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EDITORIAL

We greet the reader on the occasion of the publication of the thirteenth issue of the Central European Papers (C.E.P.). This number of our scientifical journal is dedicated to different historical and legal topics. The first article regarding history deals with the "totalitarian" and "revisionist" approaches to the study of the Holocaust in Hungary and Slovakia. The Holocaust is always a current topic in Central Europe. This paper is a product of the cooperation between the Hungarian and Slovak historians. The following article focuses on the introductory parts (preambles) to the constitutions of the Visegrad Group countries and their relevance, constitutional identity and relation towards European constitutional identity. The author is from Poland, but he knows very well the Central European context. The third article focuses on the threats to the image of the Polish Army. This is the first "military" article in our journal. The fourth paper deals with detours in Hungarian administrative criminal justice. Finally the current issue contains a review about an interesting book dealing with the history of Hungarian legal education in Transylvania during the communist regime (1945–1959).

The authors of the current volume are respected scholars from Hungary, Poland and Slovakia. Readers can find among them scientific researchers, professors and PhD students as well. We hope that this issue of Central European Papers (C.E.P.) will be useful not only for scholars but also for graduate and undergraduate students as well as for non-professional readers.

Editors

ARTICLES

Memory and politics: "totalitarian" and "revisionist" approaches to the study of the Holocaust in Hungary and Slovakia[1]

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doc. PhDr. Slávka OTČENÁŠOVÁ, M.A., PhD.

Abstract

The totalitarian theory, which essentially treats Stalinism and Nazism (in a wider variant Communism and Fascism) as equally evil regimes, or at best, fundamentally the same arch-enemies of democracy, has been challenged by the so called revisionist school in the Anglo-American academy already from the 1980s. The theory, however, experiences a new Renaissance in the Eastern and East-Central European postsocialist countries, where it is used to de-legitimate and criminalize the state socialist past.

The paper examines the politics of memory and the impact of new theoretical currents on the Holocaust research in the two selected countries, Hungary and Slovakia. We argue that while Holocaust was effectively silenced in the official discourse under the state socialist era, after 1989 there have been considerable efforts to integrate the tragic chapter of the Holocaust in the national historical consciousness. However, in the far right-wing discourses the Holocaust and the responsibility of the local elites for the persecution and deportation of the Jews is often relativized if not denied. We can illustrate this point with a Hungarian example. Recent historical studies demonstrated that in World War II (WWII) the Hungarian army, which was sent to the territory of today's Ukraine to exercise military control over the occupied territories, participated in the mass murder of the local Jews and the terrorization of the population. These studies and documentation triggered a fierce debate among historians, who argued that the documentation was based on Soviet "falsification" and it is an attack against Hungarian national consciousness and other scholars, who claimed that the clarification of the past should be part of the national historical consciousness.

The paper introduces some major historical debates in Hungary and Slovakia, which illustrate the ideological and political struggle between the supporters of the neo-totalitarian paradigm and the "revisionists" (who seek to go beyond the totalitarian simplifications). The latter also advocate the respect of the sources – with the opening of the archives the documents are accessible to any interested researchers and there have been extensive oral history projects conducted in the region. Diaries, letters and other ego documents can also help the work of a committed historian. Indeed, with the opening of the archives

1 The paper is the outcome of the project VEGA MŠVVaŠ no. 1/0254/17. Eszter Bartha was also supported by the International Visegrad Fund.

"revisionists" prefer to speak of a new era, which they call post-totalitarian, indicating the end of Cold War propaganda – on both sides. However, it seems that the former "East" (still) remains a terrain of ideological debates. In the paper we demonstrate how the contested ideological terrain of the interpretation of "Communism" is linked to the rise of a new anti-Semitism in both Hungary and Slovakia. In order to combat with this, it is essential to go beyond national sensitivities and national traumas (which is often translated as 'we have suffered a lot, too') and understand our common history from a global point of view.

