, in general, it is the operator (and in particular the supplier) who is responsible for the operation of the AI system, including possible breaches of protection of the data processed by the system.

In this context, one should also mention the EU proposal for an Artificial Intelligence Liability Directive.[28] Its provisions would only apply to non-contractual civil liability. However, they do not regulate the matter of contractual liability, so it must be assumed that the general rules, with freedom of contract at the forefront, will apply in this case. The draft directive envisages the introduction of a presumptive fault

[26] It should be added that it is not envisaged that AI can be granted legal personality and, therefore, there is no possibility of attributing to it liability for any infringements it may make. In the policy adopted for the development of artificial intelligence in Poland from 2020, "counteracting the granting legal personality to AI" is indicated as one of the objectives. See Annex to Resolution No. 196 of the Council of Ministers of 28 December 2020 on the establishment of the "Policy for the development of artificial intelligence in Poland from 2020" (M.P. 2021 item 23), https://wp.oecd.ai/app/uploads/2021/12/Poland_Policy_for_Artificial_Intelligence_Development_in_Poland_from_2020_2020.pdf [accessed: 2023.08.31].

[27] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

[28] Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (Artificial Intelligence Liability Directive), 2022/0303(COD), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496 [accessed: 2023.08.31].

construction of the defendant (supplier, user) for damages caused by high-risk AI systems.

Concluding remarks

Analysing the provisions of the draft AI Act is currently a challenge as it concerns systems whose operation is not fully known and therefore not controllable. Any guidelines and arrangements in this area will be difficult to enforce in practice. Even the best legally drafted act will not guarantee data security in AI systems until it is possible to fully control the operation of these systems.

This is not an isolated reflection. The European Parliament, in its resolution, also pointed out that the opacity and autonomy of AI systems could make it very difficult or even impossible in practice to trace back specific harmful actions of the systems to specific human input or human decisions at the system design stage.[29]

The regulations contained in the draft AI Act are in the nature of demands, the implementation of which may not be possible in practice. The question of assigning liability to specific entities (e.g. suppliers) will need to be considered for the actions of AI systems, which they will not be able to effectively influence or correct. If it turns out for some AI systems that they operate beyond human control, the assumption of not giving legal personality to AI may have to be verified. Such a solution, however, is undesirable at the EU level and, secondly, would create further significant legal problems, e.g. regarding the conditions necessary to attribute legal personality to an AI system (not every system is equally autonomous[30]) and the question of how such a system is to be held liable (e.g. the possibility for AI to incur fines).

Another option would be to consider restricting the release of high-risk AI systems within the EU until effective methods of controlling them have been found.[31] There is no doubt that successful implementation of the AI Act requires prior knowledge of how the technology works. As a first step, AI systems must cease to be a "black box,"[32] whose complexity, unpredictability, and partly self-contained operation may make it impossible to enforce existing laws protecting fundamental rights, assigning liability, and setting out the conditions necessary for redress. The above requires an appropri-

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[29] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

[30] More extensively on the autonomy of AI systems: S. Russell, P. Norvig, *Artificial Intelligence. A Modern Approach. Third Edition*, New Jersey 2016, pp. 39–40.

[31] In particular, this solution would be desirable during the development of so-called Strong AI or Artificial General Intelligence. More on this topic: G.W. Ng, W.C. Leung, *Strong Artificial Intelligence and Consciousness*, "Journal of Artificial Intelligence and Consciousness" 2020, Vol. 7, No. 1, pp. 63–72.

[32] Many approaches exist to providing explanations of the behaviour of neural networks and other opaque systems (also called black boxes). However, advancements of human-understandable explanation of neural networks are so far still quite limited. R. Guidotti, A. Monreale, S. Ruggieri, F. Turini, D. Pedreschi, F. Giannotti, *A survey of methods for explaining black box models*, "ACM Computing Surveys" 2018, Vol. 51, Issue 5, article 93.

ate period of trial and testing, which should take place in a way that is the least severe for society, thus excluding the use of high-risk AI systems in sensitive areas (especially in the public sector).[33]

The proposed solutions indicated in the AI Act should be enforceable; this is a prerequisite for the implementation of AI systems in the EU. The regulations adopted in this area and AI technology should inspire widespread confidence. Meanwhile, recent research indicates that the level of trust in AI is relatively low among the citizens of European countries.[34] The results of ongoing research also confirm that the role of trust in the acceptance of AI technology, including the intention to use it, is significant.[35]

The development of AI systems seems inevitable. It is the task of the legislator and lawyers to ensure that this technology is implemented as smoothly as possible, guaranteeing respect for fundamental rights, which are an undeniable value of European legal culture.

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[33] In this respect, the deletion of Article 5(3) of the draft AI Act, which allowed – under certain conditions – remote biometric identification in public spaces, should be considered correct. More on concerns about deleted Article 5(3): M. Veale, F. Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act. Analysing the good, the bad, and the unclear elements of the proposed approach*, "Computer Law Review International" 2021, No. 4, p. 102.

[34] Research conducted by the University of Queensland with KPMG in 2023 shows that among the 17 countries participating in the survey on the level of trust in AI, European countries ranked at the bottom of the list. The highest levels of confidence in AI were demonstrated by: India, China and the Republic of South Africa. By contrast, among European countries, Germany was ranked 7th (35% of respondents showed confidence in AI), the UK 10th (34%), France 13th (31%), the Netherlands 14th (29%), Estonia 15th (26%) and Finland 17th (16%). See: *Trust in Artificial Intelligence. A global study 2023*, https://assets.kpmg.com/content/dam/kpmg/au/pdf/2023/trust-in-ai-global-insights-2023.pdf [accessed: 2023.08.31].

[35] H. Choung, P. David, A. Ross, *Trust in AI and its role in the acceptance of AI technologies*, "International Journal of Human-Computer Interaction" 2022, Vol. 39, Issue 9, pp. 1–13.

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Summary

Maria Jędrzejczak

Protection of Personal Data Processed in Artificial Intelligence Systems

The text undertakes an analysis of European Union regulations on the prevention of data protection breaches in AI systems, taking into account the provisions of the General Data Protection Regulation (GDPR) and the draft AI Act. Legal guarantees for the protection of personal data processed in AI systems are sought in the general principles of the GDPR (in particular the principles of lawfulness, transparency, data minimisation and confidentiality) and the regulations on liability for data breaches. The conclusions of the analysis indicate that the implementation of the solutions contained in the current and proposed regulations may be hampered by the autonomy of some AI systems.

Keywords: artificial intelligence, draft AI Act, personal data protection.

Streszczenie

Maria Jędrzejczak

Ochrona danych osobowych przetwarzanych przez systemy sztucznej inteligencji

W tekście podjęto analizę regulacji unijnych dotyczących przeciwdziałania naruszeniom ochrony danych osobowych w systemach AI, z uwzględnieniem przepisów RODO oraz projektu AI Act. Gwarancji prawnych dla ochrony danych osobowych przetwarzanych w systemach AI poszukuje się w zasadach ogólnych RODO (w szczególności w zasadzie legalności, przejrzystości, minimalizacji danych oraz poufności), a także w regulacjach dotyczących odpowiedzialności za naruszenia danych. Wnioski z przeprowadzonej analizy wskazują, że realizacja rozwiązań zawartych w obecnych i projektowanych regulacjach prawnych może być utrudniona z uwagi na autonomiczność niektórych systemów AI.

Słowa kluczowe: sztuczna inteligencja, projekt aktu w sprawie sztucznej inteligencji, ochrona danych osobowych.

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On the Road to Electoral Democracy? Erosion of the Free and Fair Elections Standard in the Era of the Polish Constitutional Crisis after 2015

Introduction

Democracy in the most general sense means rule by the people (*demos*), and its guiding idea is the sovereignty of the people. It is a truism that elections are an essential component of democracy, whose boundary conditions, as emphasized by Robert A. Dahl, include equal voting rights and actual participation.[1] The face of democracy is revealed by its procedural approach, in which Charles Tilly includes three necessary components: 1) universal suffrage, 2) fair, competitive and periodic elections, and 3) a free election campaign in which access to the media is provided to interested participants.[2] Adam Przeworski, in defining democracy, uses a perverse formula, describing it as a form of "institutionalised uncertainty,"[3] which means that the outcome of elections must be uncertain. At the same time, the hope of the losers is the opposite of the uncertainty of the winners.[4] Democracy includes not only procedures and decision-making mechanisms, but also ideals and an axiological system. Giovanni Sartori sees democracy as a system in which "no one can choose himself, no one can entrust himself with the power of governance and, thus, no one can appropriate unconditional and unlimited power."[5] He rejects all manifestations of illiberal democracy, denying the democratic value of delegative (or populist) democracy with the primary systemic role attributed to the principle of people's sovereignty. Moving away from democracy, which for him means liberal democracy, leads to the fact that "we see only glimpses of the word democracy, we only have purely rhetorical democracy, which, thanks to the fiction of some assumed popular support, can sanction the most despotic bonds. To put it bluntly, this means that with the demise of liberal democracy, democracy

1 See R.A. Dahl, *Demokracja i jej krytycy*, trans. S. Amsterdamski, Warszawa 2012, p. 318.
2 C. Tilly, *Demokracja*, trans. M. Szczubiałka, Warszawa 2008, p. 20.
3 See A. Przeworski, *Democracy and the Market*, New York 1991.
4 J.-W. Müller, *Demokracja rządzi*, trans. T. Sawczuk, Warszawa 2022, p. 130.
5 G. Sartori, *Teoria demokracji*, trans. P. Amsterdamski, D. Grinberg, Warszawa 1994, p. 257.

also dies."[6] Democracy is therefore a rejection of personalised power, and its concept denotes the temporality of its exercise. The support constituting the antidote against threats to democracy includes not only regular elections, but also a democratic legislative procedure in matters related to elections, neutral judicial bodies and a free media.

Therefore, the very concept of democracy takes on a blurred and multifaceted character. The first research focus is the claim that the overall regulation in the era of the Polish constitutional crisis led to the erosion of the free and fair elections standard, because the features of the system do not harmonise with the essence of democracy, and thus do not implement its ideals and values. The process of the degeneration of standards has led to the formation of the phenomenon of electoral democracy. Of course, the explanation of this process is not monocausal.

In this context, the standard of free and fair elections makes it possible to present the importance and role of elections in a democratic state and to distinguish "electocracy" or "electoral democracy" from liberal democracy.[7] While in electoral democracy, which is the first step towards (liberal) democracy, i.e. the election of constitutional public authorities in periodic elections based on multiparty electoral competition and the principle of universality, ensuring a formally democratic procedure, does not allow for the recognition of the existence of democracy. Such mechanisms are confidential to authoritarian political regimes, while they have to fulfill different systemic roles. Between a full-fledged democracy and an overt dictatorship, there are electoral democracies, often inefficient and poorly functioning.[8] As in liberal democracy, they do not play the role of a mechanism related to the responsibility of power and its legitimacy. The formal competitiveness, periodicity and universality of the elections, which make up the procedural dimension of the elections, do not yet determine the existence of democracy. In addition to cyclicality, competitiveness and freedom of participation, no less important are the potential and real alternative of power and the standards of honesty that make up the concept of free and fair elections. As Wojciech Łączkowski points out, free elections conducted "according to the rules that permit honestly and faithfully taking into account the will of voters can be considered one of the foundations of the democratic system."[9]

In Poland, the timeline for the democratisation of the electoral system was set in 1989, when the elections to the Senate were fully democratic, and the elections to the Sejm (Parliament of Poland) were partially democratic. The adoption on 5 January 2011, of the Electoral Code (hereinafter: KW),[10] which defines the conditions for the validity of elections: to the Sejm of the Republic of Poland and to the Senate of the

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6 *Ibid.*, p. 481.

7 See A. Siaroff, *Comparing Political Regimes. A Thematic Introduction to Comparative Politics*, Toronto 2022.

8 See L. Diamond, *Elections Without Democracy: Thinking about Hybrid Regimes*, "Journal of Democracy" 2002, Vol. 13, No. 2, p. 23.

9 W. Łączkowski, *Prawo wyborcze a ustrój demokratyczny*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2009, No. 2, p. 51.

10 Journal of Laws 2022, item 1277, as amended.

Republic of Poland, the President of the Republic of Poland, to the European Parliament in the Republic of Poland, to bodies constituting local government units as well as mayors of towns and cities, is, on the other hand, a timeline for the consolidation of electoral law in Poland.

1. Delimitation of the free and fair elections standard

Free and fair elections is one of the concepts that make up the electoral axiology in a democratic state governed by the rule of law which allows assessing the correctness of the electoral process. The concept of fair elections in the jurisprudence of the Constitutional Tribunal[11] and international documents remains synonymous with the concept of fair elections. In accordance with Article 25b of the International Covenant on Civil and Political Rights, every citizen has the right without any discrimination (based on race, colour, gender, language, religion, political or other views, national or social origin, economic situation, birth or any other circumstance) and without unreasonable restrictions on the use of active and passive electoral law in fair elections, held periodically, based on universal suffrage, equal and secret, guaranteeing voters free expression of will. Aldona Domańska and Magdalena Wrzalik point to the diverse semantic scope of the concept of fairness and reliability of elections. Honesty refers to a sphere that is wider than just the electoral procedure.[12] Krzysztof Skotnicki rightly points out that fair elections are an element of unbiased elections, so elections can be unbiased, but they do not have to be fair at all.[13]

The principle of free elections as a statutory principle appeared in Poland along with the principles of universality, immediacy, equality and secrecy of voting in the 1991 electoral law for the Sejm.[14] The constitutionalisation of this principle took place based on the so-called Small Constitution of 1992[15] only for the elections to the Senate. The 1997 Constitution resigned from including the adjective "free" in relation to the Senate elections. Although the Electoral Code for the European Parliament adopted in connection with Poland's accession to the European Union indicated the freedom of elections,[16] it was adopted in 2011. The KW failed to place freedom of elections among

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11 Judgments of the Constitutional Court: 21 July 2009, K 7/09 and of 20 July 2011, K 9/11.

12 A. Domańska, M. Wrzalik, *Przejawy zasady (nie)uczciwości wyborów na przykładzie wyborów prezydenckich, RP* [in:] *Dylematy polskiego prawa wyborczego*, eds. J. Ciapała, A. Pyrzyńska, Warszawa 2021.

13 K. Skotnicki, *Warunki brzegowe wolnych i uczciwych wyborów w demokratycznym państwie prawnym. Czy potrzebne są zmiany polskiego prawa wyborczego?* [w:] *Wolne i uczciwe wybory. Sądownictwo konstytucyjne – teoria i praktyka. Tom VI*, ed. M. Granat, Warszawa 2023, p. 7.

14 See the Act of 28 June 1991 Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej (Electoral Act for the Sejm of the Republic of Poland) (Journal of Laws No. 59, item 252) (Article 1).

15 The Constitutional Act of 17 October 1992 o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz samorządzie terytorialnym (on the mutual relations between the legislature and executive of the Republic of Poland and local and regional government) (Journal of Laws No. 84, item 426) (Article 3(2)).

16 The Act of 23 January 2004 Ordynacja Wyborcza do Parlamentu Europejskiego (Electoral Act for the European Parliament) (Journal of Laws No. 25, item 426) (Article 2(1)).

the electoral rules. It is rightly pointed out by Ferdynand Rymarz that "it is unjustified to treat the principle of free elections as a symbolic issue," as well as "unfounded are also reservations that its constitutive importance is weaker than other principles."[17] The constitutionally shaped principle of free elections could constitute a general clause and an interpretative directive in the scope of the entire electoral law regulation. The right to free elections also results from Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the organisation of elections within reasonable time limits, based on secret ballot, under conditions ensuring the freedom of expression of the population in the choice of the legislative body. The principle of free elections was the subject of the jurisprudence of the European Court of Human Rights, which, inter alia, in the judgment in Kwiecień v. Poland of 9 January 2007[18] pointed to the organic connection between free elections and freedom of expression, and in particular the freedom to conduct political debates, which together form the foundation of the democratic system (para. 48).[19] These two rights are closely related, and coexisting contribute to mutual reinforcement. For these reasons, it is particularly important that in the period preceding the election, information and opinions of all kinds can be freely disseminated.[20] These rules apply to both local and national elections.

Free and fair elections are one of the seven institutions that allow distinguishing the political system referred to by Dahl as polyarchy (constituting the highest stage of democratisation).[21] With the honesty of elections, the functions performed by elections are: legitimising and creative. These are the features that distinguish between fair choices and façade choices. While the principle of free elections has been clearly defined in the literature, and consists of three freedoms: 1) selecting and nominating candidates, 2) competition of election campaigns; 3) expressing electoral preferences,[22] the concept of fair elections espoused by Jørgen Elklit and Palle Svensson refers to the multidimensional phenomenon of impartial and reliable organisation of the election procedure, as well as equal, neutral treatment of political competitors, not only in the juridical sphere, but also in electoral practice. The opposite is the unequal treatment of participants in the electoral process, the consequence of which is the achievement of unjustified benefits.[23] The fairness of elections requires due diligence and reliability

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17 F. Rymarz, *Wybrane konstytucyjne problemy prawa wyborczego* [in:] *Minikomentarz dla maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego*, ed. M. Zubik, Warszawa 2017, p. 491.

18 No. 51744/99. See also Tănase v. Moldova, judgment of the European Court of Human Rights of 27 April 2010 (§ 154), no. 7/08.

19 See Mathieu-Mohin and Clerfayt v. Belgium, no. 27120/95, judgment of the European Court of Human Rights of 2 March 1987 (§ 47).

20 See Bowman v. the United Kingdom, judgment of the European Court of Human Rights of 19 February 1998 (§ 42).

21 R.A. Dahl, *Demokracja i jej krytycy…*, p. 318.

22 See G. Kryszeń, *Standardy prawne wolnych wyborów parlamentarnych*, Białystok 2007, p. 88 *et seq.*

23 J. Elklit, P. Svensson, *What makes elections free and fair?*, "Journal of Democracy" July 1997, Vol. 8, No. 3, p. 35.

in determining their results.[24] The declaration adopted by the Inter-Parliamentary Union at its 154th session on 26 March 1994 in Paris indicates that, in order for elections to be considered fair, "States should take the necessary measures to provide parties and candidates with reasonable opportunities to present their political programmes."[25]

Elklit and Svensson attempt to clarify the concept of free and fair elections in order to consolidate and define strict criteria group elements in relation to the three phases of the electoral process covering the period before election day, on election day and the period after election day.[26] Honesty means neutrality, and its antonym is unequal treatment, where individuals (or groups) obtain unjustified benefits.[27] The practical difficulty lies in separating the scope of free and fair elections. In the case of the principle of free elections, the emphasis is on the rules of the game. Freedom of elections is a prerequisite for the fairness of elections. From the perspective of fairness, the pre-election phase is essential to assess whether the electoral law and the constitution guarantee the freedom of elections, as well as to verify whether resources are not distributed too unevenly.[28] The post-election phase, i.e. the period in which activities related to the verification of election results are undertaken, is also important from the point of view of fairness standards, as this process requires a neutral and impartial decision-making body. Elklit and Svensson present criteria which permit assessing the electoral process from the point of view of the principle of fairness, which before election day include: transparency of the electoral process; the law and the pike system granting no special privileges to any political party or social group; no obstacles to entry in the electoral register; an independent and neutral electoral body; impartial treatment of candidates by the police, the army and the judiciary; equal opportunities for political parties and independent candidates to apply for mandates; impartial educational and electoral programs; a transparent electoral calendar; equal access to public media; impartial allocation of public funds to political parties; prohibition of using administrative facilities for the purposes of the election campaign. The voting stage includes: access to all polling stations for representatives of political parties, election observers and the media; secrecy of voting; not intimidating voters; reliable ballots; appropriate ballot boxes; impartial assistance to voters (if necessary); appropriate procedures for counting votes; proper handling of invalid ballots; ensuring appropriate precautions for the transport of election materials; impartial protection of polling stations. The post-voting phase consists of: official and immediate announcement of election results; impartial consideration of all complaints and election protests; impartial information about election results by the media; acceptance of election results by all

[24] G. Kryszeń, *Uczciwość wyborów jako zasada prawa wyborczego*, "Studia Wyborcze" 2016, Vol. 21, p. 23.

[25] https://www.ipu.org/impact/democracy-and-strong-parliaments/ipu-standards/declaration-criteria-free-and-fair-elections [accessed: 2023.09.17].

[26] J. Elklit, P. Svensson, *What makes elections free*…, p. 36.

[27] *Ibid.*, p. 35.

[28] *Ibid.*, p. 36.

interested parties.[29] Larry Diamond emphasizes that elections are fair when administered by a neutral authority and the electoral administration is competent and able to take special precautions against crime when voting and counting votes; when the police, military, and courts treat competition among candidates and parties impartially; when competitors have access to public media; when constituencies and rules do not favour those in power (and harm the opposition); when independent monitoring of voting and counting votes takes place; when the secrecy of voting is protected; when virtually all adults can vote; when the procedures for organising and counting votes are transparent and widely known; when there are clear and impartial procedures for resolving complaints and disputes.[30] Thus, the concept of election fairness stretches temporally long before election day.

In Poland, the dismantling of constitutional axiology and practice implemented through ordinary legislation with a mentality inherent in the statutory state is the source of the Polish constitutional crisis that has been ongoing since autumn 2015. This state of affairs, which Wojciech Sadurski refers to as "anti-constitutional populist backsliding,"[31] is also reflected in electoral practice.[32]

The processes related to the erosion of democracy in Poland focus on those that include interrelated elements, among others: 1) a democratic electoral system with periodic, free and fair elections; 2) the right to freedom of expression and association; 3) the rule of law.[33] In Poland, not only is the essence of the democratic rule of law denied, one of the features of it which is institutional "restraint," i.e. the abandonment of actions that violate its essence, which can literally be considered consistent with its letter,[34] but the "game of survival" is notable, consisting in such a way as to conduct a political struggle to defeat party rivals once and for all.[35] When the process is shaped in this way and also in relation to electoral practice, it goes beyond "constitutional hardball."[36]

The analysis below puts forward the thesis that backsliding in the area of free and fair elections leads to the formation of systemic growth in the form of electoral democracy.

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29 *Ibid.*, p. 37.

30 L. Diamond, *Elections Without Democracy: Thinking about Hybrid Regimes*, "Journal of Democracy" 2002, Vol. 13, No. 2, p. 29.

31 W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019, pp. 8, 14.

32 On the factors determining contemporary populism, see W. Sadurski, *A pandemic of populists*, Cambridge 2022, pp. 25–45.

33 Cf. T. Ginsburg, A.A. Huq, *How to Save a Constitutional Democracy*, Chicago–London 2018, pp. 19–24, 90–91.

34 S. Levitsky, D. Ziblatt, *Tak umierają demokracje*, trans. O. Łabendowicz, Łódź 2021, pp. 124–125. See also A.C. Holland, *Forbearance*, "American Political Science Review" 2016, Vol. 110, No. 2.

35 M. Mistygacz, T. Słomka, *Legitimisation of power in Poland*, "Przegląd Konstytucyjny" 2022, No. 1, p. 86.

36 M. Tushnet, *Constitutional Hardball*, "John Marshal Law Review" 2004, Vol. 37, No. 2, pp. 523–553.

2. Decent electoral legislation

The standard of fairness of elections remains closely positively correlated with respect for the principles of decent electoral legislation, particularly in the period of appropriate *vacatio legis*. While, of course, the provisions of electoral law are not immutable, exceptions to this principle are permissible and justified, as long as the changes are accepted by the parliamentary majority and the opposition. In its judgment of 3 November 2006, the Constitutional Tribunal (K 31/06) emphasizes that a specific *minimum minimorum* "should be the adoption of significant changes in electoral law, at least six months before the next elections, understood not only as the act of voting itself, but as the entirety of activities covered by the so-called electoral calendar. Possible exceptions to such a specified dimension could only result from extraordinary circumstances of an objective nature." In addition, "the need to maintain at least six months from the entry into force of significant changes in the electoral law to the first activity of the electoral calendar is, in principle, an indelible normative component of the content of Article 2 of the Constitution." This line of jurisprudence was confirmed in judgments Kp 3/09[37] and K 9/11.[38] The Constitutional Tribunal clarified that the minimum period of legislative silence should be counted from the date of taking the first electoral action, i.e. until the decision to order elections is issued. Confirmation of this standard is the position set out in the Code of Good Practice in Electoral Matters:[39] "The basic elements of electoral law, especially the electoral system itself, the composition of electoral commissions and the boundaries of electoral districts should not be subject to changes at least one year before the elections, or should be enshrined in the constitution or legal acts of a higher rank than common law" (point II.2.b). An undoubted violation of this standard is the situation related to the great amendment to the KW of 26 January 2023,[40] because the act does not specify when some of the provisions enter into force. Pursuant to 19 points 2 and 3 of the Act amending a significant part of the provisions, including in particular the regulations regarding the Central Register of Voters, will enter into force on the date indicated in the communication of the Prime Minister. This regulation is not only a violation of the standard above, but also a gross violation resulting from Article 2 of the Constitution of the principle of a democratic state governed by the rule of law. Krzysztof Urbaniak's postulate to prevent the instrumentalisation of electoral law by introducing a regulation according to which "changes to electoral law regarding the essential elements of the electoral system should enter into force from the next term of office of the body to which the elections relate" is entirely correct.[41] This would allow finding a balance between the adequacy

37 Judgment of the Constitutional Tribunal of 28 October 2009.

38 Judgment of the Constitutional Tribunal of 20 July 2011.

39 Adopted by the European Commission for Democracy by Law in 2002 and approved by the Parliamentary Assembly of the Council of Europe in 2003.

40 Journal of Laws, item 497.

41 K. Urbaniak, *Wybory jako demokratyczny sposób kreowania organów władzy publicznej a dobro wspólne*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, No. 1, p. 165.

and stability of electoral law, the gradual adaptation to changes taking place not only in communication techniques, increasing mobility or the need to adapt regulations to changes in social life, and, in particular, the aging of the population.

The stability of electoral law manifested in restraint or even "legislative silence" is also called "the rest of electoral law"[42] in basic electoral matters. In this context, the situation regarding the presidential elections scheduled for 10 May 2020 was unprecedented. Despite the Covid-19 epidemic and the resulting justification for the introduction of a state of emergency, which would have result in postponing the election date (Article 229 § 7 of the Constitution of the Republic of Poland), the ruling coalition of the United Right made the decision to organise elections despite the difficult public health situation. Therefore, legislative changes were initiated to conduct elections by correspondence, and the election was to be organised by the Minister of State Assets, together with his subordinate company of the State Treasury – Poczta Polska S.A. However, despite unfinished legislative work to provide a legal basis for these elections, Prime Minister Mateusz Morawiecki undertook factual and legal actions aimed at organising the elections. Finally, the elections scheduled for 10 May 2020 did not take place. Then, regulations were passed to allow elections to be held on 28 June 2020 (the first round of voting) and 12 July 2020 (the second round of voting). Although the role of the National Electoral Commission was restored, problems related to the inability of a significant number of citizens abroad to cast their votes were not eliminated. The Supreme Court failed to consider more than four thousand electoral protests regarding discriminatory treatment by the public media of candidates for the President of the Republic of Poland. This example indicates the destabilisation of electoral law and the erosion of guarantees regarding the reliability of elections.

3. Verification of the electoral process and election results before a neutral judicial authority

An essential element of the free and fair elections standard is the verification of the electoral process itself and of election results through appropriate procedures applied by an independent court.[43] In this respect, the assessment of the status of an entity confirming the validity of elections requires taking into account the resolution of the Supreme Court of 23 January 2020, imposing each time the obligation to examine whether a person appointed to the office of judge at the request of the National Council of the Judiciary, shaped in the manner specified in the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and

[42] See P. Jakubowski, *Cisza legislacyjna – zasada prawa wyborczego w Rzeczypospolitej Polskiej*, "Przegląd Sejmowy" 2015, No. 3 and M. Zagozdon, *Spoczywanie prawa wyborczego* [in:] *Aktualne wyzwania prawa wyborczego*, eds. M. Zubik, J. Podkowik, Warszawa 2021.

[43] See A. Józefowicz, *Przesłanki prawne rozstrzygania o ważności wyborów parlamentarnych*, "Państwo i Prawo" 1999, No. 3, p. 4.

certain other acts (Journal of Laws 2018, item 3), if the defectiveness of the appointment process leads, in specific circumstances, to a violation of the standard of independence and impartiality within the meaning of Article 45 section 1 of the Constitution of the Republic of Poland and Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 item 1 European Convention on Human Rights.[44] The adjudicating panel formed in this way violates Article 3 of Protocol No. 1 because of the inability to appeal to a competent national authority that can effectively decide on the subject,[45] because the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, both in terms of the composition of its personnel and the manner of its operation, is deprived of the guarantee of impartial ruling on the validity of elections and electoral protests. It is entirely formed of new members and is an example of the old court-packing mechanism, i.e. an increase in the number of seats (in this case the creation of a new chamber within the Supreme Court) occupied by newly appointed authorities.[46]

4. Electoral distortions

It is a truism to indicate that there is no ideal electoral system that allows for the distribution of seats in proportion to the number of seats. In Poland, in the elections to the Sejm, the factors influencing the deformation of the result are: 1) electoral thresholds (5% for electoral committees and 8% for coalitions of electoral committees); 2) the adoption of the d'Hondt method for allocating seats which is more favourable for larger parties; 3) the distribution of seats on a national scale, not on a constituency scale; 4) the small size of the average constituency (8–10 seats).[47]

In order to conduct elections to the Sejm, multi-mandate electoral districts are created which cover the area of a voivodeship or part of it, while the borders of electoral districts cannot violate the borders of counties or cities with *powiat* rights. At least seven deputies are elected in electoral districts. The maximum number has not been specified (Article 201 § 1–3 KW). The division into constituencies, borders and the number of deputies elected in each constituency is set out in Annex 1 to the KW.

To ensure an appropriate representative standard, Article 203 § 1 of the Constitutional Tribunal entrusts the National Electoral Commission with the right to submit proposals to the Sejm on changing the limits of electoral terms and the number of deputies elected in them if such a necessity results from changes in the basic territorial division of the state or from a change in the number of residents in an electoral

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44 BSA I-4110-1/20.

45 Cf. case of Namat Aliyev v. Azerbaijan, no. 18705/06, judgment of the European Court of Human Rights of 8 April 2010.

46 M. Naím, *Zemsta władzy. Jak autokraci na nowo tworzą politykę XXI wieku*, trans. V. Dobosz, D. Kaczor, Katowice 2022, p. 64.

47 M. Chmaj, *Prawo wyborcze w Polsce*, Warszawa 2023, p. 85.

district or in the country. Making changes to the boundaries of counties that involve changes to the boundaries of electoral terms is unacceptable during the 12 months preceding the expiry of the term of office of the Sejm, as well as in the period from the election management in the event of shortening the term of office of the Sejm or until the date of determining the validity of the elections (Article 203 § 2 KW). The Sejm makes changes in the division into electoral determinations for the above-mentioned reasons not later than three months before the date on which the deadline for the election to the Sejm expires (Article 203 § 2 KW).