Keywords

totalitarian theory, "revisionism", relativization of the Holocaust, genocide in the Soviet Union, Holocaust studies in Hungary and Slovakia

Introduction: totalitarianism and the Holocaust

"Today there is no common knowledge: Power and the politics of memory – is there an alternative?"[2] – this is the title of a recent interview conducted with Tamás Krausz, Professor of Eötvös Loránd University of Budapest, whose book entitled *Reconstructing Lenin: An Intellectual Biography* (also published in Russian) won the Isaac Deutscher Memorial Prize 2015.[3] As the professor explains in the interview, with the title he sought to refer to the post-1989 politics of memory in the East-Central European countries including Hungary, where there have been systematic attempts to eradicate the 20th century history of the region as it was taught before the change of regimes and re-interpret the past century according to the legitimating needs of the new elite. The interpretation of the WWII has become a particularly heavily politicized issue because the history of state socialism in Eastern Europe is inseparable from the "zero hour" – namely, 1945 and the victory of the Allied over the Nazi Germany. As East-Central European countries such as Hungary seek to "whitewash" the postwar right-wing regimes, whose social and intellectual tradition they claim to continue, there has been government-led attempts to mitigate the responsibility of the contemporary elite for the alliance with the Nazi Germany and the attack of the Soviet Union. This historical endeavour goes so far as if some Hungarian historians – as the professor puts it – would like to win the WWII in retrospect. The attempt to "whitewash" the Hungarian elite for the participation in a genocide in the Soviet Union[4] and the assistance in the Holocaust goes hand in hand with the demonization of Communism and the Red Army. Some "historians" even come up with the argument that Hitler only fought a "preventive" war against the Soviet Union – hopefully they are not aware of the fact that this has been a major claim in the Goebbelsian propaganda.

In what follows we seek to give a critique of the totalitarian theory, which has become a mainstream paradigm in East-Central Europe after the collapse of state socialism. We will

2 BARTHA, Eszter: Ma már nincsenek evidenciák…Hatalom és emlékezetpolitika – van-e alternatíva? Interjú Krausz Tamással, in: *Kritika*, 46, 2016, November–December, 10–13.

3 KRAUSZ, Tamás: *Reconstructing Lenin: An Intellectual Biography*, New York 2015.

4 The barbarism of the Hungarian army in the Soviet Union is well documented in a book, which received a very controversial reception in Hungary: KRAUSZ, Tamás – VARGA, Éva Mária (eds.): *A magyar megszálló csapatok a Szovjetunióban. Levéltári dokumentumok 1941–1947*, Budapest 2013. On the reception of the book see: GÉMESI, Ferenc (ed.): *A magyar megszállás-vajúdó nemzeti* önismeret*: válasz a kritikákra*, Budapest 2013.

show in what ways this paradigm is used to retrieve the national elite groups of the responsibility for participating in the Holocaust. We will follow – on the example of Slovakia – the political changes, which triggered the re-interpretation (and sometimes the re-invention) of national history. We chose Slovakia as a "full" case study because it belongs to the new states, which have been established after the change of regimes: here postsocialist transformation went hand in hand with a new nation-building project. Lastly, we will introduce a major historian debate, which emerged following the publication of the documentation of the atrocities and war crimes the Hungarian army committed in the Soviet Union.[5]

The totalitarian theory, which essentially treats Stalinism and Nazism (in a wider variant Communism and Fascism) as equally evil regimes, or at best, fundamentally the same arch-enemies of democracy, has been challenged by the so-called revisionist school in the Anglo-American academy already from the 1980s.[6] The theory, however, experiences a new Renaissance in the Eastern European postsocialist countries, where it is used to de-legitimate and criminalize the state socialist past.

Stefan Troebst distinguishes between four groups of ex-socialist countries on the grounds of their relation to the old and new regimes. The first group includes countries, which categorically distance themselves from the past, and consider Communist regimes as ethnically alien phenomena. Such countries are Estonia, Latvia, Lithuania and Croatia where the Yugoslavian model is held to be 'Serbian Communism'. In the second group of countries there is no national consensus of state socialism and the interpretation of the past regime remains a contested terrain (and often ideological battlefield). Troebst mentions here the controversial reception of the House of Terror in Hungary, but he also considers Poland, the Czech Republic, Slovakia, Slovenia and Ukraine as part of this group. The countries of the third group hold state socialism to be alien from the national character but they recognize the modernization attempts of the past regime: Bulgaria, Romania, Albania, Macedonia and Serbia-Montenegro. Lastly, in the fourth group there was no elite change and the old autocratic structures survived. Troebst lists here the majority of the ex-Soviet republics.[7]