On 21 October 2022, the National Electoral Commission presented a proposal to change the boundaries of constituencies and the number of deputies elected in them. As of 30 September 2022, the country's population was 36,075,160. The representative norm in the elections to the Sejm is 78,424 inhabitants per mandate. The resulting number of seats (created by rounding the ratio of the number of inhabitants of the district and the representative standard) is 461, and the emerging surplus mandate in accordance with Article 202 § 1 point 2 sentence 1 KW should be subtracted in the constituency where the representative norm calculated for the constituency is the smallest, i.e. in district No. 40 (Koszalin). Compared to the number of seats set out in Annex 1 to the KW, the allocation of seats to individual electoral districts requires changes.[48]

5. Independence and transparency of the electoral administration

In the context of the free and fair elections standard, it is necessary to pay attention to the shaping of the model of electoral administration in Poland. After 1989, a judicial model of electoral administration[49] (*iudices electionis custodes*) was formed. Participation in electoral bodies of judicial authorities, with guarantees of independence and apoliticality, was to be one of the guarantees of the fair conduct of elections, as well as reliability in determining the results of the elections.[50] The judicial model of electoral

[48] In districts No. 3 (Wrocław), No. 13 (Kraków II), No. 19 (Warsaw I), No. 23 (Rzeszów), No. 25 (Gdańsk), No. 26 (Słupsk), No. 37 (Konin), No. 38 (Piła) and No. 39 (Poznań), the number of elected deputies should be increased by one, while in district No. 20 (Warsaw II) the number of elected deputies should be increased by two, and in districts No. 1 (Legnica), No. 2 (Wałbrzych), No. 5 (Toruń), No. 6 (Lublin), No. 7 (Chełm), No. 9 (Łódź), No. 31 (Katowice I), No. 32 (Katowice II), No. 33 (Kielce), No. 34 (Elbląg) and No. 40 (Koszalin) the number of elected deputies should be reduced by one. Changes in the division into electoral districts should have been made no later than three months before the deadline for ordering elections to the Sejm (14 August 2023). Therefore, the deadline for making changes in the division into constituencies expired on 14 May 2023. See the motion of the National Electoral Commission on changing the boundaries of electoral districts and the number of deputies elected in them of 21 October 2022 – https://pkw.gov.pl/aktualnosci/informacje/wniosek-panstwowej-komisji-wyborczej-w-sprawie-zmiany-granic-okregow-wyborczych-i-liczby-poslow-w-ni [accessed: 2023.09.25].

[49] See D. Sześciło, *Modele administracji wyborczej w wybranych państwach*, "Studia Wyborcze" 2013, No. 13, p. 93 *et seq*.

[50] F. Rymarz, *Udział sędziów w organach wyborczych* [in:] *10 lat demokratycznego prawa wyborczego Rzeczypospolitej Polskiej (1990–2000)*, ed. *idem*, Warszawa 2000, p. 44.

administration did not raise doubts in the main political parties and was also positively assessed in the doctrine.[51] Due to the lack of the anchoring of the National Electoral Commission in the Constitution of the Republic of Poland of 1997, it does not have constitutional guarantees ensuring its independent nature. The Act of 11 January 2018 amending the Electoral Code (the Act amending certain acts in order to increase the participation of citizens in the process of electing, operating and controlling certain public bodies[52]) changed the personnel structure of the National Electoral Commission. The previous judicial model provided that the National Electoral Commission consisted of nine judges: three appointed by the President of the Constitutional Tribunal, three by the First President of the Supreme Court and three by the President of the Supreme Administrative Court. The newly formed composition of the National Electoral Commission took a mostly political form. Amended Article 157 § 2 points 1–3 of the KW provides that the National Electoral Commission is composed of one judge appointed by the President of the Constitutional Tribunal and one judge appointed by the President of the Supreme Administrative Court elected for a nine-year term of office and seven persons qualified to hold the position of judge appointed by the Sejm for the period of its term of office (Article 157 § 2c KW). It should be stipulated that persons qualified to hold a judicial position are those who have at least three years of experience as prosecutors; those who have served as the President of the General Counsel to the Republic of Poland, its vice-president or counsel; those who have practiced the profession of lawyer, legal advisor or notary in Poland, and persons who have worked at a Polish university, at the Polish Academy of Sciences, at a research institute or other scientific institution, having the academic title of professor or the academic degree of habilitated doctor of legal sciences (Article 157 § 2a points 1–2 KW). Finally, the change in the personnel composition of the National Electoral Commission has led to the politicisation of the process of selecting the majority of its members, which affects public trust not only in the electoral authority itself, but also in the electoral process. In accordance with Article 157 § 4a of the KW, candidates for members of the National Electoral Commission are nominated by one or more parliamentary groups, except that the number of these members must proportionally reflect the representation of one or more parliamentary groups in the Sejm. The number of members appointed to the National Electoral Commission, from among those nominated by one or more parliamentary groups, may not be greater than three (Article 157 § 4b KW). Guarantees of independence are weakened or even illusory by the possibility of dismissing a member of the National Electoral Commission by the President of the Republic of Poland upon a justified request of the appointing entity (Article 158 § 1 point 5 KW). The changes also included electoral commissioners appointed for a period of five years by the National Electoral Commission at the request of the minister competent for inter-

[51] See A. Sokala, M. Święcki, *Administracja wyborcza w III Rzeczypospolitej Polskiej (struktura organizacyjna i charakter prawny)* [in:] *Iudices electionis custodes (Sędziowie kustoszami wyborów). Księga pamiątkowa Państwowej Komisji Wyborczej*, ed. F. Rymarz, Warszawa 2007, p. 172.

[52] Journal of Laws 2022, item 130.

nal affairs, from among persons with higher legal education and giving a guarantee of the proper performance of this function, i.e. by officials, and not by judges thus far. While the current judicial model guaranteed transparency and fairness of elections, the changes introduced pose a threat that election commissioners may be associates of political parties or even former members of them.[53] The changes introduced have a negative impact on impartiality and public trust in electoral procedures.

6. Access to public media

In its judgment of 3 November 2006 (K 31/06), the Constitutional Tribunal pointed out that the essential elements of the principle of freedom of elections are "authentic freedom of expression and assembly, media order in the state in general, accessibility to local media markets, transparent procedures for obtaining the necessary funds for campaigning, appropriate real guarantees for the protection of electoral rights." The principle of freedom of elections requires "that a fair and reliable election campaign provide citizens with access to truthful information about public affairs, candidates and their political programs."[54]

One of the elements related to the regression of democracy is the criminalisation of political rivals and the related treatment of political opponents not as citizens, but as lawbreakers, who can be imprisoned (incriminations for diplomatic treason, corruption).[55]

In the context of the fairness of elections, attention should be paid to the blatant disparities in the possibility of presenting the positions of political parties in the public media. One example is the disproportionate time devoted to presenting the positions of those in power and those in opposition on public television. The report for the second quarter of 2023 on the implementation of the obligations to present the positions of political parties, professional associations[56] and employer associations in the programmes of public broadcasting units shows that a total of 80.37% of the time devoted to politicians of all parties was devoted to the presentation of the positions of the ruling coalition parties, as well as the positions of the chancellery of the President, the Prime Minister and the Marshal of the Sejm (originating from the same political environment). Civic Platform and the Marshal of the Senate were given 2.95%, and the remaining opposition parties – 16.67%. These data remain in similar proportions in relation to the reports resulting from previous quarters. The glaring disproportion of time devoted to those in power and those of the opposition leads to a violation of

53 K. Urbaniak, *Wybory…*, p. 159.

54 Judgment of the Constitutional Tribunal of 20 July 2011.

55 Cf. M. Naím, *Zemsta władzy…*, pp. 19–20.

56 The obligation to present reports of results from § 4a (1) Regulation of the National Broadcasting Council of 24 April 2003 on the procedure for presenting the positions of political parties, trade unions and employers' associations on key public issues in public radio and television programs (consolidated text: Journal of Laws 2014, item 309).

the principle of pluralism in the presentation of positions and honesty during election campaigns.

Also significant with regard to access to media, is influencing the functioning of private media related to the ruling coalition, including: commissioning advertisements to friendly private media by state-owned companies, implementing joint projects (sponsored galas, patronages, conferences) and supporting social organizations associated with the ruling coalition in the implementation of projects coinciding with government policy (e.g. financing from the Justice Fund).[57]

Conclusions

The atrophy of liberal democracy standards in the electoral process leads to democratic deconsolidation, resulting in the limitation of the ingrained rules of liberal democracy, including the undermining of the neutrality of independent state institutions, including taking control and politicising the Constitutional Tribunal, taking control of public media, taking control of the Supreme Court, and limiting the ability of private broadcasters to carry out their missions.[58]

Electoral democracy can be described as a binomial – democracy minus the rule of law. It is therefore a consequence of depriving democracy of liberal values. The consequence of this state of affairs is a transformation towards a systemic restriction of freedoms and autocracy. The difference between democracy and authoritarianism is captured accurately by Norberto Bobbio using the category of questions and answers: "in a democracy it is easy to ask a question and difficult to answer, while an autocracy makes the question difficult, but it always has an easy answer."[59]

The analysis presented in this article indicates there is a full-blown systemic crisis paving the way for electoral democracy. The clinical picture of this disease heralds a direction – pragmatic authoritarianism[60] (and the associated clientelism, corruption and party favouritism[61]) underpinned by electoral democracy. The changes presented above can be described as the cancel culture of principles, roots of democratic electoral systems, rule of law, and violation of the democratic cultural code. The sum of factors leading to the erosion of guarantees and the culture of democratic elections leads

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[57] Cf. A. Bodnar, *System polityczny Rzeczypospolitej Polskiej w świetle teorii konkurencyjnego autorytaryzmu* [in:] *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*, eds. *idem*, A. Ploszka, Warszawa 2020, pp. 140–144.

[58] For example, in 2016, during public protests against the ruling party, the prime minister banned private broadcasters from entering the building.

[59] N. Bobbio, *Liberalizm i demokracja*, trans. P. Bravo, Kraków 1998, p. 64.

[60] Sometimes such a system is referred to as "competitive authoritarianism" – see S. Levitsky, L.A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War (Problems of International Politics)*, Cambridge 2010.

[61] It is the ability of new forms of authoritarianism to learn from mistakes that captures David Runciman's concept of pragmatic authoritarianism. See D. Runciman, *Jak kończy się demokracja*, trans. S. Żuchowski, Warszawa 2019.

to the formation of electoral democracy *à la polonaise*. It seems that the changes in the entire environment of electoral law make it possible to consider Polish democracy a "democracy deliberately damaged,"[62] because, although the changes related to the destruction of the system of guarantees and honesty are deliberate actions of the rulers, a change of power is not completely excluded. In the ranking of democratic countries in 2023,[63] Poland obtained 6.85 on a 10-point scale, which results in it not being included among full democracies (above eight points), and included in the group of "flawed democracies"[64] or even countries that are characterised by "soft authoritarianism" (below seven points).[65] Activities with the appearance of constitutional legalism, consolidated by a parliamentary majority, led – referring to what Bojan Bugarič puts as "a new kind of semi-authoritarian regime, which is located halfway between 'diminished democracy' and 'competitive authoritarianism'."[66]

The circumstances presented are microevidence that allows for a generalising statement that in Poland, in the era of constitutional crisis, processes are taking place that strengthen electoral democracy. This is accompanied by secretive practices including changes in the judiciary in the field of verifying the correctness of the electoral process, changes in and the politicisation of the electoral administration and the prosecutor's office, as well as the politicisation of independent public broadcasters. In addition to the sovereignty of the people, the rule of law (law-abidingness), which secures the political position of a minority contesting power. Electoral power is an essential guarantee of democracy, and from there, the road leads to representative democracy.[67] However, it requires the existence of unwritten norms of mutual tolerance and restraint, which Steven Levitsky and Daniel Ziblatt point out, are "the soft guardrails of democracy"[68] preventing the transformation of competition into a total fight "to the death." One of the elements of fair elections is institutional restraint (forbearance), referring to refraining from exercising powers.[69] Where the culture of restraint is strong, politicians do not use their formal powers to their limits. This concept permits maintaining the rules of fair play in the electoral process, while maintaining institutional restraint entails recognising each other as rivals, not enemies.

The process of falling into electoral authoritarianism occurs when the violation of the "minimum criteria of democracy" results in unequal opportunities between the government and the opposition. The standard of fair elections is related to the concept of the quality of the electoral process in the *largo sense*, which allows it to be

62 J.-W. Müller, *Strach i wolność. O inny liberalizm*, trans. P. Masłowski, Warszawa 2020, pp. 197–198.
63 Global Democracy Index.
64 The Economist, 2023.
65 Cf. P. Sztompka, *Wiarygodność. Sekret dobrych relacji*, Kraków 2023, p. 296.
66 B. Bugarič, *Central Europe's descent into autocracy: A constitutional analysis of authoritarian populism*, "International Journal of Constitutional Law" 2019, Vol. 17, Issue 2, p. 599.
67 G. Sartori, *Teoria demokracji…*, p. 115.
68 See S. Levitsky, D. Ziblatt, *The Crisis of American Democracy*, "American Educator" Fall 2020, Vol. 44, No. 3.
69 See A. Holland, *Forbearance…*, pp. 232–246.

understood in three dimensions.[70] The first, of a formal character, includes quality in a strictly procedural dimension, i.e. ensuring compliance with formal procedures. The second is of a material dimension, in which quality refers to the possession by the product of a specific content and proper functioning. The third is the quality of the results of the electoral process which results indirectly from the satisfaction expressed by voters and affects the legitimacy of the power. The lack of an institutionalised response of public authorities to the shortcomings of the standard of fair elections, in particular related to preventing access to reliable information, which is the basis for making political choices, can lead to a decrease in trust in democratic procedures. The assessment related to the disturbance or manipulation of access to reliable information by the public broadcaster or the financing of election campaigns makes it possible to show the degree of these violations. Finally, it allows for the assessment of meeting the standard of fair elections. The Polish constitutional crisis is manifest in the transition from the rule of law to the rule of law, which apparently expresses a form of people's rule, but actually constitutes an erosion in the field of legal protection. The impoverishment of the free and fair elections standard leads to the transformation of democracy into an electoral democracy, which is purely rhetorical, based on sanctioning axiologically murky elections with the adoption of assumed popular support, and as Paul Blokker points out – "legal skepticism."[71] It leads to putting an equal sign between majority governments and governments in the interest of the majority, when it should unite them.

According to the Code of Good Practice in Electoral Matters, one of the dimensions of fairness is equal opportunities, which requires "the neutral approach of state authorities especially in relation to: 1. election campaigns, 2. reporting in the media and especially in the public media, 3. public financing of political parties and election campaigns."[72] Equal opportunities refer in particular to airtime on radio and television, public funds and other forms of support (point 2.3.b). Ryszard Piotrowski rightly points out that ignoring the allegations relating to the financing of election campaigns, the presentation of candidates in the public media, the course of the legislative process allow for "legitimising electoral lawlessness."[73] The foundation of democracy is public opinion (*doxa*) that is formed in an honest and free manner. "Governance of opinion" together with electoral (electorate) democracy make up democracy in a horizontal dimension.[74] The standard free and fair elections is therefore a guarantee of the demo-

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[70] Cf. L. Morlino, *¿Cómo analizar las calidades democráticas?*, "Revista Latinoamericana de Política Comparada" Julio 2015, No. 10, pp. 15–19, 21–24.

[71] See more: P. Blokker, *New democracies in crisis? A comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Abingdon 2013 and *idem*, *Populist constitutionalism* [in:] *Routledge Handbook of Global Populism*, ed. Carlos de la Torre, London–New York 2019.

[72] Code of Good Practice in Electoral Matters – Guidelines and explanatory report taken over by the European Commission for Democracy by Law (Venice Commission), 52nd session (Venice, 18–19 October, 2002), point 2.3.

[73] R. Piotrowski, *Ważność wyborów prezydenckich w świetle Konstytucji RP* [in:] *Dylematy polskiego prawa wyborczego…*

[74] G. Sartori, *Democracia en treinta lecciones*, trans. A. Pradera, México 2009, pp. 33, 43.

cratic electoral process and a support of representative democracy. However, it must not be forgotten that, as Juan J. Linz and Alfred C. Stepan put it, "for the political order to be democratic, it is not enough that the power comes from free and fair elections, but no less important that it has a democratic pedigree and mandate, as well as a democratic way of exercising power,"[75] and the moral convictions of the custodians of power are not synonymous with public morality. The mechanisms described confirm that the erosion of the free and fair elections standard in Poland paves the way to electoral democracy, which is essentially a stopover from consolidated democracy to its crisis. Subsequent stages include electoral autocracy and closed autocracy. In addition to institutions that remain seemingly unchanged, unwritten norms that give correct meaning and values are eroded. Failure to meet these criteria results in remaining in the space between liberal democracy and closed authoritarianism, which is characterised by electoral democracy with restrictions on freedom of association, freedom of speech and academic freedom, electoral deformations, unequal access of representative political parties to the public media and judicial guarantees related to the electoral process.[76]

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[75] "No regime should be called a democracy unless its rulers govern democratically. If freely elected executives (no matter what the magnitude of their majority) infringe the constitution, violate the rights of individuals and minorities, impinge upon the legitimate functions of the legislature, and thus fail to rule within the bounds of a state of law, their regimes are not democracies." See J.J. Linz, A.C. Stepan, *Toward consolidated democracies*, "Journal of Democracy" 1996, Vol. 7, No. 2, p. 14.

[76] Cf. *V-DEM electoral democracy index* [in:] *Democracy report 2023. Defiance in the Face of Autocratization*, V-Dem Institute, pp. 19–23, 26, 37, 39.

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Summary

Michał Mistygacz

On the Road to Electoral Democracy? Erosion of the Free and Fair Elections Standard in the Era of the Polish Constitutional Crisis after 2015

This article attempts to diagnose the state of democracy in Poland, remaining in the era of constitutional crisis and following the erosion of the free and fair elections standard, which determines the criteria for distinguishing an electoral democracy from a liberal democracy. For this purpose, the individual elements constituting this concept are analyzed, both having a procedural dimension and referring to the course of the three phases of the electoral process itself (the period before election day, on election day and after election day), as well as referring to the standards of honesty, reliability, the real possibility of alternative power or equal opportunities. The conclusions drawn at individual stages of the deliberations, including an indication of the destabilisation of electoral law, the erosion of guarantees regarding the reliability of elections, disproportion in the access of political party representatives to public media, lead to a thesis on the formation of electoral democracy in Poland, which can be described as a democratic system devoid of liberal values. It is characterised by restrictions on freedom of association, freedom of speech and academic freedom, electoral distortions, unequal access of representative political parties to the public media and judicial guarantees related to the electoral process.

Keywords: electoral democracy, liberal democracy, free and fair elections, electoral administration.

Streszczenie

Michał Mistygacz

Na drodze do demokracji wyborczej? Erozja standardu wolnych i uczciwych wyborów w dobie polskiego kryzysu konstytucyjnego po 2015 r.

W niniejszym artykule podjęto próbę zdiagnozowania stanu demokracji w Polsce, pozostającej w dobie kryzysu konstytucyjnego i podążającej drogą erozji standardu *free and fair elections*, determinującego kryteria pozwalające na odróżnienie demokracji wyborczej od demokracji

liberalnej. W tym celu dokonano analizy poszczególnych elementów składających się na to pojęcie, zarówno mających wymiar proceduralny i odnoszący się do przebiegu trzech faz samego procesu wyborczego (okres przed dniem wyborów, w dniu wyborów i po dniu wyborów), jak i odwołujących się do standardów uczciwości, rzetelności, realnej możliwości alternacji władzy czy równości szans. Wnioski wyciągnięte na poszczególnych etapach rozważań, w tym wskazanie na destabilizację prawa wyborczego, erozję gwarancji w zakresie rzetelności wyborów, dysproporcję w dostępie przedstawicieli partii politycznych do mediów publicznych, prowadzą do postawienia tezy o kształtowaniu się w Polsce demokracji wyborczej, którą można określić jako ustrój demokratyczny pozbawiony wartości liberalnych. Cechują go ograniczenie wolności zrzeszania, wolności słowa i wolności akademickiej, deformacje wyborcze, nierówny dostęp reprezentatywnych partii politycznych do mediów publicznych oraz gwarancji sądowych związanych z procesem wyborczym.

Słowa kluczowe: demokracja wyborcza, demokracja liberalna, *free and fair elections*, administracja wyborcza.

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The Object Protected by the Criminalization of Insult to a Human Corpse in Polish Law

Introduction

The problem of defining the object of protection under Article 262 of the Polish Criminal Code[1] has so far been repeatedly addressed in the literature.[2] In the Polish criminal legal order this problem is made particularly intricate by placing the crime of insulting a corpse in Chapter XXXII of the Criminal Code (Crimes against public order). This suggests that the object of protection of the crime in question is public order. Moreover, the construction of the crime poses problems of interpretation. The source of the problem derives from two paragraphs: the first, in which the criminal activity is insulting a corpse, and the second, where the characteristic on the part of the object

[1] Act of June 6, 1997 – Criminal Code (consolidated text: Journal of Laws 2022, item 1138, 1726, 1855, 2339, 2600, of 2023, item 289, 403, 818, 852).

[2] A. Rybak, *Prawnokarna ochrona godności zwłok człowieka*, "Palestra" 2014, No. 1–2, pp. 99–105; R. Stefański, *Przestępstwo znieważenia zwłok, prochów ludzkich lub grobu (art. 262 k.k.)*, "Prokuratura i Prawo" 2004, No. 10, pp. 19–28; J. Strauss, *Human Remains: Medicine, Death, and Desire in Nineteenth-century Paris*, New York 2012; M. Bernet, *O wątpliwych podstawach karalności tzw. nekrofilii właściwej w Polsce. Zarys stanowiska własnego na tle art. 262 k.k.* [in:] *Zbrodnia, kara, nadzieja. Wybrane niektóre rodzaje przestępstw, ich aspekty prawne i resocjalizacyjne*, eds. M.H. Kowalczyk, A. Kinas-Zalewska, Jastrzębie Zdrój 2012, pp. 105–116; *Prawo pogrzebowe: wybór źródeł*, eds. P. Borecki, M. Winiarczyk-Kossakowska, Warszawa 2012; Z. Ćwiąkalski, *Komentarz do art. 262 Kodeksu karnego* [in:] *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, ed. A. Zoll, Warszawa 2013; T. Fedorszczak, *Przestępstwa przeciwko religii na ziemiach polskich w latach 1918–1998* [in:] *Prawo wyznaniowe. Przeszłość i teraźniejszość*, ed. J. Koredczuk, Wrocław 2008, pp. 67–94; T. Gardocka, *Czy zwłoki ludzkie są rzeczą i co z tego wynika?* [in:] *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka: zagadnienia wybrane*, eds. J. Gołaczyński, J. Mazurkiewicz, J. Turłukowski, D. Karkut, Wrocław 2015, pp. 268–281; D. Gruszecka, *Komentarz do art. 262 Kodeksu karnego* [in:] *Kodeks karny. Część szczególna. Komentarz*, ed. J. Giezek, Warszawa 2014; A. Lach, *Komentarz do art. 262 Kodeksu karnego* [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Warszawa 2016; P. Morciniec, *Ludzkie zwłoki jako obiekt badawczy: dowolność działań czy normowanie?*, "Diametros" 2009, No. 19, pp. 78–92; R. Paprzycki, *Czy bluźnierca jest przestępcą? Rozważania na temat znamienia "przedmiotu czci religijnej" przestępstwa obrazy uczuć religijnych – art. 196 k.k.*, "Palestra" 2008, No. 5–6, pp. 81–90; A. Wąsek, *W kwestii tzw. odmoralizowania prawa karnego*, "Studia Filozoficzne" 1985, No. 2–3, pp. 225–241.

is robbing a corpse. Further considerations will focus only on the object of the crime of insulting a corpse, so that described in Article 262 § 1 of the Criminal Code, insulting human ashes and the resting place of the deceased, will be ignored. This discussion is preceded by introductory remarks, which will present the other elements of the structure of the crime of insulting a corpse, i.e. the subject, the subjective side, and the objective side.[3]

The aim of the article is to point out the multiplicity of definitions of the object protected by the criminalization of insulting a corpse. This indicates that law and the values cultivated in society are more dynamic than immutable institutions[4] and, as a result, the role of law-makers is not only to repeat established values but also to figure out new ones or to search for new justification for them that are more in accord with reality.[5]

The method used in this article is to analyze the literature and case law, so as systematize information regarding the understanding of the concept of the object of protection in Polish criminal law and its specification with regard to the crime of insulting a human corpse. I also present my own understanding of this matter. The first assumption of the analysis is that the criminal law or, more specifically, crimes (in the legal meaning) are made to protect some value, but that sometimes this value is elusive and hard to establish.[6] The second assumption is that the same crime may protect a string of values at the same time.[7] The third assumption is that the value (object of protection) can evolve in a historical process or be different in the same period of time in different countries.[8] All the above assumptions find their justification in a comparative analysis of selected regulations of the crime of insulting a human corpse in different countries.

1. The crime of insulting a corpse – introductory remarks

According to Article 262 § 1 of the Penal Code, whoever insults a corpse, human ashes, or the resting place of a deceased person shall be subject to a fine, restriction of freedom, or imprisonment for up to two years.

The offense under Article 262 § 1 of the Penal Code can be committed by anyone (*delictum commune*). Currently, Polish law does not provide for individual types of the offense of insulting or robbing a corpse or grave within the meaning of the law, crimes that can be committed only by a specified group of people.

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3 W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2014, pp. 182–184.

4 J. Taylor, *Death, Posthumous Harm, and Bioethics*, New York 2012, p. 16.

5 F. Cameron, *Defamation survivability and the demise of the antique "actio personalis" doctrine*, "Columbia Law Review" 1983, No. 88, p. 1844.

6 J. Feinberg, *The Moral Limits of Criminal Law. Harm to Others*, New York 1984, p. 82.

7 W. Armstrong, *Nothing but Good of the Dead*, "ABA Journal" 1932, Vol. 18, No. 4, pp. 230–231; J. Callahan, *On Harming the Dead*, "Ethics" 1987, No. 97(2), p. 344.

8 D. Sperling, *Posthumous Interests. Legal and Ethical Perspectives*, New York 2008, pp. 35–38.

The criminal action is insulting a corpse. An "insult" has a dual function in the Criminal Code. It is either an independent type of crime (Article 216 of the Penal Code) or an executory activity of other crimes (Articles 133, 135, 136 § 3 and 4, 137, 196, 226,[9] 257, 261, 262, 347, 350 of the Penal Code). In jurisprudence it is accepted that this concept must be interpreted uniformly.[10] The Supreme Court, in its judgment of February 17, 1993 (III KRN 24/92[11]), held that the term "insults" has the same meaning (and scope) in all laws in which it defines a criminal act. Following the generally accepted position that a type of crime characterized by the same elements as another type of crime (basic type) and that an additional modifying element is a modified type (qualified or privileged) for a crime of the basic type,[12] it should be assumed that the crime of insulting a corpse, human ashes, or the resting place of a deceased person is a qualified type of the crime of insult due to elements on the part of the object. The qualifying characteristic in the case of insult refers to the object of the executive action.[13]

The means of expression used by the perpetrator of insult are indifferent.[14] Insult constitutes conduct that is derogatory to dignity, intended to humiliate and, thus, cause annoyance.[15]

Witold Kulesza points out that in order to determine the insulting nature of words, gestures, or actions directed against the insulted person, objective criteria should be adopted, because, as that author notes, the law protects the dignity of the insulted person in the name of other values than an individual, subjective opinion of oneself only.[16] Admittedly, this author in the justification of his position does not cite the protection of the deceased, but of the mentally ill and minors;[17] nevertheless, it should be assumed that it also applies in the case of the deceased, so the insult rendered to a corpse is objective in its nature.[18] This view was confirmed by the Supreme

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[9] This article was declared unconstitutional by the Constitutional Tribunal in its judgment of October 11, 2006, P 3/06, Journal of Laws 2006 No. 190, item 1409.

[10] Judgment of the Court of Appeals in Lodz of January 17, 2013, II AKa 273/13, LEX No. 1294813, with a critical gloss: J. Kulesza, *Comment on the judgment of the Court of Appeal in Łódź of 17 January 2013, II AKa 273/13*, "Prokuratura i Prawo" 2014, No. 1, pp. 181–190.

[11] LEX No. 22114.

[12] T. Bojarski, *Odmiany podstawowych typów przestępstw w polskim prawie karnym*, Warszawa 1982, p. 20; W. Wolter, *Wykład prawa karnego. Część I*, Issue 1, Kraków 1970, p. 29; I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa 1989, p. 112; L. Lernell, *Wykład prawa karnego. Część ogólna. Tom 1*, Warszawa 1969, p. 89; K. Buchała, *Odpowiedzialność za przestępstwa kwalifikowane przez następstwa czynu*, "Wojskowy Przegląd Prawniczy" 1972, No. 1, pp. 20–22.

[13] T. Bojarski, *Odmiany podstawowych typów przestępstw…*, pp. 61–65.

[14] J. Raglewski, *Komentarz do art. 216 Kodeksu karnego* [in:] *Kodeks karny. Część szczególna. Tom II…*; A. Lach, *Komentarz do art. 262…*; M. Mozgawa, *Komentarz do art. 262 k.k.* [in:] *Kodeks karny. Komentarz*, ed. *idem*, Warszawa 2015; D. Gruszecka, *Komentarz do art. 262…*; R. Stefański, *Przestępstwo znieważenia zwłok…*, p. 25.

[15] R. Paprzycki, *Prawnokarna ochrona wolności sumienia i wyznania*, Warszawa 2015, p. 109.

[16] W. Kulesza, *Zniesławienie i zniewaga. Ochrona czci i godności osobistej człowieka w polskim prawie karnym – zagadnienia podstawowe*, Warszawa 1984, pp. 169–172.

[17] *Ibid.*, pp. 167–175.

[18] *Prawo karne. Zagadnienia teorii i praktyki*, eds. D. Gajdus, A. Marek, Warszawa 1986, p. 325; J. Śliwowski, *Prawo karne*, Warszawa 1975, p. 439.

Court in the resolution of June 5, 2012 (SNO 26/12[19]), and the order of May 7, 2008 (III KK 234/07[20]). In the case of insulting speech about a deceased person, and aimed at insulting the dignity of a living person, there is a concurrence of Articles 216 and 262 of the Criminal Code.[21] The adoption of objective criteria in assessing the insulting nature of the offending act constitutes its formal nature.[22]

It is relatively uniformly indicated that an insult can be committed only by action.[23] However, in the case of an insult under Article 262 § 1 of the Criminal Code, examples can be identified of liability by omission. Persons responsible for the security of cemeteries (e.g., cemetery manager, night watchman), by whose omission cemetery property was endangered, as a rule, cannot be held criminally liable under Article 262 § 1 of the Criminal Code in conjunction with Article 2 of the Criminal Code, unless their behavior was directed at insulting specific persons resting in the cemetery in question.

The offense of insult can only be committed intentionally, according to Article 8 of the Criminal Code. The question remains concerning the intent with which the perpetrator acts. In judicature and jurisprudence it is accepted that it is permissible to deliver an insult with both direct[24] and eventual intent.[25] This position is supported by the formal (non-effectual) nature of the insult.

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19 LEX No. 1231618.

20 LEX No. 444478.

21 M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi publicznemu*, Warszawa 1999, p. 108.

22 W. Kulesza, *Zniesławienie i zniewaga*…, p. 167; J. Raglewski, *Komentarz do art. 216*…; P. Hofmański, J. Satko, *Przestępstwa przeciwko czci i nietykalności cielesnej. Przegląd problematyki, orzecznictwo (SN 1918–2000), piśmiennictwo*, Kraków 2002, p. 46; A. Marek, *Kodeks karny. Komentarz*, Warszawa 2010, p. 487; B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności, przeciwko wolności sumienia i wyznania, przeciwko wolności seksualnej i obyczajności oraz przeciwko czci i nietykalności cielesnej. Komentarz*, Warszawa 2001, p. 314.

23 J. Raglewski, *Komentarz do art. 216*…; B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności*…, p. 317; P. Hofmański, J. Satko, *Przestępstwa przeciwko czci*…, p. 48; A. Marek, *Kodeks karny. Komentarz*…, p. 480. Differently: R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 2002, p. 342.

24 Resolution of the Supreme Court of October 29, 2012.

25 T. Fedorszczak, *Przestępstwa przeciwko religii*…, pp. 88, 90; R. Krajewski, *Ochrona wolności sumienia i wyznania w świetle Kodeksu karnego z 1997 r.*, "Przegląd Sądowy" 2008, No. 3, pp. 75–76; R. Paprzycki, *Prawnokarna analiza zjawiska satanizmu w Polsce*, Kraków 2002, p. 50; W. Janyga, *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznania*, Warszawa 2010, pp. 224–229; E. Kruczoń, *Przestępstwo obrazy uczuć religijnych*, "Prokuratura i Prawo" 2011, No. 2, p. 56; M. Filar, *Przestępstwa przeciwko wolności sumienia i wyznania* [in:] *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, Issue 18, eds. *idem*, W. Radecki, Warszawa 1998, p. 105; *idem*, *Komentarz do art. 216 Kodeksu karnego* [in:] *Kodeks karny. Komentarz*, ed. *idem*, Warszawa 2016, p. 1324; R. Góral, *Kodeks karny. Praktyczny komentarz*…, p. 331; M. Makarska, *Przestępstwa przeciwko wolności sumienia i wyznania w kodeksie karnym z 1997 r.*, Lublin 2005, p. 164.