Troebst's classification can be criticized but it gives us a basic idea of the relationship between the interpretation of state socialism and the recognition of the responsibility of the contemporary national elites for the Holocaust and the war crimes their armies committed in the Soviet Union. Most countries in the region chose the totalitarian theory, which assumes an essential similarity between Nazism and Stalinism as if these two regimes would be equally evil (and some historians even assume that Nazism represented the "smaller" evil in this contest). It is therefore worth pointing out that totalitarianism was essentially a Cold War ideology, and it was *always* propaganda rather than an academic theory. In

5 KRAUSZ – VARGA.

6 On the "promotion" of totalitarianism in the Anglo-Saxon sovietology see: FITZPATRICK, Sheila: Revisionism in Soviet History, in: *History and Theory*, 46, 2007, 4, 77–91; LYNNE, Viola: The Cold War in American Soviet Historiography and the End of the Soviet Union, in: *The Russian Review*, 61, 2002, 1, 25–34. For a critical discussion of totalitarianism see also: FITZPATRICK, Sheila – GEYER, Michael (eds.): *Beyond Totalitarianism: Stalinism and Nazism Compared*, New York 2009. See also: KRAUSZ, Tamás: A Gulag aktualitása, in: *Gulag: A szovjet táborrendszer története*, KRAUSZ, Tamás (ed.), Budapest 2001, 13–26; BARTHA, Eszter: A sztálinizmus a régi és új historiográfiában: A jelenség meghatározásának elméleti és módszertani problémái, in: *A sztálinizmus hétköznapjai: tanulmányok és dokumentumok a Sztálin-korszak történetéből*, KRAUSZ, Tamás (ed.), Budapest 2003, 15–39.

7 TROEBST, Stefan: Holodomor oder Holocaust?, in: *FAZ*, 2005, 152, 4 July.

the Anglo-American world Abbott Gleason wrote a remarkable book entitled *Totalitarianism: The Inner History of the Cold War*,[8] in which he documented how closely the CIA co-operated with the American academy in order to promote totalitarianism and ensure that the field remains dominated by committed anti-Communists. The situation changed in the 1970s when the Vietnam war and the left-wing intellectual climate of the 1960s challenged totalitarianism and "revisionist" scholars (the name refers to their endeavor to "revise" the totalitarian theory) showed that the model fell short to explain the functioning of Soviet society – even at the time of the "Great Terror".[9] In the 1980s the totalitarian theory has become a discredited paradigm in the Anglo-Saxon academic world – at least among the progressive circles. This has changed again, with the collapse of state socialism and the end of the Soviet Union – but that has become part of the politics of contemporary memory.

The origins of the totalitarian theory go back to the 1930s. It was first used by Paul Tillich, who escaped from the Nazi Germany, and who thought that the state had become omnipotent in both Germany and the Soviet Union.[10] It should be noted that in England and in the United States Hitler's rise to power did not trigger immediately the protest of the intellectuals even though they were aware of the fact that Hitler had been destroying the democratic institutions. In England Christian circles started to worry, who thought that the new totalitarianism poses a threat to the religion and the Christian churches.[11] "Dissident" left-wing circles, mainly the followers of Trotsky, would also draw a parallel between the Nazi and the Stalinist regimes on the basis of the show trials.[12]

The Molotov-Ribbentrop pact started a new phase in the history of totalitarianism. Even though Trotsky predicted that Stalin would be able – or would feel compelled – to sign the treaty, many Russian Mensheviks refused to believe this and reacted very emotionally. Even Rudolf Hilferding referred to the Soviet Union as a totalitarian state after this and Max Eastman, the translator of Trotsky's famous critique of Stalinism,[13] wrote that no one can serve democracy and totalitarianism at the same time.[14]

There is no evidence that after the Nazi attack on the Soviet Union totalitarianism would interest many people in the Anglo-Saxon world. This situation changed with the outbreak of the Cold War when an intellectual "munition" was also needed to fight against the (suspected) Communist influence. The intellectually most outstanding work is undoubtedly Hannah Arendt's *Origins of Totalitarianism*, which was published in 1951, which sought to explain the rise of totalitarianism from a historical perspective. It is not easy to determine when Arendt started to write the book because the main themes – imperialism, anti-Semitism and the formation of the nation states – kept her mind busy since the 1930s. Her original aim was to explain the rise of Nazism in Germany, and it was only after the

8 GLEASON, Abbott: *Totalitarianism: The Inner History of the Cold War*, New York – Oxford 1995.

9 For a challenging interpretation of the working of terror in Stalinist Russia see: GETTY, J. Arch: *Origins of the Great Purges: The Soviet Communist Party Reconsidered 1933–1938*, Cambridge 1985; THURSTON, Robert: *Life and Terror in Stalin's Russia 1934–1941*, New Haven 1996.