The object of the executive act[26] of insult under Article 262 § 1 of the Criminal Code is a human corpse, human ashes,[27] or the resting place of the deceased.[28]

The term corpse has a legal definition. Bodies of deceased persons and stillborn children are considered corpses, regardless of the duration of pregnancy in the case of the latter.[29] The moment of death is defined as demise. According to Article 43 of the Act of December 5, 1996, on the Profession of Physician and Dentist,[30] a physician may determine death on the basis of personally performed examinations and findings.[31] Human remains are not human corpses. The concept of human remains has a legal definition in § 8(1) of the Regulation of the Minister of Health of December 7, 2001, on the handling of human remains and remains.[32] According to this paragraph, human remains are: ashes resulting from the burning of corpses; remains of corpses excavated when digging a grave or under other circumstances; and parts of the human body, detached from the whole.

2. The object of the crime of insulting a corpse

The object of the crime is a concept similar to the object of an attack and the object of protection.[33] It defines the legal good protected by specific criminal law provisions.[34]

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[26] A real world object on which the perpetrator's behavior is focused (B. Wróblewski, *Przedmiot przestępstwa, zamachu i ochrony w prawie karnym*, Wilno 1939, pp. 3–5).

[27] Human ashes are remains that, as a result of decomposition or cremation, can no longer be referred to as cadavers, i.e. bones and the remains of bones (A. Lach, *Komentarz do art. 262*…).

[28] A resting place is any place where the deceased is buried, regardless of whether it is in a cemetery or other public or private place, as well as anything connected with it (R. Stefański, *Przestępstwo znieważenia zwłok*…, p. 24). Currently, there is no legal definition of a grave in Polish law. The legal definition of a grave was contained in § 6 of the Regulation of the Ministers of Territorial Economy and Environmental Protection and Health and Social Welfare dated October 20, 1972, on the establishment of cemeteries, the keeping of cemetery books, and the burying of the dead, which expired in 2008 (Journal of Laws 1972 No. 47, item 299).

[29] § 2 of the Regulation of the Minister of Health of December 7, 2001 on the handling of human remains and remains (Journal of Laws No. 153, item 1783).

[30] Journal of Laws 2005 No. 169, item 1411.

[31] More: A. Szczęsna, *Wokół medycznej definicji śmierci* [in:] *Umierać bez lęku: wstęp do bioetyki kulturowej*, ed. K. Szewczyk, Warszawa–Łódź 1996, pp. 77–78; I. Ziemiński, *Zagadnienie śmierci w filozofii analitycznej*, Lublin 1999, p. 102; T. Kalita, *Śmierć mózgu jako granica prawnokarnej ochrony życia człowieka*, "Prokuratura i Prawo" 2016, No. 7–8, p. 44; P. Morciniec, *Legalny kanibalizm? Transplantacja organów pojedynczych: problem ustalenia kryterium śmierci* [in:] *Śmierć i wiara w życie pośmiertne w świetle nauk przyrodniczych i humanistycznych*, ed. M. Machinek, Olsztyn 2003, p. 203; A. Nestorowicz, *Śmierć mózgu, śmierć człowieka*, "Wiedza i Życie" 1996, No. 1, p. 16; K. Sobczak, A. Janaszczyk, *Kontrowersje wokół neurologicznego kryterium śmierci mózgu*, "Forum Medycyny Rodzinnej" 2012, No. 4, p. 190; A. Lewandowicz, *Kiedy nie umarł jeszcze człowiek?*, "Puls" 2012, No. 6–7, pp. 36–37.

[32] Journal of Laws No. 153, item 1783.

[33] P. Kozłowska-Kalisz, *Ustawowe znamiona czynu zabronionego* [in:] *Prawo karne materialne. Część ogólna*, ed. M. Mozgawa, Warszawa 2016, p. 193.

[34] *Ibid*.

These terms can be used interchangeably.[35] A distinction can be made between the general, generic, and individual object of crime.[36] A legal good should be understood as a value that is highly important to the individual, as well as to society in general; that why it is subject to criminal law protection.[37] However, this does not mean that only the goods (values) specifically indicated by the legislator are legally protected.[38] The catalog of goods deserving protection, if it is assumed that there is such a thing at all, is not closed and expands as society develops.[39]

Legal goods can be differentiated according to whether they have a simple or a complex structure. Simple goods are those that are the object of protection on one level of social functioning. Complex goods, on the other hand, are goods protected in more than one sphere of social relations. Examples of simple goods include life, health, or property. However, the vast majority of goods are complex in nature, such as peace, freedom, family, or economic turnover.[40] Sometimes a single act disrupts the normal functioning of society in so many spheres, and thus violates so many legal goods, that it is impossible to say unequivocally what constitutes the primary object of protection. Such is the case with insulting or robbing a corpse, human ashes, a grave, or other resting place of a deceased person.

2.1. General and generic object of the crime of insulting a corpse

The general object of protection is taken as common to all types of crimes: the totality of social relations in a given society protected by criminal law or the totality of values protected by the criminal legal system.[41]

The generic (statutory) object of the crime of insulting a corpse is public order. This concept does not have a legal definition. It serves both as an object of protection and as a statutory characteristic of certain crimes.[42] The concept of public order can be understood as either narrow or broad.[43] In the first, it is identified with legal order, understood as "the state of undisturbed reign of legal order."[44] In turn, in the broad view, public order is often identified with security, social order, and public peace.[45] In defin-

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35 K. Buchała, *Prawo karne materialne*, Warszawa 1989, p. 199; I. Andrejew, *Polskie prawo karne*…, p. 163; T. Bojarski, *Polskie prawo karne. Zarys części ogólnej*, Warszawa 2012, p. 120.

36 L. Gardocki, *Prawo karne*, Warszawa 2015, pp. 92–95.

37 M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warszawa 1995, p. 25.

38 E. Partridge, *Posthumous Interests and Posthumous Respect*, "Ethics" 1981, No. 91(2), p. 256.

39 D. Gruszecka, *Pojęcie dobra prawnego w prawie karnym*, "Wrocławskie Studia Erazmiańskie. Zeszyty Studenckie" 2008, No. I, pp. 142–144.

40 S. Tarapata, *Dobro prawne w strukturze przestępstwa. Analiza teoretyczna i dogmatyczna*, Warszawa 2016, pp. 100–121.

41 H.J. Hirsch, *W kwestii aktualnego stanu dyskusji o pojęciu dobra prawnego*, "Ruch Prawniczy, Ekonomiczny i Społeczny" 2002, No. 1, p. 6.

42 M. Flemming, W. Kutzman, *Przestępstwa*…, p. 9.

43 J. Waszczyński, *System prawa karnego. Tom IV. O przestępstwach w szczególności*, Wrocław 1989, pp. 719–721.

44 M. Flemming, W. Kutzman, *Przestępstwa*…, p. 10.

45 See W. Kubala, *Ochrona porządku publicznego w polskim prawie karnym*, Warszawa 1983, p. 76; W. Makowski, *Prawo karne. O przestępstwach w szczególności*, Warszawa 1924, pp. 144–147.

ing the concept of public order, some authors emphasize the subjectivity of the concept by defining it as a state of mental equilibrium of social groups and collectivities.[46]

A linguistic analysis of the title of Chapter XXXII of the Criminal Code prompts the conclusion that the concept of public order is the common and main object of protection of crimes under this chapter. However, one cannot agree with such a position. Every crime is directed against public order.[47] Based on studies conducted by Marian Flemming and Witold Kutzman, which indicate a tendency to reduce the number of crimes under the Criminal Codes of 1932, 1969, and 1997 (respectively: 40 articles, 19 articles, and 13 articles[48]), it should be assumed that the Polish legislator in this particular case adopts a transcendental concept of legal good.[49] which cannot be clearly defined yet. This is the reason for the collective nature of Chapter XXXII of the Criminal Code.[50] The above-mentioned authors divide the crimes in Chapter XXXII into four groups (political, against the public order *sensu stricto*, against human freedom and dignity, and others). The offense of insulting a corpse is placed in the category of "other crimes that are difficult to reduce to a common denominator."[51] With the above in mind, it is worth quoting some definitions of public order and comparing them with the understanding of the general object of protection indicated at the beginning of this article.

Jerzy Zaborowski states that public order, tranquility, and security are elements characteristic of a certain state, enabling the members of organized society to coexist and enabling society to develop undisturbed.[52]

According to Stefan Glaser, public order is a state of security existing in society, a state of the undisturbed reign of legal order, and, from the subjective point of view, a state of public awareness of the existence of this state.[53]

Władysław Kawka calls public order a set of norms (and not only legal ones) the observance of which determines the normal coexistence of human individuals in a state.[54]

According to Stefan Bolesta, public order is a system of legal-public devices and social relations arising or forming in public places (i.e., in the open and in the place of public use, which can be used by all people) and social relations arising or developing in non-public places, and ensuring, in particular, the protection of life, health and property of citizens and social property.[55]

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46 J. Waszczyński, *System prawa karnego*…, p. 719.

47 W. Wolter, *Nauka o przestępstwie. Analiza prawnicza na podstawie przepisów części ogólnej kodeksu karnego z 1969 r.*, Warszawa 1973, p. 44.

48 M. Flemming, W. Kutzman, *Przestępstwa*…, p. 13.

49 D. Gruszecka, *Pojęcie dobra prawnego*…, p. 143.

50 M. Kalitowski [in:] *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2012, p. 1169.

51 M. Flemming, W. Kutzman, *Przestępstwa*…, pp. 15–17.

52 J. Zaborowski, *Prawne środki zapewnienia bezpieczeństwa i porządku publicznego*, Warszawa 1977, p. 7.

53 S. Glaser, *Polskie prawo karne w zarysie*, Kraków 1933, p. 355.

54 W. Kawka, *Policja w ujęciu historycznym i współczesnym*, Wilno 1939, pp. 67–69.

55 S. Bolesta, *Pozycja prawna MO w systemie organów PRL*, Warszawa 1972, p. 118; *idem*, *Charakter i zakres prawny działalności Milicji*, "Zeszyty Naukowe ASW" 1975, No. 9, pp. 135–151.

According to Włodzimierz Kubala, public order is the state of social relations and devices desirable from the point of view of the interests of the state, ensuring the proper functioning of the apparatus of government and management, and guaranteeing security and tranquility in places open to the public. This state is regulated by legal norms and principles of social coexistence.[56]

Jerzy Zaborowski defines public order as a state of facts within the state, regulated by "legal and extra-legal norms […] the observance of which enables the normal coexistence of individuals in the state organization."[57]

Zdzisław Kijak describes public order as a desirable state of facts within the state, regulated by legal norms and rules of social coexistence, the observance of which enables normal collective coexistence in a specific place and time.[58]

Comparing the definitions of public order and the general object of protection indicated above, it can be stated that they are identical to such an extent that it seems permissible to put an equal sign between them. Thus, it is justified to state that in the case of crimes under Chapter XXXII of the Criminal Code, the generic object of protection is the general object of protection, and the generic object is not specified. Thus, it should be agreed that in a given chapter of the Criminal Code we are dealing with a number of individual objects of protection.[59]

It is worth noting the historical context of the inclusion of Chapter XXXII in the current Criminal Code. Most of the crimes in a given chapter can be assigned an object of protection that is abstract enough, but at the same time specific enough that this allows them to be placed in other parts of the law, or, if the object of protection is characterized by a special peculiarity, to create a separate chapter for them in a special part of the Penal Code.

In the case of insulting a corpse, it is difficult to agree with the claim that the behavior criminalized in Article 262 of the Criminal Code is just a violation of public order, so legally relevant that it should be punishable mainly for this reason. This crime is so individualized that in some legislations a chapter in the criminal law is separately devoted to it.[60] Leaving aside the redundancy of Chapter XXXII of the Criminal Code and the possibility of locating its individual crimes in other chapters, it is necessary, following Władysław Wolter and Lech Gardocki,[61] to consider public order as a general

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[56] W. Kubala, *Porządek publiczny jako rodzajowy przedmiot ochrony przepisów prawa karnego*, "Palestra" 1981, Vol. 25, No. 7–9, p. 56.

[57] J. Zaborowski, *Administracyjno-prawne ujęcie pojęć "bezpieczeństwo publiczne" i "porządek publiczny". Niektóre uwagi w świetle unormowań prawnych 1983–1984*, "Zeszyty Naukowe ASW" 1985, No. 41, p. 130.

[58] Z. Kijak, *Pojęcie ochrony porządku publicznego w ujęciu systemowym*, "Zeszyty Naukowe ASW" 1987, No. 47.

[59] A. Marek, *Kodeks karny. Komentarz…*, p. 485; *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Warszawa 2016; *Kodeks karny. Komentarz*, ed. M. Mozgawa…

[60] Cf. South Korea Criminal Code from 1953, http://www.refworld.org/docid/3f49e3ed4.html [accessed: 2023.06.30]; Japan Criminal Code, http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf [accessed: 2023.06.30].

[61] W. Wolter, *Nauka…*, p. 44; L. Gardocki, *Prawo karne…*, p. 92.

object of protection that is protected regardless of its location in a special part, and therefore to assume that in the case of the crime of Article 262 of the Criminal Code, the generic object of protection is human reputation, which, incidentally, is indicated in the literature as an object of protection, but as an individual object of protection.[62] However, it should be accepted that reputation is a generic object of protection, since it is a manifestation of the protection of human dignity. Human dignity is an absolute axiom and it does not expire even after the death of a person.[63] Thus, teleologically, it seems reasonable to understand the generic object of protection as something that follows directly from the supreme value, which here is human dignity. It is also worth noting that the reputation of a deceased person is not subject to civil protection as a legal good,[64] as this would be flawed by the construction of 24 of the Civil Code. Therefore, a *de lege ferenda* postulate should be made that the behavior criminalized in Article 262 of the Criminal Code should be placed in Chapter XXVII of the Criminal Code, that is among crimes against reputation and bodily integrity.

Recapitulating the above considerations, the generic object of protection of the crime under Article 262 of the Criminal Code should be taken as reputation. Respect for any person is his/her constitutional right to be free from a feeling of humiliation and does not expire after his/her death,[65] but due to the impossibility of defending one's good name after death,[66] the legislator rightly criminalizes behavior that violates the reputation of a dead person,[67] which seems justified and meets the test of proportionality.[68]

2.2. The individual object of the crime of insulting a corpse

There are many different opinions regarding the determination of the individual object of protection of the crime of insulting a corpse in the Polish criminal legal order. The individual object is indicated thus:

1) veneration for the deceased,[69]
2) protecting the human corpse and resting place against profanation,[70]

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62 A. Lach, *Komentarz do art. 262…*; M. Mozgawa, *Komentarz do art. 262…*; Z. Ćwiąkalski, *Komentarz do art. 262…*

63 Judgment of the Constitutional Court of October 5, 2015, K12/14, Journal of Laws of 2015, item 1633.

64 The worship of the deceased is protected. For more: P. Księżak, *Komentarz do art. 23 Kodeksu cywilnego* [in:] *Kodeks cywilny. Komentarz. Część ogólna*, eds. *idem*, M. Pyziak-Szafnicka, Warszawa 2014.

65 R. Belliotti, *Do Dead Human Beings Have Rights?*, "Personalist" 1979, No. 60, p. 201.

66 S. Winter, *Against Posthumous Rights*, "Journal of Applied Philosophy" 2010, No. 27(2), p. 186.

67 K. Smolensky, *Rights of the dead*, "Hofstra Law Review" 2009, No. 37(3), p. 774.

68 Judgment of the Constitutional Tribunal of October 11, 2006, P3/06, Journal of Laws 2006 No. 190, item 1409; judgment of the Constitutional Tribunal of October 30, 2006, P10/06, Journal of Laws 2006 No. 202, item 1492.

69 L. Peiper, *Komentarz do kodeksu karnego*, Kraków 1936, p. 360; R. Stefański, *Przestępstwo znieważenia zwłok…*, pp. 21–22.

70 Judgment of Supreme Court of May 20, 1948, ZO 1949, item 36.2.

3) the inviolability of objects found with the dead and the material inviolability of the resting place of the corpse,[71]
4) affection for the deceased, expressed in respect for the corpse, human ashes, and resting places,[72]
5) the institution of the mourning rite,[73]
6) the honor, respect, and peace due to the deceased and their eternal resting place,[74]
7) the feelings of people related to the deceased, especially those close to the deceased,[75]
8) human dignity,[76]
9) respect for human corpses and their place of burial and the protection of reverence towards them and their loved ones,[77]
10) respect and reverence for the remains of the deceased and their resting places; and further the protection of the feelings of those close to the deceased and possible religious feelings,[78]
11) respect for corpses, human ashes, and resting places.[79]

To determine the object of protection of the crime of insulting a corpse, it is important to determine the reason for its criminalization.[80] However, it is impossible to agree with the statement of Juliusz Makarewicz,[81] supported by Ryszard Stefański,[82] among others, that respect for the corpse lies in connection with the cult of the deceased, and not with respect for the human body. This position violates the protection of the feelings of non-believers or those who do not practice the cult of the dead. There is no legal obligation to worship the deceased. The belief that the memory of the deceased must be respected is only culturally based, and therefore should not be the basis for criminalizing behavior that violates it. The obligation to worship the deceased is not a legal norm. No one can be forced to cultivate the memory of the deceased, much less be forced to remember the deceased at all.[83] The cult of deceased is a moral norm; so it cannot be an independent basis for criminalization.[84]

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71 J. Śliwowski, *Prawo karne*…, p. 438.
72 *Prawo karne w zarysie. Część szczególna*, ed. J. Waszczyński, Łódź 1981, pp. 148–149.
73 *Prawo karne. Zagadnienia teorii i praktyki*…, p. 352.
74 Z. Ćwiąkalski, *Komentarz do art. 262*…
75 R. Góral, *Kodeks karny. Praktyczny komentarz*…, p. 423.
76 A. Rybak, *Prawnokarna ochrona*…, p. 100.
77 *Kodeks karny. Komentarz. Tom II*, ed. A. Wąsek, Warszawa 2004, p. 380.
78 D. Gruszecka, *Komentarz do art. 262*…
79 A. Lach, *Komentarz do art. 262*…
80 R. Stefański, *Przestępstwo znieważenia zwłok*…, p. 21.
81 J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1932, p. 265.
82 R. Stefański, *Przestępstwo znieważenia zwłok*…, p. 21.
83 More about *Memory Law:* S. Löytömäki, *Law and the Politics of Memory. Confronting the Past*, Cheshire 2014.
84 A. Wąsek, *Prawo karne – minimum moralności*, "Annales UMCS. Sectio G" 1984, Vol. 31, No. 3, p. 50. Cf. L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa 1990, p. 171; A. Wąsek, *W kwestii*…; R. Paprzycki, *Prawnokarna ochrona*…, p. 109.

As Stefański emphasizes, respect for the corpse stems from humanity and dignity,[85] However, this author fails to note that these are not the same concepts, which, in turn, is pointed out by Witold Kulesza.[86] Humanity is a set of specific characteristics of the human species.[87] These are such elements of the anatomical and morphological structure of a being that allow it to be considered human. They also include non-material qualities, such as the ability to think abstractly. Dignity does not exist materially. The concept is conventional in nature. It is assumed that it cannot be defined, but it is an inalienable attribute of every human being and at the same time a source of other values.[88] It is emphasized that a person has dignity just by virtue of being human.[89] However, Stefański wrongly highlights that the act under Article 262 of the Penal Code does not directly harm human dignity, but does so indirectly.[90] Since dignity is the source of other values,[91] it *prima facie* follows that the violation of these values directly harms dignity and only indirectly harms other goods, not the other way around. This reasoning is supported, among other things, by the structure of the Criminal Code of France, in which the crime of insulting a corpse is one of the crimes against dignity.[92] However, since dignity is the source of all personal goods, it seems unnecessary to identify it in every case as an object of criminal protection. It cannot be assumed that it is not subject to protection under Article 262 of the Criminal Code. I agree with Agnieszka Rybak about the object of protection of a corpse from insult, but with several reservations. Her view is supported by the Judgment of the Court of Appeal in Kraków of September 7, 2000, II Aka 126/00,[93] in which the court emphasized the lack of identity of legally protected goods in the case of murder and the concealment of a corpse. Agreeing with the thesis of this ruling, Rybak writes: "This is because the perpetrator attacks different protected goods: with one of the acts, human life, and with the other, the reputation of and respect towards the dead, which precludes the adoption of an apparent concurrence of crimes." This view deserves approval, but it is not consistent with the earlier statement, establishing dignity as the object of protection of insulting a corpse. After all, it is dignity that is the source of both the right to life and the right to honor (reputation) after death; so according to Rybak's understanding there would be a unity of the legally protected good. However, Rybak also points

85 R. Stefański, *Przestępstwo znieważenia zwłok*…, p. 21.

86 W. Kulesza, *Zniesławienie i zniewaga*…, p. 165.

87 J.D. Buller, *Adapting Minds: Evolutionary Psychology and The Persistent Quest for Human Nature*, Cambridge 2005, p. 428.

88 D. Shultziner, *Human Dignity – Functions and Meanings*, "Global Jurist Topics" 2003, No. 3, pp. 1–21.

89 L. Peiper, *Komentarz do kodeksu karnego*…, p. 360; Z.J. Zdybicka, *Wolność religijna fundamentem ludzkiej wolności*, "Człowiek w Kulturze. Prawa Człowieka" 1998, No. 11, p. 129.

90 R. Stefański, *Przestępstwo znieważenia zwłok*…, p. 21.

91 I. Zgoliński, *Zniesławienie w polskim prawie karnym*, Warszawa 2013, p. 22. Dignity is not to be defined as self-esteem. Dignity is an autonomous concept in relation to self-esteem. Self-esteem and reputation derive from personal dignity (H.J. Hirsch, *Ehre und Beleidigung*, Heidelberg 1967, p. 101; K. Schmid, *Freiheit der Meinungsäußerung und strafrechtlicher Ehrenschutz*, Tubingen 1972, p. 51).

92 Criminal Code of France, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/ [accessed: 2023.06.30].

93 KZS 2000, No. 9, item 34.

to the honor and respect due to the deceased as an object of protection, but this is inconsistent with her argumentation.

Therefore, dignity is a value that is directly violated in any violation of legal goods closely related to a person, including insulting a corpse or grave, but as the source of these goods, it seems unnecessary to point to it as a legally protected good in every single case. Therefore, the assertion that respect and honor for the corpse derive from dignity, but that this does not mean that it is subject to protection, is unacceptable.[94]

3. Comparison with other European regulations

Crimes of which the object of the executive action is a human corpse are not a homogeneous group. With regard to the object of protection of the crimes in question (both main and collateral), they are divided into the following groups:

1) crimes against the honor (reputation) and physical integrity of the corpse,
2) crimes against the place of rest,
3) crimes of taking property from a corpse or resting place,
4) crimes of a sexual nature,
5) crimes of a medical nature,
6) crimes of a religious nature,
7) criminal-procedural crimes,
8) administrative crimes.[95]

The heterogeneity of definition of the object of protection of the crime of insulting a corpse is also visible in European legislation. As in the Polish legislation, the verbal elements suggest a different individual object of protection from the statutory one.

In the Albanian regulation, the statutory object of protection is morality and dignity, while the criminal act is desecration (*desacration*), which suggests that religious feelings and respect for places considered sacred are also protected.[96]

Similarly, despite the designation of public order as the statutory object of protection, behavior that violates religious sentiments and respect for places of worship is indicated as the criminal action. This is noted in the Danish regulation ("whoever violates the sanctity of cemeteries"),[97] the Swiss regulation ("whoever seriously [*in roher Weise*] desecrates [*verunehrt*] the resting place of the deceased, or maliciously disrupts

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[94] Cf. L. Manteuffel, *Etyczne aspekty transplantacji serca* [in:] *Krąg życia i śmierci. Moralne problemy medycyny współczesnej*, ed. Z. Szawarski, Warszawa 1987, pp. 298–299. Differently: R. Stefański, *Przestępstwo znieważenia zwłok*…, pp. 21–22.

[95] M. Najman, *Determinants of the Object of Protection of the Crime of Desecration of a Corpse and a Grave and Defamation of a Deceased Person*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2021, Vol. 13, No. 3, p. 242.

[96] Criminal Code of Albania, https://www.legislationline.org/documents/section/criminal-codes/country/47/Albania/show [accessed: 2023.06.28].

[97] Criminal Code of Denmark, https://legislationline.org/sites/default/files/documents/39/Denmark_Criminal_Code_am2005_en.pdf [accessed: 2023.06.28].

[*böswillig stört*] or desecrates a funeral procession or funeral ceremony"),[98] the Russian regulation ("insults on the bodies of the dead or damage, destruction or desecration of burial sites, gravestones or cemetery buildings intended for funeral ceremonies or memorial ceremonies"),[99] and the Icelandic regulation ("the same punishment applies to whoever acts unworthily with objects belonging to churches or intended for church ceremonies").[100]

Swedish legislation, on the other hand, identifies public order as the statutory object of protection, but the executive actions indicate a violation of administrative regulations ("whoever, without permission [*obehörigen*], exhumes [*flyttar*], […] opens a grave or otherwise damages or destroys a coffin, urn, grave, other resting place of the deceased or a gravestone").[101] The Dutch regulation is similar ("any person who intentionally prevents lawful access to a cemetery or crematorium or the lawful transportation of a corpse to a cemetery or crematorium; any person who intentionally violates [*graf schendt*] a grave or intentionally and unlawfully destroys or damages a monument erected in a cemetery [*enig op een begraafplaats opgericht gedenkteken*]; any person who intentionally and unlawfully exhumes [*opgraaft*] or takes [*wegneemt*] a human corpse or transfers [*verplaatst*] or transports [*vervoert*] it"),[102] as it is in the Croatian regulation ("whoever, without authorization, exhumes [*iskopa*], digs up [*prekopa*], demolishes [*razruši*], destroys [*ošteti*] or otherwise grossly desecrates [*grubo oskvrne*], a grave, burial site or monument to the dead"), and in the Finnish regulation ("whoever unlawfully opens a grave or removes a body or part thereof, a coffin or a buried urn from it").[103]

On the other hand, German legislation is different, as it identifies religion and worldview as the statutory object of protection [*Straftaten, welche sich auf Religion und Weltanschauung beziehen*], while the executive act consists in a violation of administrative regulations ("whoever unlawfully takes the body or parts of the body of a deceased person, a stillborn fetus or parts thereof, or the ashes of a deceased person from the custody of a person entitled to it").[104] It is the same in Lithuanian legislation ("whoever unlawfully takes away the remains of a deceased person or parts thereof; whoever

98 Criminal Code of Switzerland, https://www.admin.ch/opc/en/classified-compilation/19370083/201903010000/311.0.pdf [accessed: 2023.06.28].

99 Criminal Code of Russia, https://www.legislationline.org/documents/section/criminal-codes/country/7/Russian%20Federation/show [accessed: 2023.06.28].

100 Criminal Code of Iceland, https://www.government.is/library/Files/General_Penal_Code_sept.-2015.pdf [accessed: 2023.06.28].

101 Criminal Code of Sweden, https://www.legislationline.org/documents/section/criminal-codes/country/1/Sweden/show [accessed: 2023.06.30].

102 Criminal Code of Netherland, https://sherloc.unodc.org/res/cld/document/nld/1881/penal-code-of-the-netherlands_html/Netherlands_Penal_Code_1881_as_amd_2014.pdf [accessed: 2023.06.30].

103 Criminal Code of Croatia, https://legislationline.org/sites/default/files/documents/3b/Croatia_Criminal_Code_2011_en.pdf [accessed: 2023.06.30].

104 Criminal Code of Germany, https://www.gesetze-im-internet.de/stgb/index.html [accessed: 2023.06.30].

unlawfully digs up [*atkasė*] a grave")[105] and in Austrian legislation ("whoever unlawfully removes [*wegschafft*] a corpse or parts of a corpse or ashes of a deceased person from a grave, monument or other resting place, or improperly handles [*mißhandelt*] a corpse, parts thereof, ashes of a deceased person or a grave").[106]

The Spanish regulation is somewhat different. In it the statutory objects of protection are freedom of conscience, religious feelings, and respect for the dead while the formulation of a perpetrator's actions clearly indicate that the object of protection is the honor (reputation) of the deceased ("whoever disrespecting [*faltando al repeto*] the memory of the dead, destroys graves or tombs [*sepulcros o sepulturas*], desecrates corpses or ashes or, with intent to humiliate, destroys, alters or damages funerary urns, cemeteries, shrines, and tombstones").[107]

Conclusions

As indicated, the generic object of protection against insult to a corpse is the reputation of a human being, which does not cease after death.[108] In turn, the reputation of the deceased should be considered an individual object of protection.[109] This is a special type of reputation that requires public law protection. First of all, the deceased cannot defend his/her personal rights on his/her own. Second, not every deceased person has relatives who can defend his/her honor. Thirdly, honor (reputation) is an attribute of every person, regardless of his or her deeds during life or religion.[110] It seems unnecessary to introduce an additional concept of respect for the corpse as an object of protection, since it remains essentially the same as the concept of honor. It should

[105] Criminal Code of Lithuania, http://www.uwm.edu.pl/kpkm/uploads/files/litewski-kodeks-karny.pdf [accessed: 2023.06.30].

[106] Criminal Code of Austria, http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/93674/109612/F467747936/AUT93674%20Ger.pdf [accessed: 2023.06.30].

[107] Criminal Code of Spain, https://legislationline.org/sites/default/files/documents/32/Spain_CC_am2013_en.pdf [accessed: 2023.06.30], https://wipolex.wipo.int/en/text/415252 [accessed: 2023.06.30].

[108] R. Belliotti, *Do Dead Human Beings…*, p. 201; D. Hacker, *The rights of the dead through the prism of Israeli succession disputes*, "International Journal of Law in Context" 2015, No. 1(03), pp. 42–43; J. Feinberg, *The Moral Limits…*, p. 83; *idem*, *Harm and Self-Interest* [in:] *idem*, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*, Princeton 1980, pp. 65–66; K. Smolensky, *Rights of the dead…*, pp. 763–804.

[109] See: Judgment of the Regional Court of Warsaw dated February 9, 2021, III C 657/19, LEX No. 3169942. The court held that "by asserting the protection of a personal good in the form of the cult of memory of a deceased person, respect for a person's personal goods (e.g., honor, image, privacy) after his or her death can also be ensured," as amended by the judgment of the Court of Appeals in Warsaw on August 16, 2021, I ACa 300/21 (https://oko.press/images/2021/10/Wyrok_I_ACa_300_21.pdf [accessed: 2023.05.04]).

[110] K. Smolensky, *Rights of the dead…*, p. 782. Differently: I. Zgoliński, *Zniesławienie…*, p. 94.

be noted, however, that it is a matter of the honor of a specific deceased person or a specific resting place of a deceased person, and not the dead in general.[111]

The positions stating the cult of the deceased, feelings of relatives or religious feelings as the (primary) individual object of protection of the crime of insulting a corpse should be rejected. This would significantly violate the religious feelings of non-believers, and, thus, the constitutional principle of equality before the law.[112] A collateral and possible object of protection may be religious feelings,[113] but this cannot be the main argument to justify posthumous protection of the human body.