10 GLEASON, 37.

11 Ibidem, 38.

12 See e.g. the articles of *The Partisan Review*, whose leading figure was Trotsky until his murder.

13 TROTSKY, Leon: *The Revolution Betrayed. What is the Soviet Union and Where is It Going?*, New York 1937.

14 GLEASON, 47.

WWII when she first read about the Gulag that she decided to "include" Stalinist Russia in her book. She thought that the institutionalized and systematic terror as embodied in the concentration camps constitutes the basic "link" between the two regimes.[15]

The comparison between the Gulag and Auschwitz is particularly "helpful" to criminalize the history of state socialism – and in a wider sense, the whole Marxist concept of Communism. At this place we would like to single out only three important aspects, which need to warn us against the "easy" analogy. The first and most important aspect is the questioning of Auschwitz's singularity although this singularity has a voluminous literature. The Nazis planned and prepared the genocide intentionally, with large industrial methods, and the execution of their program was carried out in parallel with the unfolding of the totalitarian war against the Soviet Union – a war, which was started by the Dritte Reich. We should not forget that the totalitarian war fit in well with the original aims of the Nazis (colonizing the Slavic people, robbing them of their resources and the elimination of the European Jews at any price). It cannot be our aim to "whitewash" the Gulag but in the Soviet Union one cannot document the intention of a genocide – even though some Ukrainian "historians" are trying to interpret the great famine after the collectivization as a conscious "genocide" against the Ukrainian people ("Holodomor").[16]

The second aspect is the relativization of Auschwitz. Many ex-socialist countries seek to identify themselves as *both* the victims of Nazism and Communism – although part of their population was actively co-operating with the Nazis and participated in the Holocaust. The totalitarian paradigm is often used in these countries in order to relieve national consciousness of facing the dark chapters of its history. The interwar period of Hungary was identified with the Horthy regime, which eventually led Hungary to the war and was responsible for the deportation of hundreds of thousands of Jewish people (the Jewry of the countryside) to the death camp of Auschwitz. This can be partly explained through the fact that the local elite committed itself to the revision of the Trianon Treaty, which largely narrowed the scope of the Hungarian foreign policy and eventually led to an alliance with Nazi Germany, which supported Hungary's quest for regaining the territories lost after the Trianon Treaty and expand the borders of Hungary. However, anti-Semitism was strong even in the interwar period with Hungary "pioneering" anti-Semitic measures with the numerus clauses, which set a certain ratio for Jewish students, who were allowed to be admitted to the universities. Furthermore, the local elite sought to finance the solution of social problems (poverty of the landless peasantry, bad housing conditions, lack of social security) and the implementation of other welfare program through the dispossession of Jewish people in Hungary.[17] This politics was manifest even prior to Hungary's entrance to the war.

The third criticism concerns the interpretation of the terror. While the concept of terror is central for the totalitarian theory, it is unclear, what we mean by that – apart from the illustrative analogy with the death camps.[18] A "revisionist", Wendy Z. Goldman wrote an excellent and thoroughly researched book, in which she showed that terror was in fact a common social "product" of the masses and the party elite: in fact, the latter frequently

15 ARENDT, Hannah: The Concentration Camps, in: *The Partisan Review*, 15, 1948, 7, 747.

16 For the background of this interpretation see: KRAUSZ, A Gulag aktualitása.

17 On the long-term policy of the robbing of the Hungarian Jews of all their property (and eventually of their life) see: ALY, Götz – GERLACH, Christian: *Az utolsó fejezet: A magyar zsidók legyilkolása*, Budapest 2005.