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111 W. Makowski, *Prawo karne*…, p. 423.
112 Z. Mirgos, *Przestępstwa przeciwko uczuciom religijnym w polskim kodeksie karnym z 1932 r.*, "Wojskowy Przegląd Prawniczy" 1982, No. 37, p. 196.
113 D. Gruszecka, *Komentarz do art. 262*…

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Summary

Michał Najman

The Object Protected by the Criminalization of Insult to a Human Corpse in Polish Law

The insult of a human corpse is one of the oldest crimes. The guarantee of the inviolability of a human body after death, as well as the cult of the deceased are considered a precursors of religious faith. In the early periods of social development, the protection of corpses and burial sites stemmed from the prevailing religious beliefs among community members. Hence, in legal orders, it was religion, religious feelings, worship of the deceased, and others that were the main objects protected by the criminalization of insulting a corpse. To date, such a position remains popular and widely accepted. However, with the progress of civilization, more attention is beginning to be paid to the fact that the legal protection of human corpses is independent of religion. The purpose of the article is to point out the multiplicity of definitions of the object protected by the criminalization of insulting a corpse and thereby make the reader aware that

both the law and the values cultivated in society are dynamic institutions. This will make lawyers aware that their activity should not only focus on passive acceptance and repetition of the established truths and values, but also prompt them to figure out new ones or to search for new justifications that are more suitable in the current reality.

Keywords: insult, corpse, protection, criminalization.

Streszczenie

Michał Najman

Przedmiot przestępstwa znieważenia zwłok w prawie polskim

Przestępstwo znieważenia zwłok jest jednym z najstarszych przestępstw. Gwarancja nienaruszalności ciała człowieka po jego śmierci, a także kult zmarłych są uznawane za paragenezę wiary. W początkowych okresach rozwoju społecznego ochrona zwłok i miejsc wiecznego spoczynku wynikała z panujących wśród członków społeczności przekonań religijnych. Stąd też w porządkach prawnych jako przedmiot przestępstwa znieważenia zwłok wskazywano właśnie religię, uczucia religijne, kult zmarłych itp. Do chwili obecnej stanowisko takie cieszy się popularnością i powszechną akceptacją. Jednak wraz z postępem cywilizacyjnym zaczyna się coraz częściej zwracać uwagę na fakt, że prawna ochrona zwłok ludzkich jest niezależna od uwarunkowań wyznaniowych. Celem artykułu jest wskazanie na wielość określeń przedmiotu przestępstwa znieważenia zwłok i tym samym uświadomienie, że zarówno prawo, jak i wartości kultywowane w społeczeństwie są instytucjami dynamicznymi co do ich treści. Ma to uświadomić przedstawicieli doktryny, że ich aktywność nie tylko powinna skupiać się na biernej akceptacji i powtarzaniu zastanych prawd i wartości, lecz również wskazywać nowe bądź też poszukiwać ich nowego, bardziej przystającego do rzeczywistości uzasadnienia.

Słowa kluczowe: znieważenie, zwłoki, przedmiot przestępstwa.

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Essential Elements of the Democratic Rule of Law as an Expression of Constitutional Identity in the Czech Constitution[1]

Introduction

I would like to start this article with a personal experience. Several years ago, during my study visit to the USA, I was discussing constitutional comparative law with an American colleague. At one point he asked me what ideals I understood the Czech Constitution to express. I wasn't quite sure what he meant, so I asked him to tell me how he perceived the American constitution. He replied that for him the ideal expressed in the U.S. Constitution is the freedom of the rider on horseback in an open landscape, limited by nothing but the horizon and his own interests and abilities. This seemed to me to be a very illustrative expression of the basic philosophy on which the Founding Fathers built the American constitutional system. I then tried to find a similarly apt statement of the Czech constitutional philosophy, but failed. Only later did I connect the notion of constitutional identity to this discussion. However, the attempt to find that Czech constitutional ideal, i.e. the Czech constitutional identity, periodically comes back to me. The present text is an attempt to move further in the search for it. It consists of two parts. In the first part I focus on the concept of constitutional identity in a general comparative perspective and its connection with constitutional philosophy. In the second part I try to apply these premises to the Constitution of the Czech Republic, specifically its core values denominated by the Czech Constitution as the essential elements of the democratic rule of law and analyze, whether they can be used to define Czech constitutional identity.

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1. Source and definition of constitutional identity

Even with an increasing amount of legal discourse on the topic in recent years, constitutional identity remains a fundamentally contested, in some aspects, even a controversial concept. A variety of definitions and approaches are found in the literature and case law. Two basic approaches derive from the two basic meanings of the word identity: (1) who or what a person or thing is, what qualities define it; (2) or very close similarity, affinity, or sameness, being identical. From the point of view of constitutional law and constitutional identity, both meanings have significant importance. Constitutional identity in the meaning of defining qualities of the constitution or constitutional system is a key factor in the process of interpreting a constitution. Constitutional identity in terms of sameness is an instrument of self-preservation of a constitution, and thus a key concept related to constitutional amendments and unchangeable provisions in a constitution. Many constitutions require that even after amending them, the constitutional system must remain "the same," or in other words it still must retain its constitutional identity.

The key in-depth analysis was conducted by Gary Jeffrey Jacobsohn, who argues that "a constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings."[2]

Michel Troper, on the other hand, sees constitutional identity as the result of a process of extracting certain essential principles distinct from other constitutional provisions, the purpose of which is to protect the integrity of the constitution so as not to weaken the constitution's crucial connection to the people or nation it is intended to serve.[3] He thus understands constitutional identity as part of the constitutional text, which is manifested in specific provisions enshrining the basic immutable principles of the state system. Examples include the requirement of a republican form of government enshrined in the constitutions of France or the USA, secularism in the Turkish constitution, or the protection of the essential elements of the democratic rule of law in the Czech Constitution. This perspective corresponds with the concept of the common constitutional traditions of the EU Member States,[4] which has been elaborated and defined in more detail by the CJEU in its case law.[5]

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2 G.J. Jacobsohn, *Constitutional Identity*, Cambridge 2010, p. 7.

3 M. Troper, *Behind the Constitution? The Principle of Constitutional Identity in France* [in:] *Constitutional Topography: Values and Constitutions*, eds. A. Sajó, R. Uitz, The Hague 2010, p. 202.

4 See Article 6(3) of the Treaty on European Union (2012/C 326/01) and Article 52(4) of the Charter of Fundamental Rights of the European Union (2012/C 326/02).

5 See for example judgment of 17th December 1970, No. 11/70 *Internationale Handelsgesellschaft*, or judgment of 14th May 1974, No. 4/73 *Nold*.

Synthesizing what was said above, we can identify two general approaches to the perception of constitutional identity. According to the first approach, constitutional identity identifies a particular constitutional regime. It is therefore a certain set of elements or features that, when present in a constitutional system, mean that it is still the same (identical) constitutional system. Conversely, if any of these elements cease to be present, it will mean that the constitutional system is different. In the second approach, constitutional identity defines the intention of the sovereign, that is, in simple terms, who the people, who have adopted a given constitution, understand themselves to be. Its aim, then, is not so much to assess whether it is still the same constitutional system, but to define the constitutional sovereign, to say who we are. The first approach can, in theory, be implemented quite formally, based on certain constitutional mechanisms (e.g. form of government, form of state, system of checks and balances). The second approach, however, is inherently value-based.[6]

Constitutional identity is characterized by the fact that, unlike personal identity, it is a collective identity. This implies a particular dynamic tension between individual difference and belonging to a particular community. As in the case of personal identity, on the one hand we want to be different from others, but at the same time we want to belong to a particular group or community. We can observe here another dichotomy related to the discourse on constitutional identity focusing on the question as to whose identity it refers to: the constitution itself or the political community ruled by the constitution? As summarized by Zoltán Szente, European discourse focuses on the identity of the constitution itself, while U.S. scholars focus on the identity of the people and their attitude towards their constitution.[7] In the Czech context, we can observe tension between the legal approach to constitutional identity, as defined by the Czech Constitutional Court and constitutional scholars, and popular approach, based on people's reflection of the nation's past and their aspirations.[8]

Constitutional identity must relate to the constitutional community as a whole, which can be a very difficult task in the case of some states, given the degree of social differences and the distinctiveness of different social groups. Setting certain principles accepted by all actors and thus creating a fair playing field for political competition is one of the key tasks of a constitution, which also reflects constitutional identity.[9] For example, the Constitution of South Africa states in its preamble: "We, the people of South Africa, […] believe that South Africa belongs to all who live in it, united in our diversity." If we consider not political or class differences, but regional or national differences, federalism may be a suitable element of constitutional identity to overcome

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6 M. Tomoszek, *Podstatné náležitosti demokratického právního státu*, Praha 2015, p. 115.

7 Z. Szente, *Constitutional identity as a normative constitutional concept*, "Hungarian Journal of Legal Studies" 2022, Vol. 63, No. 1, p. 6.

8 D. Kosař, L. Vyhnánek, *Constitutional Identity in the Czech Republic. A New Twist on an Old-Fashioned Idea?* [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. van der Schyff, Cambridge 2019, pp. 112–113.

9 A. Arato, *Civil Society, Constitution, And Legitimacy*, Lanham 2000, p. 168.

these differences while preserving a common identity, as we can see in the example of the USA, India, or even Czechoslovakia.

2. Constitutional identity in the context of constitutional philosophy and comparative constitutionalism

We can understand the term "constitutional philosophy" in various ways. In a more general perspective, it is the idea of constitutionalism expressed by the existence of a constitution in itself and its philosophical foundation related to the community of individuals or state that establishes such a constitution. In a more specific perspective, constitutional philosophy is understood as a philosophy of a given constitution, i.e. a specific philosophical basis for a specific constitutional text, which, as a result of the specifics of a given state's context, its historical, cultural, religious backgrounds and other developments, and the specifics of its constitutional and legal system, differ for each state. In other words, in this meaning constitutional philosophy defines on which philosophical foundations a given constitution is built. Most constitutions express, at least metaphorically, such ideas in their preambles or introductory provisions.

The question of constitutional identity is as old as the idea of constitutionalism itself. Aristotle, in his work *Politics*, reflects on the identity of a community of citizens (*polis*) in relation to the constitution of such a community: "the state is a partnership, and is a partnership of citizens in a constitution, when the form of government changes, and becomes different, then it may be supposed that the state is no longer the same, just as a tragic differs from a comic chorus, although the members of both may be identical. […] And if this is true it is evident that the sameness of the state consists chiefly of the sameness of the constitution, and it may be called or not called by the same name, whether the inhabitants are the same or entirely different."[10]

It is already clear from this notion that the concept of constitutional identity must be distinguished from national identity, although they can often overlap, combine or merge, depending on the content of a particular constitutional document. Some similarity between the two is seen in the fact that both national identity and constitutional identity bring together unknown, alien individuals into a national or constitutional community, often united by nothing other than the constitution or nationality. These communities can be described as so-called imagined communities, which have replaced family or tribal ties leading gradually to the emergence of an absolutist monarchy.[11]

It is therefore not surprising that modern constitutionalism as well as the idea of the nation-state were born out of the philosophical ideals of the Enlightenment. The need to find a new bond to maintain social cohesion among individuals arose with

[10] Aristotle, *Politics*, trans. B. Jowett, Kitchener 1999, p. 55.
[11] B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London 2006, p. 7.

the end of feudalism, which was based primarily on hierarchical fief relations, the legitimacy of which stemmed from God himself, so that no consent or acceptance from subjects was necessary.[12] However, a nation-state must already have a clearly defined territory and population on which it can exercise state power, and therefore Georg Jellinek's still valid three-element definition of a state applies: territory, population, and state power.[13]

Basing a constitutional identity on a national or ethnic basis can also pose a risk, being a useful tool for populist political parties to enforce various restrictions on equality, especially for minorities, for example in times of migration or other socio-economic crises. Such tendencies are a manifestation of the fact that, with regard to the sources of constitutional identity (discussed in more detail below), constitutional identity generally corresponds with how a given community perceives its identity. These might not necessarily be only liberal democratic ideals of freedom, equality, and justice; history teaches us that it can also be slavery, segregation, or the superiority of a single pure race or a particular ideology.[14] The Czech Constitution has, as a result of historical experience, abandoned the concept of a nation,[15] and consistently uses the term "people."

Abandoning earlier (pre-modern) theories of legitimacy (and related sovereignty) creates a vacuum that is filled by a constitutional identity. According to Michel Rosenfeld, that vacuum is filled in three ways. First comes (1) negation in the form of overcoming or even rejecting previous constitutional regimes. Negation, however, is just another contribution to the void, so in order for a constitutional community to emerge, it is necessary to begin to construct a positive narrative about the identity of that community, or to paint a certain positive image that captures its identity. The consolidation of constitutional identity is achieved through (2) metaphor, the use of external similarity (e.g.structure or scale), or (3) metonymy, which transfers a label or concept to another object based on criteria other than similarity.[16]

All three of these elements are illustrated by examples from the constitutional order of the Czech Republic. The negation of the practices of the previous regime are seen clearly, for example, in Art. 11 para. 1, second sentence, of the Charter of Fundamental Rights and Freedoms[17] or Art. 14 para. 4 of the Charter,[18] but also in Art. 12 para. 2 of the Constitution of the Czech Republic.[19] Metaphors are used often in both

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12 M. Rosenfeld, *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*, New York 2010, pp. 17–18.

13 G. Jellinek, *Všeobecná státověda*, Praha 1906, p. 148 *et seq.*, pp. 412–456.

14 D.J. Galligan, M. Versteeg, *Social and Political Foundations of Constitutions*, Cambridge 2013, p. 10.

15 J. Plaňavová-Latanowicz, *National and European Identity – Opposing or Complementary Concepts in Czech, Polish and EU Law?*, "Studia Europejskie" 2019, Vol. 23(1), p. 72.

16 M. Rosenfeld, *Constitutional Identity* [in:] *Oxford Handbook of Comparative Constitutional Law*, eds. *idem*, A. Sajó, Oxford 2012, p. 759.

17 Published under No. 2/1993 Coll., hereinafter referred to as "Charter"; the provision states: "The right of ownership of all owners has the same legal content and protection."

18 The provision states: "A citizen cannot be forced to leave his or her homeland."

19 Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, as amended, herein-

the preamble to the Constitution and preamble to the Charter, for examples references to values shared by other democratic states or to the traditions of Czech and Czechoslovak statehood. Metonymy is seen, for example, in the term "democratic rule of law,"[20] which combines the term democracy, which is linked to a political system, with the rule of law, which is a legal concept.

The more common approach today is to view the concept of the democratic rule of law as a combination of basic principles of rule of law with basic principles of democracy.[21] However, the concept of rule of law can be understood in different variations, in a narrow or wide sense,[22] and similarly there are different categories of democracy, which is illustrated by tension between procedural[23] and participative[24] democracy. This makes it quite hard to precisely define whether a certain country is perceived as democratic or not,[25] or adheres to the rule of law or not, and thus the basic principles of democracy and the rule of law, which are the minimum threshold, are not understood uniformly. The concept of the democratic rule of law also cannot be understood as additive in the sense of certain states being democratic and adhering to rule of law, because the provision does not state democratic and respecting the rule of law (*demokratický a právní stát*). The provision is qualitative, indicating a higher level of blending democracy and the rule of law.[26] The concept of the democratic rule of law is therefore not just a combination of certain democratic principles and certain principles of the rule of law, but the key element is the qualitative shift from the formal (or rather façade) rule of law to the substantive (material) rule of law and participative democracy, allowing the fulfillment of basic constitutional values. The Czech Constitutional Court expressed the key feature of concept of the democratic rule of law in this way: "The Czech Constitution […] subordinates the interpretation and application of legal norms to their substantive meaning, makes law conditional on respect for the fundamental constitutive values of a democratic society and measures the use of legal norms by these values."[27]

The value element is essential, because constitutional identity is often used for resolving conflicts within the constitutional community, between particular individuals and others, which are typically manifestations of the tension between identity

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after referred to as "Czech Constitution"; the provision states: "No one can be deprived of citizenship against his or her will."

20 In Czech: "Demokratický právní stát," Article 1 para. 1 of the Czech Constitution.

21 For example, see the structural distinction of principles of rule of law analyzed in V. Šimíček, *Commentary to Art. 1 para. 1* [in:] J. Filip *et al.*, *Ústava České republiky, komentář* [*Commentary to the Czech Constitution*], Praha 2010, pp. 27–28, and democratic principles analyzed in V. Šimíček, *Commentary to Art. 9 para. 2* [in:] J. Filip *et al.*, *Ústava České republiky, komentář*…, pp. 158–159.

22 B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, p. 91.

23 See e.g. J.A. Schumpeter, *Capitalism, Socialism and Democracy*, London 1976, p. 269 *et seq.*

24 R. Dahl, *Democracy and Its Critics*, New Haven 1989, p. 211 *et seq.*

25 For comparative analysis of different countries see L. Diamond, *Defining and Developing Democracy* [in:] *The Democracy Sourcebook*, eds. R. Dahl, I. Shapiro, J.A. Cheibub, Cambridge 2003, p. 36 *et seq.*

26 V. Mikule, R. Suchánek, *Commentary to Art. 1 para. 1* [in:] V. Sládeček *et al.*, *Ústava České republiky, komentář* [*Commentary to the Czech Constitution*], 2nd ed., Praha 2016, p. 12.

27 Decision of the Czech Constitutional Court from 21.12.1993, No. Pl. ÚS 19/93, Part A.

(sameness) and difference. Constitutional identity must provide answers to three fundamental questions related to the Constitution: "To whom is the constitution addressed? What should the constitution provide? And, how can the constitution be justified?"[28]

For the first question, the easy answer is that the constitution is addressed to the citizens of the state whose constitution is in question. However, not everyone who is in the territory has the status of a citizen, and even for these individuals the constitution has major implications, especially in the area of fundamental rights. History provides numerous examples of systemic discrimination, such as slavery or apartheid, which have been reflected (and sometimes based) in the relevant constitutional documents. Today, it is particularly the case of migrants, who represent an ever-growing segment of the population.

The justification of the constitution is constructed today in a more or less similar way in all constitutions and is based on social contract theory. In the case of the Czech Constitution, this is evident in the first sentence of the preamble (We, the citizens…[29]), similar to the US Constitution (We the people…). This provides an answer to the question of which subject can confer legitimacy on the constitution, which is closely related to the question of to whom the constitution is addressed. Logically, however, justification must be based also on facts other than who adopted the Constitution. After all, neither the Czech Constitution nor the U.S. Constitution were adopted by the people who are invoked by the constitutional text, but by a particular constituent assembly that had varying degrees of legitimacy to create and adopt the constitution. That said, it must be noted that the adoption of a constitution by referendum is one of the most common ways of adopting constitutions (see, for example, Switzerland in 1848, Chile in 1925, France in 1958, Estonia in 1992, Poland in 1997, or Syria in 2012). In addition to the constitutional subject – the people – social legitimacy is also important for the constitution as such, and especially for constitutional identity, providing justification for a new constitutional regime, whether it is a transition from a totalitarian regime to a democracy, a response to a social crisis or the resolution of a major social conflict.

The most difficult question concerns the content of constitutional regulation. In this respect, constitutions can quite legitimately follow very different conceptions based on contemporary contexts, political circumstances, historical experiences, or the objectives of the constitutional arrangements being adopted. Thus, the same institutions can fulfill fundamentally different roles in different constitutions. In the Federal Republic of Germany, federalism is an insurance policy for democratic order, while in Belgium it was introduced as a last-ditch attempt to hold together a deeply divided country. Some constitutions enshrine state religion and allow for an intense link between church and state, while others are strictly secular. As Hannah Pitkin notes: "to understand what a constitution is, one must look not for some crystalline core or

[28] M. Rosenfeld, *Constitutional Identity*…, p. 761.
[29] In Czech: „My, občané…"

essence of unambiguous meaning but precisely at the ambiguities, the specific oppositions that this specific concept helps us to hold in tension."[30]

This is closely linked to the issue of constitutional stability and amendments.[31] Pavel Holländer asserts that the "imperative of immutability, which establishes the identity of the constitutional system, is immanent to the constitution and is contained in it even if it is not explicitly stated."[32] If we see constitutional identity as the identity of a particular constitutional regime, it is necessary to somehow determine which changes of constitutional rules immediately lead to a change in constitutional identity and which do not. In other words, which constitutionally enshrined principles can be changed without changing constitutional identity and which constitutional principles define constitutional identity and are therefore immutable.

Similarly, it is important to note that the immutability of certain fundamental building blocks of the constitutional system can only prevent regime changes that take place through constitutionally prescribed procedures. Thus, for example, preventing parliament from passing a law that would extend the terms of office of its members indefinitely. However, it cannot protect the constitution from a violent coup d'état or de facto seizure of power. Jellinek points out in relation to immutable provisions that they can only be repealed by force, not by law.[33] The crucial difference, however, is that the absence of legitimacy is usually evident in the case of a violent seizure of power, while the appearance of legitimacy can be created by using constitutionally enshrined procedures. Some totalitarian regimes have created (or tried to create) the illusion that they respect rule of law because they have laws and courts, or that they are democratic because they hold elections.

Thus it can be concluded that constitutional identity is directly related to continuity. As long as constitutional identity is preserved, continuity is preserved, even though the specific wording of the constitutional text may change. Conversely, even without a change in the constitutional text, there can be a change in constitutional identity that stems from discontinuity: a typical example is the situation of Poland, which still has its 1997 Constitution in an (almost) identical form, yet it can be argued that since 2015 there has been a change in the understanding of constitutional identity, that at certain point there has been a break that has led to the creation of a new constitutional regime. The refusal of the Council of Ministers to publish the judgments of the Constitutional Tribunal can be seen as such a moment, effectively negating (without amending the Constitution) its function as the judicial guardian of constitutionality.

Finally, it is also necessary to point out the tension between an objectively defined constitutional identity and an ideologically influenced or conditioned understanding of constitutional identity, which then becomes a mere instrument of propaganda or

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30 H. Pitkin, *The Idea of a Constitution*, "Journal of Legal Education" 1987, Vol. 37, No. 2, p. 167.

31 For more detailed elaboration of this issue, see *How Constitutions Change. A Comparative Study*, eds. D. Oliver, C. Fusaro, Oxford 2013; and Y. Roznai, *Unconstitutional Constitutional Amendments*, Oxford 2016.

32 P. Holländer, *Materiální ohnisko ústavy a diskrece ústavodárce*, "Právník" 2005, roč. 144, č. 4, p. 327.

33 G. Jellinek, *Všeobecná státověda*…, p. 512.

purposeful constitutional change. We know from history (but also from the present, as will be demonstrated below via the example of Hungary) a number of cases where constitutional identity or the ideological resources of constitutions have been misused to undermine or eliminate the democratic rule of law.

3. Constitutional Identity in the Czech Constitution

In the constitutional system of the Czech Republic, constitutional identity is closely linked to the concept of the essential elements of the democratic rule of law, enshrined in Art. 9 para. 2 of the Czech Constitution as a limit to constitutional amendments. It is therefore an example of an explicit, albeit ambiguously defined, clause limiting the scope of changes to the constitution. If we look at the concept of the essential elements of the democratic rule of law through the lens of the concept of constitutional identity, the essential elements can be applied on two levels: they identify the main features of the constitutional system of the Czech Republic, in the sense of determining whether it is still the same constitutional system even after some constitutional changes have been made (ensuring the identity of the constitutional system), but they also define the value framework of the Constitution of the Czech Republic, thus fulfilling the unifying and reconciling function of constitutional identity.

Acknowledging the comparative context, the question arises whether the concept of the essential elements of the democratic rule of law should be understood universally or as something specific to the Czech Republic, or even as a compromise between a universal and particularistic approach. If the essential elements of the democratic rule of law are to define the constitutional identity of the Czech Republic, this would suggest that they also contain elements specific to the Czech Republic since it is difficult to imagine a constitutional identity that would merely copy the constitutional identities of other states. On the other hand, there is certainly room for the Czech constitutional identity to subscribe to universal principles recognized in the family of Western democracies. Therefore, if there is no solution universally regarded as the only possible one, the constitution-maker must have made a choice that is sometimes so fundamental and embedded in our constitutional identity that it is impossible to reverse this decision.

This leads to the conclusion that the protection of the essential elements of the democratic rule of law comprises both the generally accepted basic attributes of the democratic rule of law (e.g. today we cannot imagine the democratic rule of law in which there is no parliament or the sovereignty of the people is not guaranteed, etc.), as well as elements specific to the Czech Constitution that are not present in some other states, which undoubtedly belong within the concept of the democratic rule of law (e.g. a specialized Constitutional Court, an individual constitutional complaint, the republican character of the state, the separation of state and church). This composite conception is confirmed by Yaniv Roznai, according to whom the content of the material

core of a constitution can be divided into universal principles common to all democratic societies and particularistic principles that are typical of certain political cultures.[34]

From a practical perspective, when courts define and interpret constitutional identity, the key question appears to be the extent to which it is defined purely on the basis of the constitutional history and traditions of a given state. This, of course, depends on the specific conditions and contexts of particular constitutional systems. George P. Fletcher's view that in interpreting the constitution it is necessary to turn inward and reflect on the constitutional identity and legal culture in which the interpretation is made,[35] is strongly linked to long-standing U.S. constitutional tradition, culture, and history, and thus is not suitable to be applied in relation to so-called "new" constitutions, which lack such extensive context, background, and related discourse. Especially in a situation when a new constitution replaces an older totalitarian document, constitutional identity serves as a tool for discontinuity.

However, constitutional identity alone is incapable of resolving the complex issues presented to a constitutional court. In the early years after adopting a new constitution, the decisions of the constitutional court significantly contribute to determining, what exact identity a given constitutional system develops. In the Czech Republic, the Constitutional Court has often pondered adhering to the historical Czech constitutional tradition preceding the communist regime and leaning toward the modern European constitutional tradition.[36]

When considering the relationship between constitutional identity and the essential elements of the democratic rule of law, it is essential to determine whether the concept enshrined in Art. 9 para. 2 of the Czech Constitution is a reference to a universal principle, so that it can only be defined on the basis of universal, universally accepted standards, and to what extent it is a manifestation of a specific Czech constitutional identity. I believe that universal elements represent only part of the concept of the essential elements of the democratic rule of law and reflect the fact that the Czech Republic identifies itself as part of a community of states based on respect for these principles. David Kosař and Ladislav Vyhnánek argue that the emphasis placed by the Czech Eternity Clause expressed in Art. 9 para. 2 of the Czech Constitution on the values and aspirations shared with other states of Western and Central Europe reflects the sentiment of early 1990s, when "the Czech Republic aimed to deal with its past and then 'return to Europe'."[37]

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[34] Y. Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, "American Journal of Comparative Law" 2013, Vol. 61, No. 3, p. 714. Similarly also O. Preuss, *Klauzule věčnosti: Je možné odstranit liberální demokracii?*, Plzeň 2015, p. 237.

[35] G.P. Fletcher, *Constitutional Identity* [in:] *Constitutionalism, Identity, Difference, And Legitimacy, Theoretical Perspectives*, ed. M. Rosenfeld, Durham 1994, p. 223.

[36] R.G. Teitel, *Reactionary Constitutional Identity* [in:] *Constitutionalism, Identity, Difference…*, p. 235; see also J. Elster, *Constitutionalism in Eastern Europe: An introduction*, "University of Chicago Law Review" 1991, Vol. 58, No. 2, pp. 447, 476–477, 481.

[37] D. Kosař, L. Vyhnánek, *The Evolution and Gestalt of the Czech Constitution* [in:] *The Max Planck Handbooks in European Public Law*, Vol. 2, *Constitutional Foundations*, eds. A. von Bogdandy, P.M. Huber, S. Ragone, Oxford 2023, p. 101.

However, universally accepted principles are not sufficient in themselves to define the Czech constitutional identity. The prime example of a provision, which cannot be perceived as universally accepted, is the Eternity Clause itself.[38] Besides certain core principles, shared only by some other constitutions, the Czech Republic also has its own unique constitutional identity, which is based on its historical experience, social conditions, culture, and tradition and is reflected in the choices made by the constitution-maker in shaping the constitutional system of the Czech Republic. In summary, this means that the notion of the essential elements of the democratic rule of law has a certain universal component that reflects the external relations and the anchoring of the Czech Republic within the international community (i.e., where we agree with other states), and a specific component that is unique to the Czech Republic and distinguishes it from other states.

Based on an analysis of the case-law of the Czech Constitutional Court,[39] the following elements define Czech constitutional identity:

A) Elements deriving from constitutional traditions common to democratic states respecting the rule of law:
   a) Sovereignty of the people (government of the people, by the people, for the people),
   b) Free political competition and free elections,
   c) Firm time-limits for public offices,
   d) Decision-making of majority respecting the protection of minorities,
   e) Separation of powers,
   f) Independence of judiciary and judges,
   g) Core (essential content) of fundamental rights,
   h) Testing limitations of fundamental rights by the test of proportionality,
   i) Principle of legality, rule of law, and essential requirements for quality of legislation,
   j) Legal certainty, transparency, predictability, and prohibition of arbitrary decision-making,
   k) Basic constitutional values such as human dignity, freedom, and justice,
   l) Responsibility and control of public officials;
B) Elements specific to the Czech Constitution:
   a) Eternity clause (unchangeability of certain parts of constitution),
   b) Republican form of state,
   c) Ideological and religious neutrality,
   d) Existence of a specialized Constitutional Court,
   e) Prohibition of decreasing procedural protection of fundamental rights,
   f) Reservation of regulation of certain issues to a statute issued by Parliament,
   g) Unitary state respecting the right to self-government,
   h) Right to resistance.

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[38] For detailed comparative analysis of the explicit and implicit limitations of constitutional amendments, see Y. Roznai, *Unconstitutional Constitutional Amendments*…, p. 685 *et seq.*

[39] For details, see M. Tomoszek, *Podstatné náležitosti*…, pp. 154–169.

Last, but not least, it must be noted that the constitutional identity is not an immutable component of constitutionalism, set in stone at the moment of the adoption of a constitution, but a dynamic component of constitutionalism that evolves as a result of decisions taken either in the legislative process or in the constitutional judiciary. In making specific decisions, therefore, we should not ask what solution derives from our constitutional identity, but whether our preferred solution fits with our perception of our constitutional identity, so in other words, if we do make such a decision, will it change us. In making this decision, of course, we must look back to how we have perceived our constitutional identity in the past, and if we wish to depart from an earlier conception, we should make a compelling case for doing so, e.g. on the basis of social developments or the unsustainability of the previous conception.

Conclusions

Defining constitutional identity is a rather problematic task, as there is no universal agreement on its definition. It is possible to distinguish opinions which perceive constitutional identity either as a set of certain constitutional rules that are the basis of a given constitutional system and make it possible to determine whether it is still an identical system, or approaches that perceive identity as an expression of the identity of the constitutional sovereign, i.e. to whom a given constitution is addressed. Quite logically, the first approach prevails in legal scholarship, as it is more tractable from a legal perspective and has concrete implications, especially in the area of reviewing constitutional amendments.

Constitutional identity has a variety of sources, but the unifying element for most authors who have addressed this question is the context of the constitution's creation. This can be thought of as a reaction to the previous regime, to the specific circumstances from which the new constitution emerged, but also as an expression of who the people adopting the new constitution feel they are. Identity can also be expressed aspirationally, i.e. who we want to become, or traditionally, i.e. who we want to remain. Of course, a combination of these approaches is also permissible, because usually the purpose of adopting a constitution is both to preserve the basic constitutive values of a given society, but at the same time that society has certain aspirations that it wants to achieve by establishing a given constitutional regime.

In the case of the Czech Republic, constitutional identity is directly related to the concept of the essential elements of the democratic rule of law. The very naming of this concept defines the basis of the constitutional identity of the Czech Republic, according to which the Czech Republic is a democratic state governed by the rule of law and wants to remain so in the future. However, the constitutional identity is not defined in any more detail in the constitutional order, which is why the Constitutional Court of the Czech Republic has undertaken this task. When defining in more detail the content of the concept of the essential elements of a democratic state governed

by the rule of law, the basic problem is whether it is a universal concept (i.e. what is usually understood in different states as the essential elements of a democratic state) or whether it stems specifically from the Czech context (i.e. how the Czech constitutional system understands the democratic rule of law). Although identity is something specific to each constitutional system, in a comparative approach it is clearly visible that many elements of constitutional identity are present in a majority of democratic states respecting the rule of law (e.g. separation of powers, judicial independence, or protection of human rights). Still, there are some issues these states may differ in (relationship of state and church, form of state, territorial self-government), making them unique and distinguishable, and as a result constitutional identity will contain both components. The essential elements of the democratic rule of law must therefore be interpreted to contain both groups.

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Summary

Maxim Tomoszek

Essential Elements of the Democratic Rule of Law as an Expression of Constitutional Identity in the Czech Constitution

The present article consists of two parts. The first part focuses on the concept of constitutional identity in a general comparative perspective and its connection with constitutional philosophy. In the second part, these premises are applied to the Constitution of the Czech Republic, specifically its core values denominated by the Czech Constitution as the essential elements of the democratic rule of law in order to analyze whether they can be used to define Czech constitutional identity and what specific principles constitute the constitutional identity of the Czech Constitution.

Keywords: constitutional identity, democratic rule of law, Czech Constitution, constitutional philosophy, constitutional values, eternity clause.

Streszczenie

Maxim Tomoszek

Podstawowe elementy demokratycznych rządów prawa jako wyraz tożsamości konstytucyjnej w czeskiej konstytucji

Niniejszy artykuł składa się z dwóch części. Pierwsza część koncentruje się na koncepcji tożsamości konstytucyjnej w ogólnej perspektywie porównawczej i na jej związku z filozofią konstytucyjną. W drugiej części założenia te zostały zastosowane do Konstytucji Republiki Czeskiej, a konkretnie do jej podstawowych wartości określanych przez czeską konstytucję jako zasadnicze elementy demokratycznego państwa prawa, w celu przeanalizowania, czy można je wykorzystać do zdefiniowania czeskiej tożsamości konstytucyjnej, oraz ustalenia, jakie konkretne zasady stanowią tożsamość konstytucyjną czeskiej konstytucji.

Słowa kluczowe: tożsamość konstytucyjna, demokratyczne rządy prawa, czeska konstytucja, filozofia konstytucyjna, wartości konstytucyjne, klauzula wieczności.

Commentaries

Jurisdiction in Actions for Damages Against Private-law Companies Acting on Behalf of and upon Delegation from a Third State

Judgment of the Court (First Chamber) of 7 May 2020, C-641/18, LG and Others v Rina SpA and Ente Registro Italiano Navale[1]

Article 1 (1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for damages, brought against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third State, falls within the concept of 'civil and commercial matters', within the meaning of that provision, and, therefore, within the scope of that regulation, provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law, which it is for the referring court to determine. The principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law.

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Commentary

Introduction

This paper deals with determining jurisdiction in actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of

[1] ECLI:EU:C:2020:349.

and upon delegation from a third state. The inspiration to take up this topic was the judgment of the Court of Justice in the case C-641/18 LG v Rina SpA, the conclusion of which is merited and deserves approval. In the judgment under analysis, the Court of Justice has interpreted Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[2] The judgment was issued after consulting the Advocate General.[3] The need to seek the opinion of the Advocate General demonstrates the importance of the issue under consideration. The Court of Justice confirmed previous case law on activities related to the exercise of public powers and on the exclusion of such activities from the scope of application of the regulation.[4] Simultaneously, it should be emphasized that in the present case, the novelty lies in the fact that a private-law entity carried out activities in the field of ship classification and certification on behalf of and under the authority of a third state. Therefore, the subjective point of reference differentiates the case under consideration from cases settled previously by the Court of Justice. The purpose of the analysis is to determine whether an action for damages brought against private-law bodies in respect of classification and certification activities carried out by those bodies as delegates of a third state, on behalf of that state and in its interests, falls within the concept of "civil and commercial matters" within the meaning of Article 1(1) of Regulation No 44/2001 or not. For this reason, the activities of ship classification and certification corporations as *acta iure imperii* or *acta iure gestionis* deserves analysis. The tort liability of private-law societies engaged in the classification and certification of ships can be treated as an element of the enforcement of maritime law.

In contrast, the issue of the immunity of states from jurisdiction as a customary principle of international law will be raised only marginally, as it is not decisive for the problem at issue, even if it has caused the referring court to entertain doubts about the scope of Regulation No 44/2001.

It is worth mentioning that the ruling is also valid with regard to Article 1(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[5] which replaced above-mentioned Regulation No 44/2001. For clarification, Regulation No. 1215/2012 is a recast version of Regulation No. 44/2001, and the scope of application of the new regulation has not changed in relation to the scope of application of the previous regulation. However, contrary to Article 1(1) of Regulation No 44/2001, which does not list the activities performed *iure imperii*, the second sentence of Article 1(1) of Regulation No 1215/2012 expressly states that it does not apply, *inter alia*, to "the liability of the State for acts and

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[2] OJ L 12, 16.1.2001, pp. 1–23.

[3] Opinion of Advocate General Szpunar delivered on 14 January 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18, ECLI:EU:C:2020:3.

[4] On that case-law see: A. Stadler, *EuGVVO nF Art. 1* [in:] H.-J. Musielak, W. Voigt, *Zivilprozessordnung (ZPO)*, 17. Auflage, München 2020, para 2.

[5] OJ L 351, 20.12.2012, pp. 1–32.

omissions in the exercise of State authority (*acta iure imperii*)." This supplementation included the existing jurisprudence of the Court of Justice for the sake of clarity; therefore the provisions of Article 1(1) of both regulations may be regarded as equivalent.[6] For this reason, the comments contained in this publication apply equally to both the above-mentioned regulations.

1. The facts of the case, preliminary questions and the judgment

The case under analysis was based on the following facts. A ferry sailing under the flag of the Republic of Panama (Al Salam Boccaccio '98) sank on the Red Sea in 2006 and caused the loss of more than a thousand lives. Relatives of the victims, along with survivors of the sinking of the ship (the applicants), brought an action before the Tribunale di Genova (District Court, Genoa, Italy) against the companies Rina SpA and Ente Registro Italiano Navale (the defendants), because these companies were domiciled in Italy (the forum state). The applicants argued that the defendants' certification and classification activities, the decisions they took and the instructions they gave, were to blame for the ship's lack of stability and its lack of safety at sea, which were the causes of its sinking. Therefore, the applicants claimed compensation for the pecuniary and non-pecuniary loss sustained as a result of the ship's sinking. On the one hand, the defendants contested the applicants' claims and pleaded the immunity of states from jurisdiction. They stated that they were being sued in respect of activities which they carried out as delegates of a foreign sovereign state (the Republic of Panama). On the other hand, the applicants argued that Italian courts have jurisdiction pursuant to Article 2(1) of Regulation No 44/2001.[7]

The Tribunale di Genova (District Court, Genoa, Italy) decided to stay the proceedings and to refer the following question to the Court:

"Are Articles 1(1) and 2(1) of Regulation [No 44/2001] to be interpreted – including in the light of Article 47 of the [Charter], Article 6(1) [of the] ECHR and recital 16 of Directive [2009/15] – as preventing a court of a Member State, in an action in tort, delict or quasi-delict in which compensation is sought for death and personal injury caused by the sinking of a passenger ferry, from holding that it has no jurisdiction and from recognising the jurisdictional immunity of private entities and legal persons established in that Member State which carry out classification and/or certification activities in so far as they carry out those activities on behalf of a non-EU State?"[8]

The Court ruled that: "Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments

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[6] Compare the Opinion of Advocate General in case C-641/18, para 56.

[7] Judgment of the Court of Justice of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18, paragraphs 14–20; Opinion of Advocate General in case C-641/18, paragraphs 13–18.

[8] Judgment of the Court of Justice of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18, para 20.

in civil and commercial matters must be interpreted as meaning that an action for damages, brought against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third State, falls within the concept of 'civil and commercial matters', within the meaning of that provision, and, therefore, within the scope of that regulation, provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law, which it is for the referring court to determine. The principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law."[9]

2. Assessment of the Court of Justice's ruling

The judgment discussed here opens the way to actions against private legal persons carrying out activities in the field of classification and certification of ships on behalf and under the authority of a third country, within the scope of Regulation No 44/2001, provided that such activity is not carried out under the prerogatives of the state authority and, therefore, has the nature of *acta iure gestionis*. In principle, the position of the Court of Justice deserves approval. One of the arguments against classification societies' liability to third parties is that this would change a well-balanced system of liability in shipping that has evolved from practice, by allowing claimants to side-step the limitation of liability available to ship owners, through direct, and unlimited, claims in tort against classification societies.[10] This argument does not deserve approval, and in this context the judgment under analysis serves to increase the effectiveness of the system of liability of classification societies. Moreover, the judgement under discussion shows that a balance between EU private international law and public international law has to be struck on a case-by-case basis.[11]

On the one hand, a body that has carried out acts that are covered by the concept of "civil and commercial matters" in so far as its contractual partner is concerned should not be able to escape the jurisdiction of the civil courts in actions for damages brought by third parties in connection with those same acts. On the other hand, the Court has not ruled on whether this kind of acts make part of the acts carried out *iure gestionis* and has left that question to the assessment of the national court. It is worth mentioning that the Advocate General recognized such activity as performed *iure*

[9] Operative part of the judgment of the Court of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18.

[10] P. Bäckdén, *Will Himalaya Bring Class Down from Mount Olympus? – Impact of the Rotterdam Rules*, "Journal of Maritime Law & Commerce" 2011, Vol. 42, No. 1, p. 115 *et seq.*

[11] K. Pacuła, *Relationship between public international law and Brussels Convention and Brussels I/Ibis Regulation: Scope of application and international jurisdiction in ECJ case law*, "Zeitschrift für Europäisches Privatrecht (ZEuP)" 2023, p. 435 *et seq.*

gestionis,[12] but the Court did not share the Advocate General's position on this point, although it was convincing and well-established. The Advocate General concluded that Article 1(1) of Regulation No 44/2001 was to be interpreted as meaning that an action for damages brought against private-law bodies in respect of classification and certification activities carried out by those bodies as delegates of a third state, on behalf of that state and in its interests, *a priori*, falls within the concept of "civil and commercial matters" within the meaning of that provision.[13] Finally, the Court of Justice ruled that such an action for damages fell within the concept of "civil and commercial matters," provided that that classification and certification activity was not exercised under public powers, within the meaning of EU law; it was for the referring national court to determine this issue.[14]

There are many arguments in favour of considering the activities of certification societies as *acta iure gestionis* and therefore as falling within the scope of application of Regulation No 44/2001 as a "civil and commercial matter." Firstly, it should be noted that the state can carry out its tasks by acting not only in the sphere of *imperium*, but also in the sphere of *dominium*. This rule also applies to the certification at stake which is connected with the performance of obligations of states arising from international conventions on maritime safety and the prevention of marine pollution, such as United Nations Convention on the Law of the Sea (UNCLOS)[15] and the International Convention for the Safety of Life at Sea (SOLAS).[16] The fact that a private-law body carries out acts in the performance of a state's international obligations in the area of maritime safety and the prevention of marine pollution has no bearing on whether or not those acts are performed in the exercise of public powers. The competences of a given classification and certification body may result from delegating relevant competences based on an appropriate public law act within the framework of the applicable legislation. However, it is also possible to entrust such activities to external entities of a private-law nature on the basis of civil law contracts as it is obvious that the state may be a party to civil law contracts, or more broadly speaking, the subject of civil law relations in general. Whatever the source of the classification and certification bodies' competences, and whoever the individuals for whose protection these activities are performed, it is the use of public authority prerogatives in taking these measures that is decisive for the application of Regulation No 44/2001. As a rule, the recourse to public powers in the performance of any activities excludes the application of

[12] Compare the Opinion of the Advocate General in case C-641/18, paragraphs 98, 127.

[13] The Opinion of the Advocate General in case C-641/18, paragraphs 1, 155.

[14] The operative part of the judgment of the Court of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18.

[15] Adopted in Montego Bay on 10 December 1982. United Nations Treaty Series, Vol. 1833, 1834 and 1835, p. 3. It was approved on behalf of the European Community by Council Decision of 23 March 1998 No 98/392/EC concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179, 23.6.1998, pp. 1–2.

[16] Adopted in London on 1 November 1974. United Nations, Treaty Series, Vol. 1184,1–18961, pp. 278–453. All the Member States are contracting parties to SOLAS Convention.

Regulation No 44/2001. For example, the concept of "civil and commercial matters" excludes actions brought by the agent responsible for administration of public waterways against a person having liability in law in order to recover the costs incurred in the removal of wreckage carried out by or in the course of an investigation by the administrating agent in the exercise of its public authority.[17] However, this is not the case of classification and certification societies, which is the one at issue here.

In principle, a classification society acting on behalf of a flag state is bound by two contracts. The first one, with the flag state itself, is an agreement on the delegation of power. The second contract, with the shipowner, is an agreement on the performance of the obligatory statutory surveys (a statutory survey contract).[18] Generally, this dual role of classification societies can undermine the deterrent effect of tort law.[19] However, it should be noted that even if the activities of certification and classification could be separated, the case discussed here does not solely concern liability for classification activities or certification activities. It should also be emphasized that the problem at stake concerns a third-party claim for damages, and not liability for classification activities as in the "Prestige" case.[20]

As is apparent from the facts presented here, the classification and certification bodies, acting on the basis of an agreement concluded with the Republic of Panama in 1999, carried out, as delegates of that state and on its behalf, and allegedly also in its interests, the classification and certification operations relating to ships flying its flag. In this respect, the mutual rights and obligations of the parties are, therefore, based on a contractual relationship, and not on a unilateral act of public law. Moreover, this agreement is not of a different nature than a classic civil law agreement. Simultaneously, it is significant that the contract was concluded with private-law bodies, specifically companies based in Italy, where Panama's public authority does not apply. In such circumstances, the only instrument effectively imposing certification obligations on foreign law entities operating abroad may be a civil law contract. It is also worth noting that nowadays classification societies provide consultancy services in respect of various aspects of multi-million-dollar shipping operations, in addition to their usual services.[21] This means that their services are of an increasingly broader nature tending to *acta iure gestionis*.

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17 Judgment of the Court of 16 December 1980, Netherlands State v Reinhold Rüffer, Case 814/79, ECLI:EU:C:1980:291.

18 J. De Bruyne, *Liability of Classification Societies: Developments in Case Law and Legislation* [in:] *New Challenges in Maritime Law: De Lege Lata et de Lege Ferenda*, ed. M. Musi, Bologna 2015, p. 5.

19 J. De Bruyne, *Tort Law and the Regulation of Classification Societies: Between Public and Private Roles in the Maritime Industry*, "European Review of Private Law" 2019, Vol. 27, Issue 2, p. 429.

20 The judgment of 19 March 2014 of the *Tribunal de Bordeaux* (District Court, Bordeaux, France) in the Prestige case. It was set aside, in so far as the court held that the defendants enjoyed immunity from jurisdiction, by the *Cour d'appel de Bordeaux* (Court of Appeal, Bordeaux, France) in Judgment No 14/02185 of 6 March 2017.

21 T.A. Karaman, *Comparative Study on the Liability of Classification Societies to Third Party Purchasers with Reference to Turkish, Swiss, German and US Law*, "Journal of Maritime Law & Commerce" 2011, Vol. 42, No. 1, p. 126.

Notwithstanding the foregoing, the mere fact that certain powers are conferred, or even delegated, by an act of public authority does not imply that those powers are exercised *iure imperii*.[22] Furthermore, the mere fact of acting on behalf of a state does not mean that the acts in question are performed in the exercise of public powers, in the above-mentioned sense.[23] Similarly, "acting in an interest comparable to the general or public interest" does not mean "acting in the exercise of public powers."[24] Otherwise, it could be considered that any activity carried out by or on behalf of a state may be identified as a government objective, which would, in turn, mean that entire categories of purely civil cases could be excluded from the scope of Regulation No 44/2001.[25] Likewise, the fact that a private-law body carries out, as delegate of a state, on behalf of that state and in its interests, acts in the performance of the state's international obligations in the area of maritime safety and the prevention of marine pollution does not mean that such measures are taken in as part of the exercise of public powers.[26] Thus, the mere fact that the classification and certification activities were performed on the account of and in the interest of the authorizing state is also not, in itself, decisive for considering that those activities were performed in the exercise of public authority.[27]

In this context, the provisions of the agreement concluded with the Republic of Panama in 1999 also require analysis. As the Advocate General points out,[28] it is apparent from the 1999 agreement that the interpretation of the applicable legal instruments, the determining of equivalences, and the approval of requirements other than those laid down in the applicable instruments are prerogatives of the Panamanian Government. On the one hand, the 1999 agreement provides that exemptions from the requirements laid down in the applicable instruments are also prerogatives of that government and require its approval before a certificate can be granted. Simultaneously, there is nothing to suggest that the delegating state did not retain its exclusive competence as far as that activity is concerned. On the other hand, activities such as those carried out by classification and certification bodies, the purpose of which is to establish the conformity of ships with the relevant requirements laid down in the applicable legal instruments and to issue the corresponding technical certificates, seem to be activities of a purely technical nature. As the Advocate

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22 Compare the Opinion of the Advocate General in case C-641/18, para 68; Contrary: K. Schmalenbach, *A Tale of Autonomy and Self-Containment* [in:] *The European Union and Customary International Law*, eds. F. Lusa Bordin, A.Th. Müller, F. Pascual-Vives, Cambridge 2022, p. 110.

23 Compare the Opinion of the Advocate General in case C-641/18, para 80 and the case law cited there.

24 Compare the Opinion of the Advocate General in case C-641/18, para 79 and the case law cited there.

25 Compare the Opinion of the Advocate General in case C-641/18, para 77.

26 Compare the Opinion of the Advocate General in case C-641/18, para 84.

27 Compare the Opinion of the Advocate General in case C-641/18, paragraphs 71, 83. For comparison: J. De Bruyne, *Liability of Classification Societies*…, pp. 231–232.

28 Compare Opinion of Advocate General in case C-641/18, para 94.

General underlines in this context,[29] the revocation of a certificate due to a ship's lack of conformity with those requirements does not result from the exercise of the decision-making powers of organisations such as the classification and certification bodies, whose role is limited to carrying out checks in accordance with a pre-defined regulatory framework, in particular with previously established legal regulations. If, following the revocation of a certificate, a ship is no longer capable of sailing, that is because of a sanction which is imposed by law.

In addition, the relationship between the companies in question and the shipowner is crucial. It is important that the circumstances characterizing the relationship between the public authority granting the authorization and the authorized entity have no effect on the characterisation of the legal relationship between this authorized entity and parties that benefit from its services.[30] The facts show that the defendant companies provided their services for consideration, pursuant to a private-law agreement concluded directly with the owner of the vessel Al Salam Boccaccio '98. As the Advocate General rightly points out, the provisions of this agreement were formulated on the basis of the principle of freedom of contract. Firstly, the parties to that agreement were at liberty to determine the price for those services. Secondly, the defendants could have inserted into the agreement terms to limit their liability. Finally, all the details of that agreement were not decided upon unilaterally, but in the exercise of freedom of contract. It is most important to note that freedom of contract includes the freedom to choose with whom to do business. Actually, facts prove that the shipowner chose the defendants from a number of organisations carrying out classification and certification operations for the flag state.[31] Consequently, the position of the defendants *vis-à-vis* the shipowner was framed within the agreement made with the shipowner's voluntary consent, under which the shipowner agreed to submit to inspections and surveys, and to bear the costs thereof. For that reason, even if the defendants were able to exercise their powers, they would have done so on the basis of the shipowner's voluntary consent to carry out inspections and surveys, and to bear the related costs.[32]

Therefore, the relationship between the defendants and the shipowner has a private-law character and not public-law one. It is clear that the issuing of a certificate as well as the refusal to issue a certificate by the defendant companies is not an administrative decision which could potentially make it subject to a legal remedy raised within an administrative procedure before a court. It should be highlighted that the intention of the EU legislator was to adopt a broad understanding of the concept of "civil and commercial matters" contained in Article 1(1) of Regulation No 44/2001 and, consequently, a broad scope of application of that regulation.[33] This means that,

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29 Compare Opinion of Advocate General in case C-641/18, para 95.

30 Compare the Opinion of the Advocate General in case C-641/18, para 69.

31 Compare the Opinion of the Advocate General in case C-641/18, para 92.

32 Compare the Opinion of the Advocate General in case C-641/18, para 93.

33 Judgment of the Court of 28 February 2019, BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v Gradbeništvo Korana d.o.o., Case C-579/17, ECLI:EU:C:2019:162, para 47 and case law cited there.

in principle, actions for damages fall within the scope of the "civil and commercial matters" within the meaning of Regulation No 44/2001. However, the nature of the given action may not be such as to exclude the action for damages in question from the notion of a "civil and commercial matter,"[34] in this case, to belong to *acta iure imperii*. It should be noted that the mere fact that public funds might be used to compensate for the damage caused as a result of actions undertaken by a person acting on behalf of the state does not mean that disputes arising from those activities are automatically excluded from the substantive scope of Regulation No 44/2001.[35] Likewise, possible state liability for damage caused as a result of actions undertaken on behalf of the state does not exclude *per se* disputes arising from these actions from the scope of application of that regulation.[36] From this perspective, third party compensation claims against entities such as the defendants are of a private-law, not a public-law nature. Consequently, the resulting relationship is also of a private-law nature. An act carried out without recourse to public powers does not change in nature depending upon the person that has suffered harm as a result of that act. Indeed, bodies such as the defendants do not take a sovereign position towards the injured third parties, and their action also in this context does not constitute an exercise of the prerogatives of the state. Anyhow, a body that has carried out acts that are covered by the concept of "civil and commercial matters" in so far as its contractual partner is concerned should not be able to escape the jurisdiction of the civil courts in actions for damages brought by third parties in connection with those same acts.[37]

Besides, the case law of the Court of Justice on the freedom of establishment and the freedom to provide services also supports the nature of the *iure gestionis* of classification and certification activities such as those carried out by the defendant companies. In particular, in case C-593/13 Rina Services *et al.*, the Court of Justice stated that the certification activities performed by companies acting as institutions responsible for certification are not covered by the exemption referred to in Article 51 of the Treaty on the Functioning of the European Union,[38] due to the fact that these companies are for-profit undertakings operating under competitive conditions and do not have any decision-making powers relating to the exercise of public powers.[39] Directive 2009/15/EC[40] also allows for the recognition that classification and certification activities carried out by private-law entities should be considered as

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[34] Compare the Opinion of the Advocate General in case C-641/18, para 54.

[35] Compare the Opinion of the Advocate General in case C-641/18, para 82.

[36] Compare the Opinion of the Advocate General in case C-641/18, para 82.

[37] Compare the Opinion of the Advocate General in case C-641/18, para 70.

[38] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

[39] Judgment of the Court (Grand Chamber) of 16 June 2015, Presidenza del Consiglio dei Ministri and Others v Rina Services SpA and Others, Case C-593/13, para 20.

[40] Consolidated text: Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (Recast), ELI: http://data.europa.eu/eli/dir/2009/15/2019-07-26 [accessed: 2024.01.04].

activities carried out without exercising the prerogatives of a public authority.[41] This is confirmed by recital 16 of that directive, which is the expression of the position taken by the European Union on the recognition of classification and certification activities carried out by a private-law body as activities not arising from the exercise of public power.[42]

As already mentioned, the question of immunity of states from jurisdiction does not have an important impact on the determination of the scope of Regulation No 44/2001 in the case discussed here. Generally, immunity from jurisdiction prevents the courts of one state from giving judgment on the liability of another and it is based on the principle of international law *par in parem non habet imperium*, which means that an equal has no authority over an equal.[43] As a rule, the immunity of states from jurisdiction is recognised where the dispute concerns sovereign acts performed *iure imperii*, and, by contrast, is not recognised where the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers.[44] It should be noted that this does not mean that immunity from jurisdiction is completely irrelevant to the legal problem in question, because immunity from civil action would severely inhibit the preventive role of liability in damages.[45] Simultaneously, it should be emphasized that state immunity is not absolute, but is generally recognized only where the legal dispute concerns legal acts performed *iure imperii*, which is not so in the Rina case.[46] The analysis of this case led to the finding that a private-law entity performing classification and certification activities does not act as public authority and it can neither be considered a state nor an entity performing activities *iure imperii*. It is therefore not necessary, in the context of the considerations relating to the substantive scope of Regulation No 44/2001, to rely on the principle of customary international law relating to the immunity from jurisdiction of states. As the Advocate General rightly points out, the EU legislator did not use the institution of immunity from jurisdiction to define the scope of legal regulations in the field of judicial cooperation

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41 See B. Rensch, L.-S. Wollschläger, *Verfahrensrecht. Gerichtliche Zuständigkeit für Schadensersatzklagen im Zusammenhang mit dem Untergang der Fähre Al Salam Boccaccio '98*, "EuZW" 2020, p. 903.

42 Compare the Opinion of the Advocate General in case C-641/18, para 127. On the liability regime of the Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, OJ L 319, 12.12.1994, pp. 20–27, see J.L. Pulido Begines, *The EU Law on Classification Societies: Scope and Liability Issues*, "Journal of Maritime Law & Commerce" 2005, Vol. 36, No. 4, p. 517 *et seq.*

43 Compare the Opinion of the Advocate General in case C-641/18, para 34. On the immunity of a state from jurisdiction in the USA see: W.S. Dodge, *Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of US Foreign Relation Law*, "Chinese Journal of International Law" 2020, Vol. 19, No. 1, pp. 101–135.

44 Judgment of the Court (Grand Chamber), 19 July 2012, Ahmed Mahamdia v People's Democratic Republic of Algeria, Case C-154/11, paragraphs 54 and 55, ECLI:EU:C:2012:491; Judgment of the Court of Justice of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale, Case C-641/18, paragraphs 55–58, ECLI:EU:C:2020:349.

45 J.L. Pulido Begines, *The EU Law…*, p. 539.

46 A.R. Markus, I. Ruprecht, *Rechtsprechung zum Lugano-Übereinkommen (2020)*, "Swiss Review of International and European Law" 2021, Vol. 31, No. 2, pp. 318–320.

in civil matters having cross-border implications, and in particular to define the substantive scope of the application of Regulation No 44/2001.[47] Nevertheless, the inclusion of *acta iure gestionis* performed by states into the scope of application of the said regulation is consistent with the theory of the relative or limited immunity of states, which nowadays seems to dominate under public international law.[48]

In contrast, in Canadian maritime law, the responsibility for the seaworthiness of a vessel lies primarily with its owner. The role played in this respect by a classification society is subsidiary. A classification society acts in the interests of navigation as such and not for private interests engaged in maritime commerce. Acknowledging a liability to third parties would result in its adopting a defensive attitude. It would ultimately be the shipowners who would have to assume, by means of clauses inserted in the contracts binding them to the classification societies, the consequences of the latter's negligence. American law is not more favourable to third parties.[49] On the one hand, these legal systems seem inconsistent with the economic reality in which certification societies operate nowadays. On the other, such legal systems deprive third parties of their right of access to the courts, which is one of the elements of the right to effective judicial protection.

It is worth noting that the Rina case is very often misunderstood and thus misjudged by representatives of legal doctrine. For instance, the thesis according to which the Court of Justice in the Rina case ruled on the relationship between state immunity and the exercise of jurisdiction resulting from the Brussels I Regulation, or even the relationship between state immunity and European civil procedure law, is not confirmed by the judgment under analysis and is therefore untrue.[50] Advocate General Szpunar, in his opinion in the Rina case, clarified that it was unnecessary to refer to the principle of customary international law concerning state immunity from jurisdiction when considering the *ratione materiae* scope of Regulation No 44/2001.[51] Furthermore, the claim that the Court of Justice tends to narrow the scope of state immunity is

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47 Compare the Opinion of the Advocate General in case C-641/18, paragraphs 34–48.

48 B. von Hoffmann, K. Thorn, *Internationales Privatrecht*, München 2007, p. 69.

49 A. Braën, *La Responsabilité de La Société de Classification En Droit Maritime Canadien*, "McGill Law Journal" 2007, Vol. 52, No. 3, p. 506.

50 B. Wołodkiewicz, *State Immunity and European Civil Procedural Law – Remarks on the Judgment of the CJEU of 7 May 2020, C-641/18. LG v Rina SpA and Ente Registro Italiano Navale*, "Italian Law Journal" 2021, Vol. 7, No. 1, pp. 285–302. Similarly: C. Fossati, *Material Scope of Regulation 44/2001 and State Immunity from Jurisdiction: The ECJ Judgement in the Rina Case*, "Cuadernos de Derecho Transnacional" 2021, Vol. 13, No. 1, pp. 856–873; K. Knol Radoja, *Exemption from Jurisdiction in European Civil Procedural Law*, "Pravni Vjesnik (Journal of Law, Social Sciences and Humanities)" 2022, Vol. 38, No. 2, pp. 21–36; A. Spagnolo, *State Immunity, Delegation of Public Powers to Private Actors and Access to Justice: Anything New Under the (European) Sun?*, "The Italian Yearbook of International Law" 2022, Vol. 31, No. 1, pp. 277–296; R. Dragisic, *The Shipwreck in the Red Sea and the Customary International Law Principle regarding Immunity of States from Jurisdiction – A Link with the European Union Law*, "Harmonius: Journal of Legal and Social Studies in South East Europe" 2021, pp. 62–75; A. Oddenino, D. Bonetto, *The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law*, "Global Jurist" 2020, Vol. 20, No. 3, p. 1 *et seq.*

51 Opinion of Advocate General in case C-641/18, para 48.

unfounded in the context of the Rina case,[52] because the Court of Justice did not interpret state immunity as a principle of customary international law, but interpreted secondary EU law for the purposes of a specific case involving the classification and certification of ships on behalf of and upon delegation from a third state. In fact, the essence of the Rina case was to determine whether an action for damages brought against private-law companies dealing with the classification and certification of ships on behalf of and for the benefit of a third country falls within the scope of the concept of "civil and commercial matters" contained in the Brussels I Regulation. This, in turn, depends on whether the activity in question is carried out under a "public authority" within the meaning of EU law, because only then would it be a sovereign activity and not a commercial one.[53] Since it was not the case of the exercise of public authority, there was no need to interpret the principle of state immunity as such.

Conclusions

The Court of Justice's case law concerning the determination of the scope of application of Regulation No 44/2001 is already rich, but the Court of Justice is still facing new challenges in this regard. The judgement discussed here follows the line of this case-law in the area of activities of ship classification and certification societies. In the case presented here, the Court of Justice was asked to express its position on the relationship between a customary principle of international law, which was a plea of immunity from jurisdiction, and an instrument of EU private international law, which was the regulation 44/2001. The way the preliminary question was formulated might suggest that the main problem is connected with the plea of immunity from jurisdiction raised by the defendants. In reality, the main doubts concerned the scope *ratione materiae* of Regulation No 44/2001. That is why the Court of Justice had to characterize classification and certification operations in order to determine whether they justify the obligation to recognise the immunity of states from jurisdiction on which the defendants rely. The Court's case law proves that jurisdiction – and not state immunity – operates as the predominant rule, and state immunity operates as

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52 L. Lonardo, E. Ruiz Cairó, *The European Court of Justice Allows Third Countries to Challenge EU Restrictive Measures: Case C-872/19 P, Venezuela v Council*, "European Constitutional Law Review" 2022, Vol. 18, No. 1, p. 123.

53 Similarly: V. Power, *Ships, sovereign immunity and the subtleties of the Brussels I regulation: Case C-641/18 LG and others v. Rina SpA, Ente Registro Italiano Navale: Ships, sovereign immunity and the subtleties of Brussels I: Rina*, "Maastricht Journal of European and Comparative Law" 2021, Vol. 28, No. 3, pp. 419–429; D. Moravcova, *The Scope of Judicial Cooperation in Civil and Commercial Matters within the EU in the Context of the Exclusion of Administrative Matters and Acta Iure Imperii*, "Institutiones Administrationis – Journal of Administrative Sciences" 2023, Vol. 3, No. 1, p. 122; A.R. Markus, I. Ruprecht, *Rechtsprechung…*, pp. 318–320; M. Pérez, A. Lucas, *Doctrine of the CJEU on the Immunity of Execution of International Organizations and the Field of Application of the Brussels I Bis Regulation*, "Cuadernos de Derecho Transnacional" 2021, Vol. 13, No. 1, pp. 1039–1040.

an exception, which only applies in those cases where there is a functional need for state immunity.[54]

In the light of the considerations presented above, the general conclusion is that a private-law entity performing classification and certification activities does not act as a public authority. As a consequence, it is justified to state that actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state are not excluded from the scope of Regulation No 44/2001 and, consequently, from the scope of Regulation No 1215/2012, because these actions fall within the concept of "civil and commercial matters." Such a legal classification of the classification and certification of ships on behalf of and upon delegation from a third state is reasonable and merits approval. What is more, the risk of tort liability can be used as a starting point to increase the accuracy and reliability of class certificates because of its so-called deterrent effect.[55] More broadly, the risk of tort liability of private-law societies engaged in the classification and certification of ships can serve as an element of enforcement of maritime law.

The only thing that could be unsatisfactory in the judgment under analysis is that the Court did not rule definitively on whether this kind of act is part of the acts carried out *iure gestionis*, and it left that question to the assessment of the national court. Simultaneously, the recognition of such activities as performed *iure gestionis* in the wording of the Advocate General's opinion is clear and leaves no doubt. Deferring the question is all the more incomprehensible as it follows from the content of the ruling under discussion that the Court considers such activities as performed *iure gestionis*. The only explanation for the position of the Court of Justice could be an intention to give the judgment a more universal scope so that it can be used in similar cases in the future. Regardless of the intention of the Court in this particular case, the matter of jurisdiction in actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state is already settled.

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Summary

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Jurisdiction in Actions for Damages Against Private-law Companies Acting on Behalf of and upon Delegation from a Third State

This paper deals with the legal characteristic of the classification and certification of ships in the context of jurisdiction in actions for damages against private-law corporations acting on behalf of and upon delegation from a third state which is generally the ship's flag state. The aim of the analysis was to determine whether the activities of ship classification and certification societies fall within *acta iure imperii* or *acta iure gestionis*. This is a key issue in determining the jurisdiction of courts in case of an action for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state. Analysis showed that a private-law entity performing classification and certification activities does not act as a public authority. Thus, the activities of ship classification and certification corporations fall within *acta iure gestionis*. As a result, actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state fall within the concept of "civil and commercial matters" and, consequently, are not excluded from the scope of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and, consequently, of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Keywords: jurisdiction**,** actions for damages, *acta iure imperii*, *acta iure gestionis*, delegation of public powers, ship classification, ship certification, state immunity from jurisdiction.

Streszczenie

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Jurysdykcja w sprawach o odszkodowanie przeciwko spółkom prawa prywatnego działającym w imieniu i na rachunek państwa trzeciego

Niniejsza glosa zawiera charakterystykę prawną czynności klasyfikacji i certyfikacji statków dokonaną na potrzeby ustalenia jurysdykcji w zakresie powództw o odszkodowanie przeciwko spółkom prawa prywatnego działającym w imieniu i na rachunek państwa trzeciego, którym zazwyczaj jest państwo bandery statku. Celem analizy było ustalenie, czy działalność towarzystw klasyfikacyjnych i certyfikujących statki mieści się w zakresie *acta iure imperii* (działania władcze państwa) czy też *acta iure gestionis* (czynności cywilnoprawne). Kwestia ta stała się kluczowa

dla ustalenia właściwości sądów w sprawach o odszkodowanie przeciwko spółkom prawa prywatnego zajmującym się klasyfikacją i certyfikacją statków w imieniu i na rachunek państwa trzeciego. Dogłębna analiza wykazała, że podmiot prawa prywatnego wykonujący działalność klasyfikacyjną i certyfikacyjną nie pełni funkcji władzy publicznej. Tym samym działalność instytucji zajmujących się klasyfikacją i certyfikacją statków ma charakter *acta iure gestionis*, czyli czynności cywilnoprawnych. W rezultacie pozwy o odszkodowanie przeciwko spółkom prawa prywatnego zajmującym się klasyfikacją i certyfikacją statków w imieniu i na rachunek państwa trzeciego wchodzą w zakres pojęcia „spraw cywilnych i handlowych" i tym samym nie są wyłączone z zakresu rozporządzenia 44/2001 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych oraz w konsekwencji z rozporządzenia 1215/2012 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych (przekształcenie).

Słowa kluczowe: jurysdykcja, powództwo o odszkodowanie, *acta iure imperii*, *acta iure gestionis*, delegowanie uprawnień publicznych, klasyfikacja statku, certyfikacja statku, immunitet państwa.

Against the Instrumentalization of Law: Justice for the Convicted in the Brześć Trial

Judgment of the Supreme Court of 25 May 2023, II KK 453/22
Acquitting Convicts in the Brześć Trial[1]

The example of the Brześć trial should be a lesson on the role of the law and the courts in a democratic state under the rule of law, a lesson not only for judges, but also for representatives of the executive and legislative branches of government, and finally a lesson for all of us. The case should also serve as a warning against the temptation to succumb to political emotions in an unmeasured fashion, the temptation to fight political opponents using the instruments of the state and the law, and the temptation to take actions contrary to the law, including the Constitution, to achieve political goals and expand the scope of power.

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Commentary

Introduction. Political and historical context: An indication of the knotty problems and the momentousness of the ruling

It is rare that the Supreme Court directly addresses education in terms of the fundamental values of a democratic state under the rule of law. In the 25 May 2023 judgment of the Supreme Court in the Brześć case, the conclusions are of timeless significance. The ruling has the hallmarks of a precedent and is groundbreaking in the sense that, while closing a certain historical chapter in the history of the Polish justice system, it lays the foundation for a new, hopefully better, one. The verdict of acquittal in the

[1] LEX No. 3588627.

Brześć trial is not only the closure, after nearly a century, of a dark case from the 1930s, but is a reckoning with the past in the name of building a law-abiding future.

In Poland, a post-communist country, the attitude to the past and historical policy is extremely important, as national identity and consciousness are built on it, including in legal terms. In the past, there have been controversial rulings by the Supreme Court in the area of settling the past. Among the most questionable is certainly the resolution of the Supreme Court's Enlarged Composition of 20 December 2007, the importance of which was highlighted by its inclusion in the book of legal principles. The thesis of this resolution states that: "courts adjudicating criminal cases of offenses under the decree of the Council of State of 12 December 1981 on martial law (Journal of Laws No. 29, item 154) were not exempt from the retroactive application of criminal provisions of statutory rank."[2] The resolution significantly reduced the possibility of a reckoning with the communist past, and had a chilling effect, undermining confidence in the judiciary ever since. Not only did the Supreme Court fail to recognize the contradictions with domestic and international law of its decision, but also, in giving its consent to the retroactivity of criminal law in the past, it failed to recognize the importance of the historical moment and, as a result, ignored the socio-political context and the possible positive educational effect of the resolution. In this case, the effect was negative; it was as if the Supreme Court announced that in Free Poland, there can be no question of a lawful settlement of the past.

The Brześć case, well known to historians, lawyers, and certainly to a large part of the public, is a symbol of the dark period of *Sanacja* rule. For years in the People's Republic of Poland, the case was an excellent propaganda tool used to discredit the achievements of the interwar period in the twentieth century. Criticism, while fully deserved, cannot obscure the essence of the matter, namely the instrumentalization of the judiciary by the executive branch. This aspect was aptly grasped by the Supreme Court in the ruling under review, exposing the historical leadership role of Józef Piłsudski.

The progressive instrumentalization of the judiciary marks a shift away from democracy toward authoritarianism and further toward totalitarianism. Lawyers of the pre- and post-war periods were aware of this. In a monograph entitled *Sprawidliwość sowiecka* (Soviet Justice) (first edition, 1945), Kazimierz Zamorski and Stanisław Starzewski wrote that "In Western Europe, the view has become entrenched that the justice system, in order to fulfill its task, must conform to two essential conditions: 1. to

[2] Ref. I KZP 37/07 Critical glosses to this resolution: J. Zajadło, *Five minutes of anti-philosophy of anti-law*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2008, No. 1, p. 161; W. Zalewski, *Iuspositivism versus justice*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2008, No. 3, p. 127. For a partially critical gloss by M. Królikowski see: *Glosa to the resolution of the Supreme Court of December 20, 2007 (ref. 1 KZP 37/07)*, "Przegląd Sejmowy" 2008, No. 3, p. 243; see also: a critical discussion of this resolution in the context of German jurisprudence in W. Kulesza, *Crimen lease iustitie. Criminal liability of judges and prosecutors for judicial crimes under Nuremberg, German, Austrian and Polish law*, Łódź 2013, pp. 450–453. See also: Judgment of the Constitutional Court, OTK ZU 8A/2010, item 81, OJ No. 205, item 1364.

be based on certain general principles, on values independent of the interests or value judgments of particular groups or individuals; 2. to be independent in its structure and activity from the will of the governed."[3] Meanwhile, Soviet justice was obviously characterized by different principles determined by the Leninist motto that "the court is an instrument of the power of the proletariat and the working peasantry."[4] The Polish justice system was moving dangerously toward subordination to the rulers.

The Brześć trial contradicted the principles of the tripartite division of power and was an extreme violation of the rule of law. What if the Piłsudski camp had the support of a significant part of society if it violated the law? As András Sajó rightly points out: "Democracy as the rule of the people can be totalitarian, not so much because the crowd tends toward totalitarianism, but simply because democracy has totalitarian potential."[5] The principle of the independence of the judiciary from the rulers of the state was formed through the struggle against the doctrine of the supremacy of the ruler in the name of individual rights. The Brześć trial proved how easy it was to reverse this process.

1. The historical and legal problem

The court battle for the acquittal of the defendants is impressive. For lack of space, this gloss omits the very interesting legal threads related to the restoration of trial records. Also omitted are the key legal and procedural problems related to the question of the finality of the decision and the possibility of filing a cassation against the verdict issued in 1933.

2. The key substantial legal problem

From the justification of the Supreme Court's judgment of 25 May 2023, it appears that in the Brześć trial, the Court of Appeals shared the position of the court of first instance and "adopted a legal assessment of the defendants' behaviour, recognizing that they committed a crime under Article 102 Part I in conjunction with Article 100 Part III of the 1903 CC, consisting of taking part in a conspiracy to overthrow by violence the government in power in Poland at the time and to replace them with other persons, albeit without changing the fundamental state system, except that, applying Article 2, Section 1 of the 1932 CC, they used Article 97, Section 1 in conjunction with Article 95 of the 1932 CC as the basis for conviction."

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[3] K. Zamorski, S. Starzewski, *Justice of the Soviets*, Warsaw 1994, p. 21. It is worth pointing out that the first edition of this valuable book was published while the war was still in progress, in the spring of 1945 in Italy in the II Polish Army Corps.

[4] *Ibid.*, p. 27.

[5] A. Sajó, *Ruling by Cheating. Governance in Illiberal Democracy*, Cambridge 2021, p. 32.

In its further arguments, the Supreme Court, in its May 2023 judgment, focuses on the elements of Article 95 of the 1932 Criminal Code, including the signifier "by violence," rightly inferring that the provision was about "physical violence." The Supreme Court shared the position of legal doctrine[6], that mental coercion, i.e. a threat, cannot be a means of criminal action within the limits of Article 95 of the 1932 Criminal Code. The Supreme Court, relying on both documentary and historical material, also held that "since it has not been shown (established) that the defendants were participants in such an agreement that sought to remove by violence members of the government in power in Poland at the time (that they participated in such a group, organization, party, association, society, association, or otherwise defined structure that sought to do so), and thus belonged to a conspiracy to overthrow the government, then regardless of other important considerations, their behaviour did not exhaust the elements of the crime charged and attributed to them of participation in a conspiracy formed for the purpose of committing a crime under Article 100 of the 1903 Criminal Code (Article 97 of the 1932 Criminal Code)." This statement became the basis for the acquittal of the defendants.

Neither finding above is in doubt. Article 97 of the Penal Code, in conjunction with Article 95 of the Penal Code, required intentionality in the form of a willingness to remove by violence "the Diet, Senate, National Assembly, Government, Minister or courts," or to seize their power. Article 97 § 1 of the 1932 Criminal Code stipulated that a person who enters into an agreement with other persons to commit a crime specified in Articles 93, 94, or 95 is punishable by imprisonment. As accepted in the literature, "liability under Article 97 § 1 can be referred to only if the agreement is to commit a strictly defined act. Thus, the mere examination of the mood of others, or even the production of a general mood in the direction of a crime under Articles 93–95 is not sufficient. What is not required is an agreement to act according to a strictly defined plan. This condition, which was in the draft of the Codification Commission, has not been maintained in the current text. The existence of a plan of action is therefore indifferent, a strictly defined end goal is sufficient."[7] The goal of the defendants was not to "remove by violence" the Government, or at least that has not been proven beyond any doubt. The Supreme Court's consideration rightly focuses on the subjective side, for from the subjective point of view, any agreement aimed at a state crime was sufficient for a conspiracy under Article 97 of the 1932 Criminal Code. This agreement did not entail either the "creation of an organization" or of a "union."[8]

Since the crime of Article 97 § 1 of the Penal Code, in conjunction with Article 95 of the Penal Code, according to the Supreme Court's findings, was not committed, the substantive law was defectively applied in the 1930s in a situation where the regulations required the target to use physical violence, which was not used and, more importantly, they required the admission of a conspiracy, of which there was none. In

6 Cf. W. Makowski, *The Criminal Code. Commentary*, Warsaw 1937, p. 332.
7 See also: S. Glaser, A. Mogilnicki, *The Criminal Code. Commentary*, Kraków 1934, p. 340.
8 Cf. J. Makarewicz, *The Criminal Code. Commentary*, Lviv–Warsaw–Kraków 1938, p. 311.

its May 2023 verdict, the Supreme Court meticulously highlighted the legal problem against a background of errors in factual findings.

However, it behooves the author of this gloss to note that the Supreme Court should refer a little more extensively to the problem of intertemporal law, for here some doubt can be found.

To begin with, an elementary formal finding needs to be emphasized. The legal basis that the District Court in Warsaw adopted in its 13 January 1932 verdict, convicting defendants Wincenty Witos, Kazimierz Bagiński, Norbert Barlicki, Adam Ciołkosz, Stanislaw Dubois, Władysław Kiernik, Herman Lieberman, Mieczysław Mastek, Adam Pragier, and Józef Putk, could not have been the provisions of the 1932 Criminal Code, since that code came into force on 1 September 1932, nearly nine months after the verdict. The Polish President issued his decree on 11 June of that year. The change of qualification was made by the Court of Appeals ruling on 20 July 1933, thus already under the new law.

The question arises of assessing the correct application of the norms of intertemporal law. Article 2, Section 1 of the 1932 Penal Code had content similar to the current Article 4 of the 1997 Penal Code. Since the defendants were originally charged with an act under Article 102 Part I in conjunction with Article 100 Part III of the 1903 Criminal Code, it was necessary to consider whether the former law was more relevant to the perpetrators. The 1903 Penal Code provided for a heavy prison sentence of up to eight years for an act under Article 102, while Article 97, Section 1 of the 1932 Penal Code provided for "imprisonment," which, according to Article 39, Section 1 of the same Penal Code, was for a minimum of six months and a maximum of fifteen years, and therefore *prima facie* a harsher punishment, at least as far as the upper limit of the statutory sanction was concerned. Perhaps the decisive circumstance was the lower limit of the statutory sanction in Article 102 of the 1903 Penal Code, which set aggravated imprisonment under the 1917 Transitional Provisions for one year.[9] Of course, a simple comparison of statutory sanctions alone does not yet determine anything definitively on the question of "relevance," but it seems that for the sake of clarity, it would be good to address the issue.

3. Political and legal issue

It is not the material-legal issues, which are quite trivial in fact, that constitute the epochal significance of the ruling in question. Its importance in terms of transformative justice has already been mentioned. Its systemic significance should now be exposed. The May ruling of the Supreme Court touches on the fundamental issue of the effects

[9] Cf. W. Makowski, *Penal Code temporarily in force in the Republic of Poland on the lands of the former Russian partition*, Vol. I, *General Part*, Warsaw 1921, p. 89 *et seq.* and the same, *Penal Code temporarily in force in the Republic of Poland on the lands of the former Russian partition*, Vol. II, *Part II–XIX*, Warsaw 1921, p. 50.

of the detrimental influence of the executive on the judiciary and the effects of the negation of the principle of tri-partite division of power. In 1933, the independence of the judiciary was undermined in the name of legalizing Józef Piłsudski's political decision. Only with the passage of time is it possible to assess in full the extent of the detrimental impact of the 1933 Court of Appeals decision approving the District Court's ruling. There was a collapse of the moral authority of the government and the courts, resulting in the further decay of the state and drift toward an authoritarian state. Knowledge of the political and sometimes purely financial corruption of the judges and prosecutors involved in the Brześć trials became widespread.[10] In the long run, the Brześć trial cast a shadow over the perception of the judiciary of the Second Republic. The Supreme Court rightly says that "This case should also serve as a warning against the temptation […] to take actions against the law, including the Constitution, to achieve political goals and expand the scope of power."

4. The problem of the legitimacy of the judiciary

It is not difficult to find parallels in the ruling of the Supreme Court with the current situation in the judiciary. The importance of the good standing of the authority of judges was already pointed out before the war,[11] and research in this regard is also being carried out now.[12] A great deal has already been written about the current crisis caused by the post-2015 changes in the judiciary.[13] There is no doubt that restoring the credibility of the courts has become a key issue. The words of Bronisław Wroblewski are telling; he writes that "A great deal is required of judges. A judge must stand high mentally and morally. This is one of the very few sentences that has not been and is not questioned and is sometimes upheld even by those who, with the slogan of judicial independence

[10] Cf. A. Mogilnicki. *Memoirs of a lawyer and judge*, Warsaw 2016, p. 335 *et seq*. The author writes: "The judges who tried this case were quickly promoted immediately afterwards, with the exception of Judge Leszczynski, who voted for acquittal in the court of first instance and filed a dissenting opinion, but was outvoted by two other judges, Hermanowski and Rykaczewski. […] The prosecutor who conducted the investigation and 'watched over' the prisoners in Brześć was Czeslaw Michalowski, who later became Minister of Justice as a reward for this, and after his resignation from this position was given a very lucrative position as a mortgage writer in Warsaw; Car ceased to be a minister after this trial, as he was appointed Speaker of the new Sejm, but, as long as he was a minister, he mainly directed the course of the trial and everything connected with it, especially the way the prisoners in the Brześć Fortress were handled. The prosecution in this trial was brought by prosecutor Witold Grabowski, who also became Minister of Justice after Michalowski" – *ibid.*, p. 335.

[11] Cf. B. Wróblewski, *Ability and legal mental culture of criminal judges*, imprint from vol. X of the Vilnius Legal Yearbook, 1939; *idem*, W. Świda, *Sentencing in the Republic of Poland*, Vilnius 1939.

[12] Cf. W. Zalewski, *Why do people need courts? Judging in times of crisis of confidence* [in:] *Legitimization of judicial power*, ed. A. Machnikowska, Gdańsk 2016, pp. 211–229; J. Królikowska, *Judges on punishment, punishing and impunity. Sociological analysis of the judicial dimension of punishment*, Warsaw 2020.

[13] Cf. e.g. *Rule of Law as a Universal Value. Jubilee Book of Professor Krzysztof Wojtowicz*, ed. A. Kozłowski, Wrocław 2022.

on their lips, cast more or less elaborate nets to affect the judiciary."[14] Nowadays, more people are being removed from adjudication for failing to meet an "impartiality test."[15] To make matters worse, there is an undermining of the credibility of the European Court of Human Rights (ECHR) by the Polish Constitutional Court, which "monitors" the jurisprudence of other courts and tribunals, and even worse, rules on the scope of the non-application of the ECHR, especially Article 6.[16]

5. Lesson for the future

Sociological writing emphasizes that the activity of judges that affects the formation of legal awareness is "extremely modest."[17] Compounding this state of affairs are, of course, legal restrictions, but there is also little awareness among judges of the importance of their work. Rarely are there rulings that appreciate the social dimension in shaping the social consciousness of citizens.[18] I hope that we may be able to properly appreciate the Supreme Court's decision in the Brześć case and appreciate its importance. The Supreme Court restores justice to the accused and gives proper meaning to the law and the rule of law. A historical antecedent has multiple meanings. First and foremost, it gives the right perspective as to what is important to the state and society. While not denying the good intentions of "good change," it should be remembered that the road to hell is paved with good intentions.

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14 B. Wróblewski, *Ability…*, p. 3.

15 Cf. Resolution of the Supreme Court I KZP 2/22, OSNK 2022/6/22, LEX No. 3348360, OSP 2023/2/13, and, for example, Order of the Supreme Court III KK 114/23, which dealt with the circumstance of a judge's participation in a procedure conducted under the amended law on the National Council of the Judiciary and a reasonable doubt about the judge's objective and subjective impartiality, LEX No. 3568272.

16 A. Wyrozumska, *Judgment of the Constitutional Court (K 6/21) on the ruling of the European Court of Human Rights in the Xero Flor case, which allegedly "does not exist"*, "Europejski Przegląd Sądowy" 2023, No. 2, pp. 4–15.

17 J. Królikowska, *Judges on punishment…*, p. 325.

18 However, cf. Order of the Supreme Court IV KO 36/23, dated May 25, 2023, LEX No. 3567076, in which the Supreme Court stated that "The external image of the functioning of the courts requires that we avoid any situation that may pose a threat to the formulation of rational opinions that not only considerations of merit determine how a case is decided."

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Summary

Wojciech Zalewski

Against the Instrumentalization of Law: Justice for the Convicted in the Brześć Trial

The acquittal after ninety years of Prime Minister Wincenty Witos and others convicted in the Brześć trial is a landmark ruling. The author seeks to demonstrate the multifaceted nature of this Supreme Court verdict in the context of the implementation of transformational justice with regard to judicial crimes of the communist period. The gloss approvingly assesses the interpretation of the criminal law adopted by the Supreme Court including, in particular, Article 97 of the Criminal Code of 1932.

Keywords: justice, acquittal, criminal law, separation of powers, instrumentalization of law.

Streszczenie

Wojciech Zalewski

Przeciw instrumentalizacji prawa – sprawiedliwość dla skazanych w procesie brzeskim

Uniewinnienie po 90 latach premiera Wincentego Witosa i innych skazanych w procesie brzeskim jest orzeczeniem przełomowym. Autor stara się wykazać wieloaspektowość tego wyroku Sądu Najwyższego w kontekście realizacji sprawiedliwości transformacyjnej również w odniesieniu do przestępstw sądowych okresu komunistycznego. W glosie aprobująco oceniono wykładnię prawa karnego przyjętą przez SN, w tym zwłaszcza art. 97 Kodeksu karnego z 1932 r.

Słowa kluczowe: sprawiedliwość, uniewinnienie, prawo karne, podział władzy, instrumentalizacja prawa.

Is One Step Enough? Serious Illness as a Ground for Non-execution of a European Arrest Warrant

Judgment of the Court of Justice (Grand Chamber) of 18 April 2023, C-699/21, E.D.L. (Ground for Refusal Based on Illness)

Articles 1(3) and 23(4) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, read in the light of Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that:

1. **where the executing judicial authority called upon to decide on the surrender of a requested person who is seriously ill in execution of a European arrest warrant concludes that there are substantial and established grounds for believing that that surrender would expose that person to a real risk of a significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health, it must postpone that surrender and ask the issuing judicial authority to provide all information relating to the conditions under which it intends to prosecute or detain that person and to the possibility of adapting those conditions to his or her state of health in order to prevent such a risk from materialising;**
2. **if, in the light of the information provided by the issuing judicial authority and all the other information available to the executing judicial authority, it appears that that risk cannot be ruled out within a reasonable period of time, the executing judicial authority must refuse to execute the European arrest warrant. On the other hand, if that risk can be ruled out within such a period of time, a new surrender date must be agreed with the issuing judicial authority.**

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Commentary

The Council Framework Decision on the European arrest warrant (hereinafter: Framework Decision)[1] was the first concrete measure in the field of European criminal law based on the principle of mutual recognition. It has been the subject of several significant judicial decisions, of which probably the most ground-breaking was the decision in the Aranyosi and Căldăraru joined cases.[2] This ruling has been widely adopted in doctrine and jurisprudence. Nevertheless, the recent judiciary decision issued by the Court of Justice can significantly change the well-established approach adopted in it.

The case was initiated by the Municipal Court in Zadar, which issued a European arrest warrant (hereinafter: EAW) against E.D.L. Since the requested person submitted medical documentation, the Milan Court of Appeal, which was the executing court in this case, ordered a psychiatric examination, which revealed that E.D.L. suffers from a psychotic disorder requiring treatment. Based on this report, the court held, that the execution of the EAW would halt the possibility of treatment, resulting in a worsening of the general condition and a genuine risk to the health of the person concerned. However, the court noted that the possibility to not execute an EAW is limited only to the grounds for refusal listed exhaustively, and a medical condition is not one of them. In this situation, the executing court brought an action to determine constitutionality before the Italian Constitutional Court, which eventually brought the case to the Court of Justice. The Constitutional Court referred the following question: "Must Article 1(3) of [Framework Decision 2002/584], examined in the light of Articles 3, 4 and 35 of the [Charter], be interpreted as meaning that, where it considers that the surrender of a person suffering from a serious chronic and potentially irreversible disease may expose that person to the risk of suffering serious harm to his or her health, the executing judicial authority must request that the issuing judicial authority provide information [allowing] the existence of such a risk to be ruled out, and must refuse to surrender the person in question if it does not obtain assurances to that effect within a reasonable period of time?"[3]

The Advocate General concluded in his opinion[4] that if a requested person is suffering from a serious chronic and potentially irreversible disease that may expose that person to the risk of suffering serious harm to his or her health, the executing body must request the issuing judicial authority to provide information making it possible to rule out the existence of such a risk, and, if necessary, to postpone the surrender of

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1 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1–20.

2 Judgment of the Court (Grand Chamber) of 5 April 2016, in Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi (C-404/15), Robert Căldăraru (C-659/15 PPU), EU:C:2016:198.

3 Case C-699/21, Summary of the request for a preliminary ruling, available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=252182&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3148821 [accessed: 2023.08.30].

4 Opinion of Advocate General Campos Sánchez-Bordona delivered on 1 December 2022, in Case C-699/21, E.D.L., EU:C:2022:955.

that person for as long as that serious risk remains. The starting point of the analysis undertaken by the Advocate General was the case law proving that the risk of inhuman treatment may justify the refusal of surrender under an EAW. Moreover, according to the Advocate General, to make such a conclusion, the requested court is obliged to analogically apply the test introduced by the Aranyosi and Căldăraru joined cases, but in a case like this one, such a test would be limited only to its second part. However, according to the Advocate General, following this path would create a "new" ground for non-execution of the EAW, for reasons related to health, which on top of that, would be mandatory. According to the Advocate General, there is no need to create such a new ground, as a remedy is already possible based on the provisions of the Framework Decision. For these reasons, he proposed to use the measure provided for in article 23(4) of the Framework Decision to postpone the surrender and obtain from the issuing judicial authority explanations regarding the medical treatment available, in line with the medical needs of the requested person.

The Court of Justice indicated in its judgment that the Framework Decision does not provide for the possibility for the executing authorities to refuse to execute an EAW solely on the ground that the person who is the subject of such an arrest warrant suffers from serious and potentially irreversible illness. Nevertheless, the surrender of a person who is seriously ill may in some cases result in a situation in which the person will be exposed to the risk of inhuman treatment. Such a situation may justify the refusal of surrender under an EAW. According to the Court, the assessment of such treatment should be conducted based on an analogically applied two-step test, but in some situations, it can be sufficient to base the assessment only on the second stage of the test. The court shared the position of the Advocate General that based on article 23(4) of the Framework Decision, the executing body may postpone the surrender of the requested person to obtain from the issuing judicial authority explanations regarding the medical treatment available, which provide the possibility of ruling out the risk of inhuman treatment of the requested person. Nevertheless, such a state of affairs cannot be permanent. According to the Court, if the risk of inhuman treatment cannot be ruled out in a reasonable period of time, the executing body is obliged to refuse the execution of the EAW.

The assessment of the given judgment is ambiguous. While one can point to some correct conclusions made in the judgment, some aspects of the judgment deserve criticism.

The conclusion is correct regarding the question of the grounds for non-execution of the EAW. The concerns in this regard stem from Article 1(2) of the Framework Decision, which provides that execution of the EAW constitutes the rule, whereas refusal to execute is intended to be an exception which must be interpreted strictly.[5] Moreover, in its judgments, the Court has indicated that the principle of mutual recognition expressed in article 1(2) lays down the rule that Member States are required to execute any EAW and that executing judicial authorities may, in principle, refuse

[5] Judgment of the Court (Fifth Chamber) of 29 April 2021, in Case C-665/20 PPU, X, EU:C:2021:339.

to execute EAW only on the grounds for non-execution exhaustively listed by that Framework Decision.[6] However, the Explanatory Memorandum for the proposal for a Framework Decision provided that it will not be possible for the judicial authority of a Member State to refuse to execute an EAW on a ground not provided for in the text of the Framework Decision, subject, of course, to the general rules for the protection of fundamental rights, and subject particularly to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union.[7] In the case at hand, the Court has applied Article 1(3) which provides that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.[8] According to the aforementioned provision of the Treaty, the Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000.[9] Thus, the Court has properly applied the provision, claiming that the existence of a risk of infringement of fundamental rights is capable of permitting the executing judicial authority to refrain, exceptionally and following an appropriate examination, from giving effect to an EAW. The court properly indicated that, in such a case, the executing judicial authority cannot, in accordance with Article 1(3) of the Framework Decision, interpreted in the light of Article 4 of the Charter of Fundamental Rights of the European Union, give effect to the EAW. Moreover, this approach is in line with the jurisprudence of the Court of Justice according to which the existence of a risk of infringement of the fundamental rights set out in Articles 4 and 47 of the Charter is capable of permitting the executing judicial authority to refrain, exceptionally and following an appropriate examination, from giving effect to an EAW on the basis of Article 1(3) of that Framework Decision.[10] It is worth adding that each of the grounds for non-execution of the EAW resulting from the case-law of the Court of Justice is treated as stemming from the Framework Decision.[11]

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[6] Judgment of the Court (Second Chamber) of 1 June 2016, in Case C241/15, Niculaie Aurel Bob-Dogi, EU:C:2016:385.

[7] Explanatory memorandum to the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM/2001/0522 final – CNS 2001/0215, OJ 332 E, 27.11.2001, pp. 305–319.

[8] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.

[9] Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, pp. 1–22.

[10] See Judgment of the Court (Grand Chamber) of 15 October 2019, in Case C128/18, Dorobantu, EU:C:2019:857; see also: Judgment of the Court (Grand Chamber) of 22 February 2022, in Joined cases C562/21 PPU and C563/21 PPU, X (C-562/21 PPU), Y (C-563/21 PPU), EU:C:2022:100; see also: Judgment of the Court (Grand Chamber) of 25 July 2018, in case C-216/18 PPU, LM, EU:C:2018:586; see also: Judgment of the Court (First Chamber) of 25 July 2018, in Case C-220/18 PPU, ML, EU:C:2018:589; see also: A. Łazowski, *The sky is not the limit: Mutual Trust and Mutual Recognition aprés Aranyosi and Căldăraru*, "Croatian Yearbook on European Law and Policy" 2018, Vol. 14, pp. 1–30; see also: Z. Gilbert, *The implementation of the CJEU's Joined Cases Aranyosi and Caldararu by the UK and Irish Courts – A real impact on the protection of fundamental rights in surrender proceedings?*, "New Journal of European Criminal Law" 2022, Vol. 13, No. 3, pp. 314–332.

[11] Judgment of the Court (Grand Chamber) of 31 January 2023, in Case C158/21, Puig Gordi and others, EU:C:2023:57.

However, not all the conclusions of the judgment can be approved of. In the judgment, the Court indicated that if it appears that the risk of a significant reduction in the surrendered person's life expectancy or of a rapid, significant, and irreversible deterioration in this person's state of health cannot be ruled out within a reasonable period of time, the executing judicial authority must refuse to execute the EAW. A similar position has been taken by the Advocate General, who in his opinion indicated that an additional ground for non-execution based on humanitarian reasons connected with the state of health of the surrendered person would have to be mandatory in view of the nature of the fundamental right involved. An assessment of the aforementioned position should start with the observation that the Framework Decision sets out, first, the grounds for mandatory non-execution of the EAW (in Article 3), and second, the grounds for optional non-execution (in Articles 4 and 4a). In the case of the mandatory grounds for non-execution, all Member States are obliged to transpose them into their domestic law, whereas in the case of grounds for optional non-execution Member States are free to transpose them or not.[12] Nevertheless, where the latter are transposed, the Member States may not provide that the judicial authorities are required to automatically refuse to execute any EAW concerned. Those authorities must have a margin of discretion, allowing them to carry out an examination on a case-by-case basis, taking into consideration all the relevant circumstances.[13] When the state of health is the issue of concern, the situation is quite common in which it is not easy to make a decision about whether the given illness requires special treatment, whether the treatment available in case of imprisonment in the requested state meets the requirements of the treatment required in the given case, and if so, whether the execution of the EAW will expose a requested person to inhuman punishment (that is why the Court agreed to apply analogically to those cases the possibility of postponing the surrender). Of course, there is a range of potential cases in which the decision will be taken easily, e.g. in the cases of people who are paralysed, who require full-time specialised care, etc. Nevertheless, in cases like the one which brought the issue to the Court of Justice, the decision is definitely not an easy one. For such reasons in cases when the state of health is the issue of concern, a decision should be made on a case-by-case basis, taking into account the state of health of the requested person, his or her needs in terms of medical treatment, and the possibilities of the place of detention in terms of the medical treatment it can provide for the requested person. For such reasons, the possibility of non-execution of the EAW in such circumstances should be of an optional nature. Moreover, this approach is justified on the basis of the jurisprudence of the Court of Justice, which in the Aranyosi and Căldăraru joined cases indicated that the situation when the requested person, due to the conditions of his/her detention, may be exposed to a real risk of inhuman or degrading treatment

[12] N. Keijzer, E. van Sliedregt, *The European Arrest Warrant in Practice*, Cambridge 2009, p. 147; L. Klimek, *European Arrest Warrant*, Cham–Heidelberg–New York 2015, pp. 159–163.

[13] Judgment of the Court (Fifth Chamber) of 29 April 2021, in Case C-665/20 PPU, X, EU:C:2021:339; Judgment of the Court (Fifth Chamber) of 29 June 2017, in Case C-579/15, Daniel Adam Popławski, EU:C:2017:503.

within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, provides the possibility (not the obligation) for the executing judicial authority to bring the surrender procedure to an end.[14]

Moreover, the aspect regarding the application of the two-step test deserves deeper consideration. In the case analysed here, the Court has indicated that in some circumstances the surrender of a person who is seriously ill may cause that person to be exposed to a real risk of inhuman treatment, either as a result of or, in certain circumstances, regardless of the level of quality of the care available in the issuing Member State. In short, the Court has indicated that in order to assess whether the requested person will be exposed to the risk of inhuman treatment within the meaning of Article 4 of the Charter, the two-step test proposed in the judgment in Aranyosi and Căldăraru should be conducted analogically, but, in some circumstances, it is reasonable to limit the examination only to the second stage of the test. A similar position has been taken by the Advocate General, who indicated that the examination of the first stage is unnecessary and inappropriate. While understanding the reasons presented by the Advocate General in his opinion, one can point out the counter-arguments for the application of the two-step test. First and above all, the need to analyse both stages of the test has been indicated in multiple judicial decisions of the Court of Justice. It has been presented in many cases in which the initial point of consideration was connected with the general systemic malfunctions of the legal systems of the requesting countries. In this regard, the jurisprudence of the Court of Justice is well-established and commonly accepted.[15] However, the case under consideration is of a different nature, as it analyses a situation in which the executing body was provided with information regarding the threat to the fundamental rights of an individual. In other words, the issue under consideration in this case regards the question of whether the executing body, while having information regarding meeting the obligation of the second stage of the two-step test, still needs to examine the fulfilment of the first stage of the test. This issue has also been under examination by the Court of Justice. In those cases, the Court has stated that both of the steps of the test have to be examined and that those steps cannot overlap with one another.[16] Moreover, it seems

[14] G. Anagnostaras, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldararu*, "Common Market Law Review" 2016, Vol. 53, Issue 6, pp. 1675–1704; K. Bovend'Eerdt, *The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?*, "Utrecht Journal of International and European Law" 2016, Vol. 32, No. 83, p. 112; R. Barbosa, V. Glerum, H. Kijlstra, A. Klip, Ch. Peristeridou, *Improving the European Arrest Warrant*, The Hague 2023, pp. 201–223.

[15] M. Luchtman, S. Tosza, *How to deal with rule of law-concerns in surrender procedures?* [in:] M. Luchtman, K. Ligeti, S. Tosza, *Of swords and shields: Due process and crime control in times of globalization – liber amicorum prof. dr. J.A.E. Vervaele*, The Hague 2023, pp. 453–461.

[16] Judgment of the Court (Grand Chamber) of 31 January 2023, in Case C-158/21, Puig Gordi and others, EU:C:2023:57; see also Judgment of the Court (Grand Chamber) of 17 December 2020, in joined cases C-354/20 PPU and C-412/20 PPU, L (C-354/20 PPU), P (C-412/20 PPU), EU:C:2020:1033; see also Sz. Gáspár-Szilágyi, *Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant*, "European Journal of Crime, Criminal Law and Criminal Justice" 2016, Vol. 23, Issue 2–3, pp. 197–219.

to be inadvisable to manipulate the system introduced by the judicial decision in the Aranyosi and Căldăraru joined cases, which has been widely applied by the Member States.[17] Keeping the first stage of the test will provide the possibility to examine whether it will be possible for the requested person to get proper medical treatment in the requested country. This piece of information plays an important role in the assessment of whether the requested person will face inhuman treatment as a result of the execution of the warrant. As has been indicated in the previous part of this commentary, in the most severe cases, in which the medical care available in case of imprisonment is not able to provide the proper highly specialised medical treatment, giving an answer to the first step of the examination will be easy. For those cases, the result of the application of the test in both variants – application of the two-step test, and if the test is limited to just the second stage – will probably lead to the same conclusion and will oppose the execution of the warrant based on the conclusion that the requested person will be exposed to the risk of inhuman treatment within the meaning of Article 4 of the Charter. However, the answer to this question in cases like the one which brought the case to the Court of Justice will definitely not be an easy one. In such cases, limitation of the test to just its second stage, thus examination of just the individual situation without examination of the system of medical care available in the relevant detention places, may ultimately provide the possibility of broadening the scope of possibilities for non-execution of the EAW. One should keep in mind that the ultimate aim of the mechanism introduced by the Framework Decision is the effective execution of requests. For this reason, the execution of the warrant was supposed to be the rule, whereas non-execution was supposed to be an exception, which was provided for in extraordinary cases.[18] Hence, maintenance of the test in its original, two-step version is a reasonable approach, so as not overly to extend the possibility for non-execution of the EAW, and as a result strike at the heart of the system introduced by the Framework Decision.

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Summary

Marcin Biskupski

Is One Step Enough? Serious Illness as a Ground for Non-execution of a European Arrest Warrant

The subject of the commentary is the judgment of the Court of Justice regarding the possibility of non-execution of a European Arrest Warrant regarding a person suffering serious, chronic, and potentially irreversible illness. Since the Framework Decision on the European arrest warrant does not provide the ground for the non-execution of the warrant based on the threat to the health of the person concerned, the referring court was in doubt, whether such a premise can justify the non-execution of the warrant. The main legal problem dealt with in the commentary was the consideration of whether in such a case the executing judicial authority may refuse to execute such a warrant, and, if so, on what legal basis.

Keywords: Aranyosi and Căldăraru joined cases, Court of Justice of the European Union, European Arrest Warrant, Framework Decision, two-step test.

Streszczenie

Marcin Biskupski

Czy jeden etap jest wystarczający? Poważna choroba jako podstawa odmowy wykonania Europejskiego Nakazu Aresztowania

Przedmiotem glosy jest orzeczenie Trybunału Sprawiedliwości Unii Europejskiej dotyczące odmowy wykonania Europejskiego Nakazu Aresztowania w stosunku do osoby cierpiącej na poważną, przewlekłą i potencjalnie nieodwracalną chorobę. Ponieważ decyzja ramowa w sprawie Europejskiego Nakazu Aresztowania nie przewiduje przesłanki odmowy wykonania nakazu z powołaniem się na zagrożenie dla stanu zdrowia osoby przekazywanej, sąd odsyłający

powziął wątpliwość co do możliwości odmowy wykonania nakazu z powołaniem się na wyżej wspomnianą przesłankę. Głównym problemem prawnym glosy było ustalenie, czy w zaistniałej sytuacji sąd wykonujący może odmówić wykonania takiego wniosku, a w razie pozytywnej odpowiedzi na tak postawione pytanie, jaka powinna być podstawa takiej odmowy.

Słowa kluczowe: sprawy połączone Aranyosi i Căldăraru, Trybunał Sprawiedliwości Unii Europejskiej, Europejski Nakaz Aresztowania, decyzja ramowa, test dwustopniowy.

Special Jurisdiction Based on the Place Where Damage Occurred in Cases Related to the Dissemination of Disparaging Comments on the Internet

Judgment of the Court (Grand Chamber) of 21 December 2021, C-251/20, Gtflix Tv v DR[1]

Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a person who, considering that his or her rights have been infringed by the dissemination of disparaging comments concerning him or her on the internet, seeks not only the rectification of the information and the removal of the content placed online concerning him or her but also compensation for the damage resulting from that placement may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seised, even though those courts do not have jurisdiction to rule on the application for rectification and removal.

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Commentary

Introduction

In the judgment commented on here, the Court dealt with the interpretation of Article 7(2) of regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judg-

[1] ECLI:EU:C:2021:1036.

ments in civil and commercial matters[2] (hereinafter: the Brussels I bis regulation) in the context of torts committed on the internet. Infringement of personality rights committed in online publications falls within the scope of a notion of *cyber torts*, defined as any harmful conduct that is either committed via or affects the use of the internet or a harmful act performed by a computer in the broadest sense (including mobile computer devices, such as smartphones and tablets).[3] The use of the internet has expanded to nearly all areas of everyday life and the feeling of anonymity of its users triggers a temptation to engage in spontaneous posting. Subsequently, tortious acts aimed at personality rights, particularly reputation and privacy, have increased in frequency and intensity. As digitalisation is cross-border by nature, the scope of defamatory content published on a webpage or on social media platforms is not limited by national borders and such harmful acts might be followed by harm in numerous jurisdictions. Due to challenges related to the omnipresence of internet publications, jurisprudence needs to adapt traditional connecting factors in conflict of laws to torts committed in a digital environment. The judgment in the Gtflix Tv case adds a new element to a series of judgments on jurisdiction in cross-border defamation cases related to mass media rendered by the Court over the past years.[4] The topic of jurisdiction in cross-border defamation conflicts raises vivid debates in legal doctrine. According to the global status report published in 2019 by the Secretariat of the Internet & Jurisdiction Policy Network, the problems related to cross-border defamation cases are becoming increasingly acute.[5] For this reason, both the judgment and arguments presented in this judgment by the Court deserve further consideration.

1. The facts of the case, preliminary questions and the judgment

In the case decided by the Court on 21 December 2021, the claimant was Gtflix Tv, a company with its center of interests in the Czech Republic. Its areas of professional

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2 Official Journal of the European Union L 351/1.

3 B. Koch, *Cyber Torts: Something Virtually New?*, "Journal of European Tort Law" 2014, Vol. 5, No. 2, pp. 133–164.

4 Previously, the issues were the subject of e.g. Judgment of the Court of 7 March 1995 – Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, ECLI:EU:C:1995:61; Judgment of the Court (Grand Chamber) of 25 October 2011 in joined cases C-509/09 and C-161/10 eDate Advertising GmbH and Others v X and Société MGN LIMITED, ECLI:EU:C:2011:685; Judgment of the Court (Grand Chamber) of 17 October 2017 in case C-194/16, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, ECLI:EU:C:2017:766; Judgment of the Court (First Chamber) of 17 June 2021 in case C-800/19, Mittelbayerischer Verlag AG v SM, ECLI:EU:C:2021:489. As to the interpretation of "the place where a harmful event occurred" of great value is also: Judgment of the Court of 30 November 1976. Handelskwekerij G.J. Bier BV v Mines de potasse d'Alsace SA, ECLI:EU:C:1976:166, although the case itself was not related to cross-border defamation.

5 D. Jerker, B. Svantesson, *Internet & Jurisdiction. Global Status Report (2019)*, Paris 2019, p. 15, https://www.internetjurisdiction.net/uploads/pdfs/Internet-Jurisdiction-Global-Status-Report-2019-Key-Findings_web.pdf [accessed: 2024.01.30].

activity covered the production and distribution of audiovisual content. It accused DR, domiciled in Hungary, of publishing disparaging comments about it on several websites and forums. Then it brought an action against the defendant before the Regional Court in Lyon, seeking an order to cease all acts of disparagement against Gtflix Tv and to publish legal notice in French and in English on all the forums in question. Additionally, Gtflix Tv pursued claims for compensation for pecuniary and non-pecuniary harms related to the violation. DR raised an objection about the lack of jurisdiction of French courts, which was upheld both by the court of first instance and the court of appeal. Gtflix Tv criticised the judgments issued by the courts of lower instances before the Supreme Court for excluding the jurisdiction of French courts and for having found that the company should pursue the claims before a court in the Czech Republic. The Supreme Court submitted a preliminary question whether a person who, considering that his or her rights have been infringed by the dissemination of disparaging comments on the internet, seeks not only the rectification of the information and the removal of the content, but also compensation for the resulting non-material and economic damage, may claim before the courts of each Member State in which content published online is or was accessible, compensation for the damage caused in that Member State, or whether that person must make that application for compensation before the court with jurisdiction to order rectification of the information and removal of the disparaging comments. The main problem in the judgment commented on here pertained to the question of whether, on the basis of the rule of special jurisdiction laid down in Article 7(2) of Regulation No 1215/2012, it was possible to pursue a claim in France, where damage allegedly materialised. In a judgment rendered on 21 December 2021, the Court decided that the court in the Member State where comments were accessible (in the facts of the case commented on here, that is France) has jurisdiction to award damages, hence only for harm suffered in that state. This court does not have jurisdiction to rule on the application for rectification and removal, as these claims can be decided only by the court that has jurisdiction on the entirety of an application for compensation for damage, which in the case would be the court in the Czech Republic.

2. Assessment of the Court of Justice's ruling

The facts in the case discussed here highlight problems with adapting traditional jurisdictional bases in disputes relating to online defamatory publications that users can easily access or distribute in other countries. The challenges related to cross-border jurisdictional tensions had already appeared in the Shevill case, decided by the CJEU in 1995.[6] The Court held that the claimant can either bring an action before a court of the state where the defamatory publication is established and apply there for damages for all the harm caused by the defamation, or before a court in the state where the

[6] Judgment of the Court of 7 March 1995 – Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, ECLI:EU:C:1995:61.

publication was distributed and the claimant suffered injury to his/her reputation. The latter court can decide only upon damages for harm caused in the state where court is sited. Although the judgment referred to press publications, the adopted interpretation of Article 5 point 3 of the Brussels I regulation[7] (currently Article 7 point 2 of the Brussels I bis regulation[8]), called by legal scholars a "mosaic approach,"[9] was applied by the Court in judgment in the Gtflix Tv case. Originally, the mosaic solution was conceived by the Court in its well-known judgment in joined cases C-509/09 and C-161/10 eDate Advertising GmbH,[10] in which the Court related to "the place where the harmful event occurred or may occur" in the context of virtual reality and pointed out that the alleged victim of violation may bring an action for liability before the courts of the Member State in which the center of his/her interests is based.[11] Of course, it shall not be perceived as a separate jurisdictional base, but a specific place where damage occurred[12] in the sense of (current) Article 7(2) of the Brussels I bis regulation.

Contrary to an action for compensation of pecuniary and non-pecuniary harms, an action for rectifying information and removing harmful content is, by its nature, indivisible. Therefore, as the Court decided in ase C-194/16 Bolagsupplysningen OÜ, a victim of harmful defamation (both a natural person and a legal person) may bring an action for this indivisible claim only to the court that is capable of deciding upon all claims, which is the court of the state where the claimant's center of interests is based.[13] It also determined that the approach in cases related to violations of personality rights applies both to natural persons and legal entities.[14] However, it should be emphasized that the the case C-251/20 Gtflix Tv was the first case related to the mosaic approach, where the harm suffered by the claimant occurred in another state than the one where the center of his/her interests was located.

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[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union L 012.

[8] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union L 351/1.

[9] See P. de Miguel Asensio, *Conflict of laws and the Internet*, Cheltenham 2020, p. 176 and Opinion of Advocate General M. Bobek delivered on 13 July 2017 in case C-194/16, Bolagsupplysningen OÜ Ingrid Ilsjan v Svensk Handel AB, ECLI:EU:C:2017:554, para 28.

[10] Judgment of the Court (Grand Chamber) of 25 October 2011 in joined cases C-509/09 and C-161/10 eDate Advertising GmbH and Others v X and Société MGN LIMITED, ECLI:EU:C:2011:685.

[11] A person may also have the center of his/her interests in a Member State, with which he/she has particularly close links established by factors such as professional activity, even though he/she does not habitually reside in that State; see Judgment of the Court (Grand Chamber) of 25 October 2011 in joined cases C-509/09 and C-161/10 eDate Advertising GmbH and Others v X and Société MGN LIMITED, ECLI:EU:C:2011:685, para 49.

[12] This has also been noted by Ł. Dyrda, *Dotychczasowa praktyka i orzecznictwo dotyczące jurysdykcji krajowej w sprawach o ochronę dóbr osobistych a wyrok Trybunału Sprawiedliwości z 17.06.2021 r., C-800/19, Mittelbayerischer Verlag KG przeciwko SM*, "Europejski Przegląd Sądowy" 2022, No. 7, p. 38.

[13] Judgment of the Court (Grand Chamber) of 17 October 2017 in case C-194/16, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, ECLI:EU:C:2017:766, para 44.

[14] *Ibid.*, para 38.

According to an equally consistent line of the Court's case-law, the concept of the "place where the harmful event occurred or may occur" envisages two distinct places: the one where the damage materialised, and the one where the event giving rise to it took place. In the event that these places were located in separate countries, the defendant may be sued, at the applicant's option, in the courts sited in either of those places.[15] It merits approval that the Court utilises the argument of reasons relating to the sound administration of justice and the efficacious conduct of proceedings to explain the use of this special jurisdiction rule in cases related to tort, delict or quasi-delict.[16] The injured party shall have a right to bring his/her action before a court that is close to the case, which is economically justified and makes the claims more approachable. In this regard, jurisdiction based on the special rule of Article 7(2) of the Brussels I bis regulation prevails over the general rule of Article 4, which affiliates jurisdiction with the "home state" of the defendant.

Unlike an application for rectification of information and removal of content, which is indivisible, an application for compensation may seek either full or partial compensation. For this reason – as the Court stated in the Gtflix case – there is no justification for excluding a claim for partial compensation before any other court within whose jurisdiction the victim considers that he/she has allegedly suffered damage.[17] In other words, a victim of a violation of personality rights should not be deprived or limited in his/her right to seek damages in the court that is closest to the place where damage materialized. Such an interpretation of "the place where the harmful event occurred" adapts the existing regulations to challenges related to online violations, places emphasis on the accessibility of the court and is in accord with the previous case law regarding online defamation disputes. Due to the immaterial and dispersed nature of harm related to the violation of personality rights, it is hard to accept that narrowing down the jurisdictional bases would adequately meet the challenges of virtual reality. Further, it would also call into question the practical utility of special jurisdiction based on Article 7(2) of Brussels I bis, as a departure from the mosaic approach would lead, in fact, to loss of the relevance of this jurisdictional base and backtrack to jurisdiction focused in one place, namely the place of the center of interest of the victim or the place of residence of the defendant. The claimant is still free to rely on the interpretation of Article 7(2) that he/she finds more adequate in his/her case and choose special jurisdiction based on his/her center of interests or rely on general jurisdiction based on the place of habitual residence of the tortfeasor. Yet, as Advocate General Gerard Hogan rightly points out in his opinion,[18] since each national court is only competent

[15] Judgment of the Court (Sixth Chamber) of 29 July 2019 in case C-451/18, Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF Trucks NV, ECLI:EU:C:2019:635, para 25; Judgment of the Court (Second Chamber) of 16 June 2016 in case C-12/15, Universal Music International Holding BV v Michael Tétreault Schilling and others, ECLI:EU:C:2016:449, para 28 and the case-law cited.

[16] Judgment of the Court (Grand Chamber) of 21 December 2021 in Case C-251/20, Gtflix Tv v DR, ECLI:EU:C:2021:1036, para 24 and the case-law cited.

[17] *Ibid.*, para 35.

[18] Opinion of Advocate General G. Hogan delivered on 16 September 2021 in Case C-251/20, Gtflix Tv v DR, ECLI:EU:C:2021:745, para 85.

to rule on the damages occurring in its state in the absence of harmonisation of the rules relating to defamation, each court will logically apply a different law.

In cases decided by the Court within the past few years additional limits of jurisdictional mosaic dissociation have been set. The first is to exclude the possibility of bringing an action for rectification or removal of information in every state where information has been available.[19] The second is to make conditional the jurisdictional base for the defamatory publication on the possibility of identifying the alleged victim based on its content.[20] Another unwritten condition that is also included in the judgment in the Gtflix case is that a claim for compensation based on the mosaic principle has to be based on the fact that the victim allegedly suffered damage in that particular place, not on the fact that the information was accessible to the public in that country. Jurisdiction based on the fact of the damage, rather than on accessibility of the content, removes most risks related to the mosaic approach, because, as Sylvian Bollée and Bernard Haftel rightly point out, the assessment of the existence of "targeting" the public of this or that country is also often very delicate and exposes the tortfeasor to the potential jurisdiction of all the courts in the world.[21] Admitting jurisdiction in defamatory cases based on the accessibility of the content would not contribute to ensuring legal certainty and predictability, which are among the fundamental objectives of the Brussels I bis regulation.[22]

Indeed, nothing in the text of the judgment explicitly states a requirement that a natural or legal person should allegedly have to suffer damage in the place where the comments were accessible to pursue claims in that state. It seems that such an unwritten condition, however, might be drawn from several aspects of the judgment, where the Court directly stated that a person who considers his/her rights to have been infringed may bring an action before the courts of each Member State in which content placed online is or has been accessible, yet those courts have jurisdiction only in respect of the damage caused in the Member State of the Court seised.[23] Moreover, the Court held that there is no justification (such as the fact that an application for rectification of information and removal of content is of a single and indivisible character) for excluding the possibility for the applicant to claim partial compensation before any other court within whose jurisdiction he or she considers that he or she has suffered

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19 Judgment of the Court (Grand Chamber) of 17 October 2017 in Case C-194/16, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, ECLI:EU:C:2017:766.

20 On the basis of such a criterion, The Court refused to give the Polish court jurisdiction in a case brought by a citizen who claimed that the use of the phrase "Polish death camps" in an online publication violated his national identity and dignity, see: Judgment of the Court (First Chamber) of 17 June 2021 in Case C-800/19, Mittelbayerischer Verlag AG v SM, ECLI:EU:C:2021:489.

21 S. Bollée, B. Haftel, *Les nouveaux (dés)équilibres de la compétence internationale en matière de cyberdélits après l'arrêt eDate Advertising et Martinez*, "Recueil Dalloz" 2012, Nº 20, p.1285, para 16.

22 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, para 16.

23 For example, paragraphs 30, 39 and 40 [in:] Judgment of the Court (Grand Chamber) of 21 December 2021 in Case C-251/20, Gtflix Tv v DR, ECLI:EU:C:2021:1036.

damage.[24] Making jurisdiction in online defamation cases conditional on the fact that the victim has to allegedly suffer harm in the state of the forum seems to be a natural consequence of interpreting "the place where the harmful event occurred" as the place where damage materialised. As the claimant might sue merely in those states where the alleged harm can be identified, the appropriate forum might be determined more predictably. Subsequently, this contributes to providing certainty of law in the context of Article 7(2) of the Brussels I bis regulation.

When jurisdiction is exercised on the basis of the mosaic approach, a legal maxim *actor sequitur forum rei* gives its way to *forum damni*. To decide upon its jurisdiction in a case, the court will not only have to precisely indicate harms but also settle the blurred boundaries between territories. Obstacles in this area may be set by modern-day technology that easily enables users from one state to find out the results of web searches in other states using the settings of their Internet search engine, through geo-blocking or through access to a VPN. As such actions may lead to difficulties in locating damages, this means additional duties for national courts, as entities safeguarding the effectiveness of the rights granted to individuals by the norms of EU law. On the defendant's side, difficulties in reasonably predicting future jurisdiction and the risk of involvement in a complex and costly dispute may lead to increased self-censorship and fear of freely expressing one's views. Moreover, recognizing harm related to the violation of a legal person's personality rights may differ in the countries where the damage occurred. Significant differences can also be seen in the way in which the damage suffered by a legal person is defined (in particular those of a non-pecuniary nature) and the scope and permissible means of compensating for them, such as compensation for the harm suffered.[25] Such discrepancies may create a temptation for claimants to pursue their claims in states where they can obtain the most favourable outcome (forum shopping)[26] or to increase the phenomenon of strategic actions against public participation (SLAPP). These ever-new challenges foster posing the question of a need to introduce regulation on a choice of court agreements, which would allow the parties of the dispute to choose (obviously, under certain conditions) the court that would have exclusive jurisdiction in the case.[27]

Even though the acceptance of the mosaic principle is evident both in the Opinion and in the Court's final decision, the remarkable interplay between the two documents seems to reflect the fact that maintaining the mosaic principle was not a foregone con-

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[24] *Ibid.*, para 35.

[25] *Personality rights in European Tort Law*, eds. G. Brüggemeier, A. Colombi Ciacchi, P. O'Callaghan, Cambridge 2010, pp. 562–563.

[26] E. Prévost, *Étude sur les formes de responsabilité et questions de compétence juridictionnelle relatives à l'application du droit civil et administratif en matière de diffamation dans les États membres du Conseil de l'Europe*, Conseil de l'Europe 2019, p. 8, https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-fr/168097d9c4 [accessed: 2024.01.09].

[27] Article 6 [in:] *Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments, Institute of International Law. Eight Commission: Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments*, The Hague 2019, https://www.idi-iil.org/app/uploads/2019/09/8-RES-EN.pdf [accessed: 2024.01.30].

clusion. In the Opinion delivered in the Gtflix case, Advocate General Hogan insightfully grasps challenges related to the mosaic approach and touches upon the problem in question in a broader sense. Thus, the approach adapted in the Opinion varies from the final decision in a few significant points. First of all, divergence comes from the fact that, while Advocate General Hogan approached the case from the perspective that the company based its claims on French unfair competition law (and not on defamation law, as would be so in a typical defamation case),[28] interestingly, the Court of Justice did not share this approach in its decision, which was noticed and assessed rather critically by representatives of legal doctrine.[29] Secondly, the Opinion turns the spotlight on the fact that the multiplication of potential forums is not solely related to the jurisdiction of the courts of each State in which the publication was distributed and where the victim claims to have suffered an injury to his/her reputation, as such a possibility also appears when the jurisdiction is based on the center of the victim's interests.[30] It is noteworthy that the Advocate General comes up with a proposal to modify the mosaic approach by combining it with the focalisation criterion applied by the Court in other cases.[31] Moreover, the Opinion presents an accurate review of the Court's case law on the place where the harmful event occurred or may occur[32] and analyzes the mosaic principle in the light of the main objectives of the Brussels I bis regulation, with the emphasis placed on the principle of legal certainty. Advocate General Hogan rightly points out that, since the principles of proportionality and legal certainty also apply to the Court, the mosaic approach shall not be abandoned.[33] A versatile analysis to the problem in question is followed by a definite statement: "Not only am I unconvinced that the mosaic approach is contrary to the objectives of Regulation No 1215/2012, but I am equally unconvinced that the use of one of the other connecting factors justifying a 'single-jurisdiction rule' (such as the place of residence of the defendant, the place of occurrence of the causal event, or the center of interests) will lead to the designation of courts that are necessarily in a better position to assess the defamatory or non-defamatory nature of a content, as well as the extent of the resulting damage."[34] In essence, the Opinion of the Advocate General in case C-251/20 seems to call for a more far-reaching application of the mosaic principle. In contrast, in

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28 Opinion of Advocate General G. Hogan delivered on 16 September 2021 in Case C-251/20, Gtflix Tv v DR, ECLI:EU:C:2021:745, para 107.

29 M. Requejo Isidro, *Update – December at the Court of Justice of the European Union*, 2021, https://eapil.org/2021/12/20/update-december-at-the-court-of-justice-of-the-european-union/ [accessed: 2024.01.30]; D.J.B. Svantesson, I. Revolidis, *From eDate to Gtflix: Reflections on CJEU case law on digital torts under Art. 7(2) of the Brussels Ia Regulation, and how to move forward* [in:] *National and International Legal Space – The Contribution of Prof. Konstantinos Kerameus in International Civil Procedure*, ed. P. Arvanitakis, Athens 2022, pp. 319–371.

30 *Ibid.*, paragraphs 65, 71.

31 *Ibid.*, paragraphs 88–92.

32 Opinion of Advocate General G. Hogan delivered on 16 September 2021 in Case C-251/20, Gtflix Tv v DR, ECLI:EU:C:2021:745, paragraphs 33–42.

33 *Ibid.*, paragraphs 57–58.

34 *Ibid.*, para 80.

the judgment the Court seems to opt for approval for the mosaic principle in a more balanced manner, remaining focused more strictly on the circumstances of the case.

The obstacles that clearly arise in cases related to online defamation incline one to reconsider the role of territoriality as the foundation of jurisdiction. Therefore, a search to establish new legal solutions in the area of jurisdiction in online defamation disputes is apparent. Among many noteworthy initiatives,[35] particularly interesting in the context of the issues discussed here is the resolution presented by the Institute of International Law.[36] Its provisions seek simplicity and efficiency by rejecting the mosaic principle and replacing it with a holistic principle.[37] Applying them to the Gtflix case, the French court would not have the power to decide on any harm allegedly suffered in France, as the possible jurisdiction could only be based on the defendant's home state, the state of the defendant's critical conduct, the state of the most extensive injurious effects, or the plaintiff's home state and injury.[38] Although there is no doubt that the authors' call for coordination and cooperation efforts in the area of the internet and jurisdiction deserves approval, it does not seem appropriate to fully obliviate the mosaic principle. At a glance, settling the dispute only by one court would simplify the proceedings. Nevertheless, the court in power would have to decide upon harms in other states, which, in fact, would lead to long or highly intricate proceedings involving the risk that the court in one state would not be able to adequately decide upon the entire loss caused in multiple legal orders. As the Court aptly stated in the Gtflix case, a person who considers that he/she has been injured must always be able to bring proceedings before the courts of the place where the damage occurred, and setting limits to this ability could lead, in some cases, to the *de facto* exclusion of the option to claim compensation.[39]

As a follow-up problem associated with potential fragmentation of jurisdiction, non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, are excluded from the scope of the Rome II regulation.[40] As

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35 Inter alia E. Prévost, *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states. Prepared by the Expert Committee on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT)*, Council of Europe 2019, https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-en/168097d9c3 [accessed: 2024.01.09] and D.J.B. Svantesson, *Proposed Defamation Convention Model* [in:] *idem*, *Private International Law and the Internet*, Alphen an den Rijn 2021.

36 *Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments, Institute of International Law. Eight Commission: Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments*, The Hague 2019, https://www.idi-iil.org/app/uploads/2019/09/8-RES-EN.pdf [accessed: 2024.01.30].

37 See an analysis presented by D.J.B. Svantesson, S.C. Symeonides, *Cross-border internet defamation conflicts and what to do about them: Two proposals*, "Journal of Private International Law" 2023, Vol. 19, Issue 2, pp. 138–177.

38 Article 5 [in:] *Injuries to Rights of Personality Through the Use of the Internet*…

39 Judgment of the Court (Grand Chamber) of 21 December 2021 in Case C-251/20, Gtflix Tv v DR, ECLI:EU:C:2021:1036, para 40.

40 Article 1 g) of regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union L 199/40.

a result, in the specific context of online publications and infringements of personality rights, jurisdiction based on the mosaic approach will, in all likelihood, also determine the applicable law, as the court would apply its domestic rules on conflict of laws. In effect, outside the scope of the regulation is an area in which increasing predictability and legal certainty would be highly desirable. Lack of harmonisation implies that, for example, when a harmful act causes harm in many states and, according to the mosaic principle, courts in these states will have the power to decide upon compensation of harm suffered in these states, the content may be identified as defamatory in one state, whereas in another state, it may be considered acceptable. After entry into force of the Rome II regulation, the above-mentioned legislative imperfection has been noted in proposals on regulating the law applicable to non-contractual obligations arising from violations of personality rights.[41] It remains to be hoped that the EU legislator will consider the postulates made in this regard.[42]

Conclusions

The judgment in the Gtflix Tv case and arguments presented in it certainly deserve approval, yet it does not dispel many doubts related to the mosaic approach. Therefore, its application in legal practice might be problematic. Nowadays, the essential question whether the defendant can foreseeably define where he/she might be sued is left open; this cannot be evaluated positively. Hopefully, the conditions of exercising jurisdiction on the basis of Article 7(2) of the Brussels I bis regulation will be further defined in future case law. Notwithstanding, the importance of the mosaic principle lies in the possibility for the plaintiff to bring an action for compensation and redress in the territory of each Member State in which the damage occurred. Conducting the case by the court that is "closest" to the case makes possible the quick, precise and more effective conduct of the proceedings and, thus, makes possible fuller protection of the rights of the injured entity. The jurisdiction in a case shall not be exclusively limited to the places that the defendant would have subjectively foreseen.[43] The argument that the existing regulations on jurisdiction in digital tort cases cannot fulfil all reasonable expectations cannot be abandoned. However, it seems to me that in the up-to date state of affairs, rather than drastically changing the existing regulations in search of new legal solutions, emphasis should be placed on adapting the existing ones to the needs of an ever-changing reality.

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41 European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), para O, https://www.europarl.europa.eu/doceo/document/TA-7-2012-0200_PL.html [accessed: 2024.01.30].

42 Some scholars express doubts that these attempts will succeed; see M. Pilich, *Prawo właściwe dla dóbr osobistych i ich ochrony*, "Kwartalnik Prawa Prywatnego" 2012, Issue 3, p. 608.

43 Advocate General M. Bobek also stated this [in:] Opinion of Advocate General M. Bobek delivered on 23 February 2021 in Case C-800/19, Mittelbayerischer Verlag AG v SM, ECLI:EU:C:2021:489, para 47.

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Summary

Kinga Konieczna

Special Jurisdiction Based on the Place Where Damage Occurred in Cases Related to the Dissemination of Disparaging Comments on the Internet

An approving commentary on the judgment of the Court (Grand Chamber) of 21 December 2021 in Case C-251/20 Gtflix Tv v DR. In the judgment commented on, the Court held that that a legal entity who, considering that its rights have been infringed by the dissemination of disparaging comments on the internet, can seek not only the rectification of the information and the removal of the harmful content placed online, but also compensation for the damage resulting from that placement, and it may claim before the courts of each Member State in which those comments are or were accessible compensation for the damage suffered in the Member State of the court seised, even though those courts do not have jurisdiction to rule on the application for rectification and removal.

Keywords: conflict of laws, jurisdiction in civil matters, mosaic approach, personality rights, tort law, Brussels I bis regulation.

Streszczenie

Kinga Konieczna

Miejsce powstania szkody jako podstawa jurysdykcji szczególnej dla roszczeń o naprawienie szkody doznanej w związku z rozpowszechnianiem w Internecie dyskredytujących wypowiedzi

Glosa aprobująca do wyroku Trybunału (wielka izba) z dnia 21 grudnia 2021 r. w sprawie C-251/20 Gtflix Tv przeciwko DR. W glosowanym orzeczeniu Trybunał rozstrzygnął, że osoba, która uznając, iż doszło do naruszenia jej praw poprzez rozpowszechnianie w Internecie dyskredytujących ją wypowiedzi, podejmuje jednocześnie działania z jednej strony w celu doprowadzenia do sprostowania dotyczących jej informacji i usunięcia dotyczących jej treści umieszczonych w sieci, a z drugiej strony w celu uzyskania naprawienia wynikających z tego umieszczenia w sieci szkód i krzywd, może żądać przed sądami każdego państwa członkowskiego, na terytorium którego wypowiedzi te są lub były dostępne, naprawienia szkody i krzywdy wyrządzonych na terytorium państwa członkowskiego siedziby sądu, do którego wniesiono powództwo, nawet jeśli sądy te nie są właściwe do rozpoznania żądania sprostowania i usunięcia.

Słowa kluczowe: delikt, dobra osobiste, jurysdykcja w sprawach cywilnych, prawo prywatne międzynarodowe, rozporządzenie Bruksela I bis.

The Nature of Constitutional Review of Judicial Decisions Exercised by the Supreme Court in Proceedings Initiated by an Extraordinary Complaint

Judgment of the Supreme Court of 28 October 2020, I NSNc 22/20[1]

1. **Article 76 of the Constitution of the Republic of Poland[2] expresses a constitutional principle, and this updates the possibility of its use as a standard of review of a judicial decision in proceedings initiated by an extraordinary complaint.**
2. **Although, according to the Constitutional Tribunal, the plea of infringement of Article 76 of the Polish Constitution may not constitute an autonomous basis for a constitutional complaint, this position certainly may not be extended *per analogiam* to an extraordinary complaint.**

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Commentary

The extraordinary complaint was introduced into the Polish legal order on the basis of the Act of 8 December 2017 on the Supreme Court (SCA),[3] as a new extraordinary remedy against final judicial decisions.[4] More than five years of the functioning of the extraordinary complaint in the case law of the Supreme Court provides an opportunity to reflect on the nature of this judicial remedy and its implications for the legal system.

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[1] Judgment of the Supreme Court of 28 October 2020, I NSNc 22/20, OSNKN 2021/1/4.

[2] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483 as amended; hereinafter: Polish Constitution).

[3] The Act of 8 December 2017 on the Supreme Court (consolidated text: Journal of Laws 2023, item 1093 as amended; hereinafter: SCA) entered into force on 3 April 2018.

[4] It should, however, be noted that the material scope of the extraordinary complaint does not cover all judicial decisions. Pursuant to Article 89 § 1 of the SCA, an extraordinary complaint may be only lodged against final decisions of a common court or a military court.

The starting point for further considerations is the observation that the extraordinary complaint is a constitutional remedy which is particularly highlighted by the construction of substantive conditions for its admissibility both in terms of content (i.e. as to the standards of review) and in terms of functionality (i.e. as to the manner in which fulfilment of these conditions are assessed).

Indeed, pursuant to Article 89 § 1 of the SCA, the substantive conditions for the admissibility of an extraordinary complaint, also referred to as its grounds,[5] comprise the general (functional) condition of the need to ensure compliance of the contested decision with the principle of a democratic state ruled by law and implementing the principles of social justice, and three special conditions:

1) infringement by the contested decision of the principles or rights and freedoms of human and citizen, enshrined in the Polish Constitution,
2) gross infringement of law by the contested decision through its misinterpretation or misapplication, and
3) obvious contradiction between the court findings and the evidence collected in the case.

For the extraordinary complaint to be admissible, the general condition and one of the special conditions must be met cumulatively. Thus, the fulfilment of the general condition is mandatory, while the fulfilment of the special conditions is alternative.

The construction of the substantive conditions for the admissibility of the extraordinary complaint, as presented above, indicates the strong focus of this judicial remedy on the constitutional content, which is manifested in at least two aspects. First, as many as three categories of standards of review of a constitutional nature are distinguished in this construction, i.e. the principle of a democratic state ruled by law formulated in Article 2 of the Polish Constitution, the principles enshrined in the Polish Constitution and rights and freedoms of human and citizen enshrined in the Polish Constitution (the content aspect). Second, the admissibility of the extraordinary complaint always depends on the fulfilment of a general condition, which is the carrier of the constitutional standard of review. Each decision contested by the extraordinary complaint is therefore subject to mandatory review in terms of compliance with the constitutional standard, i.e. the principle of a democratic state ruled by law expressed in Article 2 of the Polish Constitution (the functional aspect).

The arguments above are also perceived in the jurisprudence of the Supreme Court, which indicated at least several times that the general condition gives the extraordi-

[5] The terminology used in this regard varies. The concept of grounds for an extraordinary complaint is used, inter alia, by K. Szczucki, *Article 89* [in:] *Ustawa o Sądzie Najwyższym. Komentarz*, edition 2, Warszawa 2021, p. 462; and R. Bełczącki, *Dopuszczalność skargi nadzwyczajnej ze względu na wymagania konstrukcyjne* [in:] *Skarga nadzwyczajna w świetle systemu środków zaskarżenia w postępowaniu cywilnym*, ed. T. Wiśniewski, Warszawa 2019, p. 52. On the other hand, the Supreme Court in its decisions more often uses the concept of conditions for an extraordinary complaint, dividing them into formal and substantive ones and then distinguishing among the substantive conditions the general (functional) condition and the special conditions. See the decision of the Supreme Court of 22 February 2021, I NSNc 164/23, LEX No. 3554513.

nary complaint the nature of a means of constitutional review of judicial decisions, and the constitutional nature of the extraordinary complaint is further emphasised by the fact that the infringement of constitutional principles or rights and freedoms of human and citizen is listed as the first among the special conditions of the extraordinary complaint.[6]

The recognition of the extraordinary complaint as a means of constitutional review of judicial decisions[7] has certain implications for the legal system. On the one hand, it confirms the evolution of the Polish system of the constitutional review of law, while on the other hand it distorts to a certain extent the model of competences of the Constitutional Tribunal and expands the systemic position of the Supreme Court in Poland.[8]

When reconstructing the current model of constitutional review of law in Poland, it should be noted that in the objective aspect, two separate spheres of constitutional review of law are distinguished under this model – the sphere of its creation and the sphere of its application. Within the sphere of law creation, the review covers normative acts, while within the sphere of law application, the subject to review are judicial decisions. In turn, in the subjective aspect, this model assumes assigning such separated spheres of constitutional review of law, bodies that are to exercise the powers of review (control competences) within them. Within the sphere of law creation, these powers are divided between the Constitutional Tribunal and the administrative courts[9] – the review of law created at the central level is entrusted to the Constitutional Tribunal, while the review of law created at the local level (including local law) is entrusted to the administrative courts, with some exceptions in this respect.[10] Within the sphere of law application, on the other hand, the powers of review are assigned to the

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[6] Judgment of the Supreme Court of 27 October 2021, I NSNc 180/21, OSNKN 2022/1/3. This is also held by the Supreme Court in its judgments: of 28 October 2020, I NSNc 22/20, OSNKN 2021/1/4; of 25 November 2020, I NSNc 57/20, LEX No. 3093105; of 14 September 2022, LEX No. 3486928; and of 19 April 2023, I NSNc 32/23, LEX No. 3585995.

[7] This is done explicitly by the Supreme Court in its judgments: of 19 January 2021, I NSNc 50/20, LEX No. 3114858; of 27 January 2021, I NSNc 147/20, LEX No. 3112900; of 15 December 2021, I NSNc 97/20, LEX No. 3275920; and of 23 June 2022, I NSNc 567/21, OSNKN 2022/3/17.

[8] Differently M. Dobrowolski, A. Stępkowski, *Skarga nadzwyczajna – dopełnienie systemu ochrony porządku konstytucyjnego*, "Studia Iuridica" 2022, No. 91, p. 72.

[9] As pointed out by M. Bogusz, the term "constitutional review of law" is a *de facto* rhetorical shortcut, as the review of legitimacy of law creation, i.e. of normative acts, exercised by the Constitutional Tribunal and by administrative courts, does not exclusively include the examination of legal norms in terms of their compliance with the Polish Constitution, but has a broader character and consists in the examination of the hierarchical compliance of legal norms within the entire system. See M. Bogusz, *Niedopuszczalność skargi konstytucyjnej na akt prawa miejscowego o charakterze generalno-konkretnym (miejscowy plan zagospodarowania przestrzennego). Postanowienie Trybunału Konstytucyjnego z dnia 6 października 2004 r., SK 42/02*, "Gdańskie Studia Prawnicze" 2020, No. 1(45), p. 145.

[10] For example, the Constitutional Tribunal is not entitled to rule on the constitutionality of a local spatial development plan in proceedings initiated by a constitutional complaint, as it is not a normative act within the meaning of Article 79 § 1 of the Polish Constitution. See M. Bogusz, *Niedopuszczalność skargi konstytucyjnej…*, p. 148.

Supreme Court in connection with the introduction of the extraordinary complaint into the Polish legal order.

In the context of the reflections above on the extraordinary complaint and the systemic implications resulting from its introduction into the Polish legal order, it seems advisable to undertake an analysis of the nature of the constitutional review of judicial decisions exercised by the Supreme Court. In particular, it is worth asking whether this review is of an independent nature, i.e. whether the Supreme Court independently reconstructs the constitutional standards of review of judicial decisions, or whether it makes use of the jurisprudence of the Constitutional Tribunal in this respect, which would prejudge the bound nature of this review and constitute a manifestation of the judicial co-dependence of the Supreme Court on the Constitutional Tribunal.

Among the relatively numerous judgements delivered as a result of the consideration of an extraordinary complaint, particular attention should be given in this respect to the judgment of the Supreme Court which is the subject of this commentary. Although almost three years have passed since its delivery, this judgement is one of the first and relatively few to include in its statement of reasons the deliberations relevant to the assessment of the nature of the constitutional review of judicial decisions exercised by the Supreme Court when considering extraordinary complaints.

Referring to the facts of the case, in the judgment under discussion the Supreme Court upheld an extraordinary complaint lodged by the Public Prosecutor General against a final order for payment issued by a district court in the proceedings by writ of payment, on the basis of which the defendant, who was a consumer, was ordered to pay to the plaintiff – a limited liability company conducting business activity including, inter alia, the provision of loans – an amount due under a loan agreement, the repayment of which was secured by a blank promissory note. When justifying the extraordinary complaint, the Public Prosecutor General alleged that the contested judgment infringes the constitutional principles and rights and freedoms of human and citizen enshrined in Article 30 and Article 76 of the Polish Constitution, i.e. human dignity, as well as the consumer protection principle, by failing to provide the defendant – as the weaker party in the relations with entrepreneurs – with due protection against unfair market practices, which consequently led to the adjudication in favour of the plaintiff of the amount due under the loan agreement solely on the basis of the blank promissory note, without examining whether the loan agreement, as the basis of the claim from which the obligation secured by the blank promissory note arose, does not contain any prohibited provisions referred to in Articles 385^1–385^3 of the Act of 23 April 1964 – Civil Code.[11] It should be emphasised that the regional court adjudicated in favour of the plaintiff the amount due solely on the basis of the blank promissory note without seeing the loan agreement.

When considering the plea of infringement of Article 76 of the Polish Constitution, the Supreme Court was first obliged to consider whether this provision constitutes

[11] Act of 23 April 1964 – Civil Code (consolidated text: Journal of Laws 2023, item 1610, as amended; hereinafter: CC).

an acceptable standard of review of a judicial decision under Article 89 § 1 point 1 of the SCA. The resolution of this issue should have been considered as particularly important in the context of the position of the Constitutional Tribunal expressed in its judgment of 13 September 2011, K 8/09,[12] which rejected the possibility of invoking Article 76 of the Polish Constitution as a basis for a constitutional complaint.

The analysis of the statement of reasons of the judgment under discussion leads to the conclusion that the Supreme Court, in reconstructing the content and nature of Article 76 of the Polish Constitution, relied on the jurisprudence of the Constitutional Tribunal, which accepted that this provision expresses one of the state policy principles, imposing on public authorities "the duty to protect consumers from actions endangering their health, privacy and safety and from unfair market practices", but does not create any specific rights or potential claims on the part of the individual.[13] This obligation is based on the assumption that the consumer is the weaker party to the legal relationship in relation to professional market participants, which requires the creation of legal solutions guaranteeing him/her protection aimed at implementing the principle of equality of parties to civil law relationships.[14]

Nevertheless, the Supreme Court recognised in the judgment under discussion that although Article 76 of the Polish Constitution does not result in any specific rights or claims for an individual and, as a result, the norm arising from this provision does not constitute a source of subjective right; however, Article 76 of the Polish Constitution has a certain normative significance, as evidenced by the activity of the Constitutional Tribunal, which has repeatedly ruled on the incompatibility of laws with this provision. Thus, although an infringement of Article 76 of the Polish Constitution may not form the basis for a constitutional complaint, "this position certainly may not be extended *per analogiam* to an extraordinary complaint. Indeed, while the objective nature of the constitutional guarantees of Article 76 of the Constitution and the reference to statutory regulations justifies the position of the Tribunal with regard to the concrete constitutional review of abstract and general normative provisions of law under a constitutional complaint, there is nothing to prevent treating this provision of the Constitution as a fully-fledged basis for concrete constitutional review of specific acts of law application, which is carried out within the framework of extraordinary review in the Supreme Court. This follows from the very wording of Article 89 § 1 point 1 of the SCA, which clearly indicates among the grounds for an extraordinary complaint not only the infringement of constitutional rights and freedoms, but also of constitutional principles."

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[12] Judgment of the Constitutional Tribunal of 13 September 2011, K 8/09, OTK-A 2011/7/72.

[13] Judgments of the Constitutional Tribunal: of 13 September 2011, K 8/09, OTK-A 2011/7/72; of 11 July 2011, P 1/10, OTK-A 2011/7/74; of 2 December 2008, K 37/07, OTK-A 2008/10/172; of 17 May 2006, K 33/05, OTK-A 2006/57; of 13 September 2005, K 38/04, OTK-A 2005/8/92; of 21 April 2004, K 33/03, OTK-A 2004/4/31; of 26 September 2000, P 11/99, OTK 2000/6/187; of 12 January 2000, P 11/98, OTK 2000/1/3 and of 10 October 2000, P 8/99, OTK 2000/6/190.

[14] See judgments of the Constitutional Tribunal: of 15 March 2011, P 7/09, OTK-A 2011/2/12 and of 11 July 2011, P 1/10, OTK-A 2011/6/53.

The position of the Supreme Court quoted above is based on the assumption that Article 76 of the Polish Constitution expresses "a constitutional principle obliging state authorities – including common courts – to take actions to protect consumers against unfair market practices." This position is supported by the jurisprudence of the Constitutional Tribunal.[15] Thus, by recognising the norm resulting from Article 76 of the Polish Constitution as a constitutional principle, the Supreme Court has updated the possibility of its use as a standard of review of a judicial decision in proceedings initiated by an extraordinary complaint.

It should be emphasised that in none of the judgments invoked by the Supreme Court has the Constitutional Tribunal given the norm arising from Article 76 of the Polish Constitution the rank of a constitutional principle,[16] but has only considered that this provision formulates a state policy principle addressed to the public authorities. However, the concepts of a state policy principle and a constitutional principle are not identical, and their distinction seems to be based on different quality criteria. Indeed, the concept of a state policy principle focuses on emphasising the content nature of the legal norm, i.e. the fact that the legal norm formulates a specific obligation for the public authorities, without connecting it with a subjective right of the individual that would allow enforcing this obligation. It therefore seems that it has been separated in order to distinguish norms of such content nature from constitutional rights and freedoms. The fundamental difference between these two is that while constitutional rights and freedoms directly affect the legal situation of the individual, in the case of state policy principles one can only speak of indirect affection (reflexive law) – in contrast to the former, state policy principles may not constitute a direct source of individual rights and claims.[17]

The notion of constitutional principle is not uniformly defined in doctrine and jurisprudence, and, consequently, its interpretation is not free from doubt.[18] In fact, the criteria for the identification of constitutional principles, their content, functions or the relation between them and other constitutional norms, are debatable.[19] Without

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[15] See judgments of the Constitutional Tribunal: of 21 April 2004, K 33/03, OTK-A 2008/10/172; of 13 September 2005, K 38/04, OTK-A 2005/8/92; of 17 May 2006, K 33/05, OTK-A 2006/5/57; of 13 September 2011, K 8/09, OTK-A 2011/7/72.

[16] For the record, it should be mentioned that the Constitutional Tribunal, in its judgment of 13 September 2005, K 38/04, OTK-A 2005/8/92, when enumerating the standards of review constituting the basis for plea of unconstitutionality, indicates, inter alia, Article 76 of the Polish Constitution, adding in brackets the annotation "infringement of consumer protection principles." Thus, the connotation of the notion of principle with consumer protection is present in this judgement, although it is not clear whether the notion of principle is used by the Constitutional Tribunal to refer to a state policy principle or a constitutional principle.

[17] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, edition 6, Warszawa 2019, p. 117.

[18] A. Pułło, *Idee ogólne a zasady prawa konstytucyjnego*, "Państwo i Prawo" 1995, No. 8, pp. 16–17; T. Zalasiński, *W sprawie pojęcia konstytucyjnej zasady prawa*, "Państwo i Prawo" 2004, No. 8, p. 18; P. Tuleja, *Pojęcie zasady konstytucyjnej* [in:] *Zasady ustroju Rzeczypospolitej Polskiej w nowej konstytucji. Materiały naukowe XXXVII Sesji Katedry Prawa Konstytucyjnego*, ed. K. Wójtowicz, Wrocław 1997, p. 20.

[19] M. Wyrzykowski, M. Ziółkowski, *Konstytucyjne zasady prawa i ich znaczenie dla interpretacji zasad ogólnych prawa i postępowania administracyjnego* [in:] *Konstytucyjne podstawy funkcjonowania admi-*

going into an in-depth consideration of the definitional problems, it can be pointed out that two basic approaches to understanding the notion of constitutional principle have been developed in the constitutional law[20] – a broad one, which considers that all constitutional norms may establish constitutional principles,[21] and a narrow one, according to which only constitutional norms of major importance may be considered as constitutional principles.[22] In view of the above, the criterion underlying the distinction of the notion of constitutional principle is the source of anchoring the legal norm, which is the Polish Constitution, and additionally, in the case of choosing a narrower definitional approach – the major importance of the legal norm for the legal system, which also indirectly results from the constitutional anchoring of the principle. Thus, assuming the different criteria for distinguishing the notions of state policy principle and constitutional principle, it should be recognised that they are not identical in content, but at the same time they do not exclude each other, as a legal norm constituting a state policy principle may at the same time constitute a constitutional principle.

Thus, the possibility of interpreting a constitutional principle based on Article 76 of the Polish Constitution largely depends on the definitional approach chosen by the Supreme Court. It seems, however, that when constructing the substantive conditions for the admissibility of an extraordinary complaint, the legislator does not aim to extend the scope of review of judicial decisions to the overall provisions of the Polish Constitution, which is what the adoption of the first of the definitional approaches indicated above would amount to. In this case, the standard of review in the form of constitutional principles would absorb both the second standard of review of the special condition, i.e. constitutional rights and freedoms of human and citizen, and the standard of review of the general condition, i.e. the principle of a democratic state ruled by law. Therefore, guided by the directives of functional interpretation, in view of the clear distinction made by the legislator between the constitutional principles and rights and freedoms of human and citizen enshrined in the Polish Constitution, a narrower interpretation of the notion of constitutional principles should be adopted under Article 89 § 1 point 1 of the SCA, limiting their scope exclusively to constitutional norms of major importance.

In view of the above, the statement of reasons of the judgement of the Supreme Court under discussion should be assessed critically. In fact, the Supreme Court has not presented any arguments in favour of recognising the norm resulting from Article 76 of the Polish Constitution as a constitutional principle, and in particular, it has

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nistracji publicznej, seria: System Prawa Administracyjnego, vol. 2, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012, p. 6.

[20] Two basic definitional approaches to the notion of constitutional principle are also mentioned by R. Kropiwnicki, *Wokół wartości i zasad konstytucyjnych* [in:] *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, eds. R. Balicki, M. Jabłoński, Wrocław 2018, p. 109; and M. Wyrzykowski, M. Ziółkowski, *Konstytucyjne zasady prawa*…, p. 6.

[21] P. Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL*, Warszawa 1967, p. 108. After: M. Wyrzykowski, M. Ziółkowski, *Konstytucyjne zasady prawa*…, p. 6.

[22] K. Działocha, *Hierarchia norm konstytucyjnych i jej rola w rozstrzyganiu kolizji norm* [in:] *Charakter i struktura norm konstytucyjnych*, ed. J. Trzciński, Warszawa 1997, p. 90.

not indicated the criteria adopted for the reconstruction of constitutional principles or the chosen definitional approach, which should be considered advisable in the light of the current academic discussion on the notion of constitutional principles. As Mirosław Wyrzykowski and Michał Ziółkowski point out, the starting point for determining whether a given norm constitutes a constitutional principle should be the reference to a selected theoretical and legal concept, and then – based on its directives – the assessment of whether a given constitutional norm[23] fulfils the conditions for recognising it as a constitutional principle.[24]

The considerations above also support the conclusion that in general the Supreme Court does not independently reconstruct the standards of review of judicial decisions but draws in this respect on the jurisprudence of the Constitutional Tribunal. This is evidenced by the jurisprudence of the Constitutional Tribunal extensively referred to in the statement of reasons for the judgment under discussion, concerning Article 76 of the Polish Constitution, as well as other constitutional standards of review, including Articles 2 and 30 of the Polish Constitution.

The non-independent (bound) nature of the constitutional review of judicial decisions exercised by the Supreme Court is also confirmed by an analysis of judgements delivered in cases initiated by extraordinary complaints. A review of the statements of reasons for the Supreme Court judgements makes it possible to conclude that the meaning and the content scope of the standard of constitutional review is very often reconstructed by referring to the jurisprudence of the Constitutional Tribunal and its opinions in this respect.[25]

At the same time, the judgment under discussion is a manifestation of the departure by the Supreme Court from the practice described above of reconstructing the standards of the constitutional review of judicial decisions using the jurisprudence of the Constitutional Tribunal, which confirms the recognition of the norm resulting from Article 76 of the Polish Constitution as a constitutional principle. It should be emphasised that although the jurisprudence of the Constitutional Tribunal[26] previously

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[23] It should be noted that a constitutional principle may be interpreted based on more than one constitutional norm.

[24] M. Wyrzykowski, M. Ziółkowski, *Konstytucyjne zasady prawa*…, p. 10.

[25] See, for example, the judgements of the Supreme Court: of 17 May 2023, II NSNc 190/23, LEX No. 3579744; of 15 December 2021, I NSNc 97/20, LEX No. 3275920; and of 3 August 2021, I NSNc 24/20, LEX No. 3207785 – in the context of the reconstruction of the principles of social justice as the standard of the review.

[26] The possibility of recognising Article 76 of the Polish Constitution as a basis for a constitutional complaint also raises doubts in the doctrine of constitutional law. The permissibility of such a solution is supported by, inter alia, J. Węgrzyn, *Prawo konsumenta do informacji w Konstytucji RP i w prawie unijnym*, Wrocław 2013, p. 102; P. Mikłaszewicz, *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej*, Warszawa 2008, pp. 115–116. An opposing view in this regard is expressed by, inter alia, E. Łętowska, *Wpływ Konstytucji na prawo cywilne* [in:] *Konstytucyjne podstawy systemu prawa*, ed. M. Wyrzykowski, Warszawa 2001, p. 131; as well as in the review of the aforementioned monograph of P. Mikłaszewicz – see E. Łętowska, *Rec.: P. Mikłaszewicz, Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej, Warszawa 2008*, "Państwo i Prawo" 2009, No. 5, p. 125.

rejected the possibility of recognising Article 76 of the Polish Constitution as a standard of the constitutional review of normative acts in proceedings initiated by a constitutional complaint, in the judgment under discussion the Supreme Court recognises this provision as an admissible standard of constitutional review of judicial decisions in proceedings initiated by an extraordinary complaint. This position of the Supreme Court is justified by the different construction of the extraordinary complaint in terms of the subject of review (in the case of a constitutional complaint, the normative acts are the subject of review, while in the case of an extraordinary complaint – judicial decisions) and the standards of review (the standards of review of a constitutional complaint are exclusively constitutional rights and freedoms of human and citizen, while in the case of an extraordinary complaint – also constitutional principles), as well as conferring the rank of a constitutional principle to the norm resulting from Article 76 of the Polish Constitution, despite the fact that this is not done directly by the Constitutional Tribunal in its previous jurisprudence.

To sum up, in the judgment under discussion, the Supreme Court independently reconstructs the constitutional standard of review of a judicial decision in proceedings initiated by an extraordinary complaint, thus demonstrating a manner of judicial independence from the Constitutional Tribunal. Although it seems that such an action of the Supreme Court should be assessed rather in terms of an exception to the rule, there is no doubt that this judgment may give rise to a change in the nature of the constitutional review of judicial decisions exercised by the Supreme Court by gradually moving away from the model of bound review to the model of autonomous (independent) review.

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Summary

Aleksandra Szydzik

The Nature of Constitutional Review of Judicial Decisions Exercised by the Supreme Court in Proceedings Initiated by the Extraordinary Complaint

The commentary concerns the nature of constitutional review of judicial decisions exercised by the Supreme Court in proceedings initiated by an extraordinary complaint. In the judgment under discussion, the Supreme Court found that the legal norm arising from Article 76 of the

Constitution of the Republic of Poland expresses a constitutional principle and, as a result, constitutes an admissible standard of review of a judicial decision contested by an extraordinary complaint. The position of the Supreme Court should be considered as particularly interesting in the context of the jurisprudence of the Constitutional Tribunal, which generally rejects the possibility of invoking Article 76 of the Polish Constitution as a basis for a constitutional complaint, indicating that the legal norm arising from this provision has the character of a state policy principle and, as a result, does not create any rights or potential claims on the part of the individual. The commentary examines the mutual relationship between the notions of "state policy principle" and "constitutional principle," and analyses the Supreme Court practice of reconstructing standards of constitutional review of judicial decisions. The considerations undertaken lead to the conclusion that the judgment under discussion is a manifestation of the departure by the Supreme Court from the previous practice of reconstructing standards of constitutional review of judicial decisions.

Keywords: extraordinary complaint, constitutional review of judicial decisions, Supreme Court, constitutional principle, standards of review.

Streszczenie

Aleksandra Szydzik

Charakter kontroli konstytucyjności orzeczeń sądowych sprawowanej przez Sąd Najwyższy w postępowaniach inicjowanych skargą nadzwyczajną

Problematyka glosy dotyczy charakteru kontroli konstytucyjności orzeczeń sądowych sprawowanej przez Sąd Najwyższy w postępowaniach inicjowanych skargą nadzwyczajną. W komentowanym wyroku Sąd Najwyższy uznał, że norma prawna wynikająca z art. 76 Konstytucji Rzeczypospolitej Polskiej wyraża zasadę konstytucyjną, a w konsekwencji stanowi dopuszczalny wzorzec kontroli orzeczenia sądowego zaskarżonego skargą nadzwyczajną. Stanowisko Sądu Najwyższego należy uznać za szczególnie interesujące w kontekście praktyki orzeczniczej Trybunału Konstytucyjnego, który zasadniczo odrzuca możliwość powoływania się na art. 76 Konstytucji RP jako podstawę skargi konstytucyjnej, wskazując, że norma prawna wynikająca z tego przepisu ma charakter zasady polityki państwa, a w konsekwencji nie kreuje po stronie jednostki żadnych praw lub potencjalnych roszczeń. W glosie zbadano relację, w jakiej pozostają do siebie pojęcia „zasady polityki państwa" i „zasady konstytucyjne" oraz przeanalizowano praktykę Sądu Najwyższego w zakresie rekonstrukcji wzorców kontroli konstytucyjności orzeczeń sądowych. Podjęte rozważania prowadzą do wniosku, że komentowany wyrok stanowi przejaw odejścia przez Sąd Najwyższy od dotychczasowej praktyki rekonstrukcji wzorców kontroli konstytucyjności orzeczeń sądowych.

Słowa kluczowe: skarga nadzwyczajna, kontrola konstytucyjności orzeczeń sądowych, Sąd Najwyższy, zasada konstytucyjna, wzorce kontroli.