18 The literature strictly distinguishes between concentration camps and death camps.

fell victim to the denunciations that the Party encouraged.[19] Her important thesis is that the terror went hand in hand with a process of *democratization*: workers were "invited" to denounce the managers, who were charged with sabotage. Stalinist terror – no matter what we think of it – was a highly complex social phenomenon – whereas the extermination of the Jews "merely" followed from the Nazi racist theory.

Re-writing national histories: the case of Slovakia

The interpretation of Holocaust – after the Soviet "export" of Stalinism to East-Central Europe – was determined by the development of the Soviet political-ideological line. After the war the official Soviet propaganda silenced Holocaust with the reasoning that the "special" treatment of one ethnic minority (Jews count in Russia as an ethnic minority) would insult other minorities, and would be therefore harmful for the unity of the Soviet Union.[20] In East-Central Europe there was also a fear that a too harsh retaliation and the condemnation of the past regime for the tragedy of the Jewry would render it more difficult to gain social support and legitimacy for the new, Communist state. Even though the Jewish Antifascist Committee put together the Black Book, documenting the genocide against the Jewish people in the occupied territories of the Soviet Union, the book could have only been published in the United States in 1946.[21] The Jewish Antifascist Committee was eventually banned and many of its leaders were arrested. Holocaust could have returned as a topic only in the period of thaw under Khrushchev, and it was mainly a topic in literature and cinematography. In history it remained a political taboo. Holocaust has not disappeared from the Soviet collective memory; officially, however, the Jewish tragedy lost its ethnical character: all victims were represented as victims of Fascism or partisans.

The silencing of Holocaust relieved the national collective memories of the East European countries of facing and coping with their Fascist past. While it is true that the genocide would have been impossible without the Nazi program of the annihilation of Jewry, and the infrastructure provided, it is also true that that Nazi troops received an active support from certain segments of the local population and authorities in Eastern Europe (including Slovakia). This could not be adequately studied and discussed under state socialism because anti-Semitism was understood as a political question. All Eastern European countries held themselves to be the victims of Fascism and this collective memory failed to encompass the specific Jewish tragedy and the public acknowledgement that parts of the local elite actively participated in the Holocaust.

After WWII Czechoslovakia followed the "Eastern" path. Until the change of the regime at the end of the 1980s, the topic of the Holocaust was considerably silenced in Slovakia, for the same reason as in Hungary: the newly established Communist regimes thought that a confrontation with the fascist past could again stir up anti-Semitic sentiments and weaken the legitimacy of the Communist Party.

Historical research and historiography were under the control of the Communist Party,

19 GOLDMAN, Wendy Z.: *Inventing the Enemy: Denunciation and Terror in Stalin's Russia*, Cambridge 2011.

20 KRAUSZ, Tamás: *The Soviet and Hungarian Holocausts: A Comparative Essay*, Boulder (Colorado) 2006.

21 The book was published in Hungarian in the edition of KRAUSZ, Tamás (ed.): *Az ismeretlen fekete könyv*, Budapest 2005.

and especially the years which followed the Prague Spring of 1968 were marked by strong ideological pressure, party censorship, and self-censorship in each sphere of public life, including historical research and historiographical production. But even in the 1960s, which were characteristic by less oppressive relations between the state authorities and the public, studies on the Holocaust could only be published if they concurrently included a sturdy antifascist rhetoric within a class struggle paradigm and excluded sensitive references to Slovak nationalism.[22] The years 1989 and 1993 brought significant changes to Slovak society. The transition from one political regime to another, which started in 1989, and the dissolution of Czechoslovakia followed by the establishment of the Slovak Republic in 1993, encouraged the reassessment of the past and opened space for new interpretations of history. On the one hand, the development of political, methodological and institutional pluralism in Slovak historiography after 1989 opened possibilities for systematic research on topics which had been before neglected. One of such topic was the history of the Holocaust – its research and interpretation has been experiencing a significant revival in Slovakia since the 1990s. Focusing firstly on political history and archival documents, historians have published a number of high quality monographs, collections of papers, editions of documents and articles.[23] Secondly, a very important step was launched by the ethnologists in Slovakia, soon followed by sociologists, historians and other scholars – exploring the so-called *small history* of the Holocaust, i.e. collecting, preserving, analyzing, interpreting and making accessible the testimonies of its survivors and their contemporaries.[24] The outcomes of solid interdisciplinary research have been also communicated to a broad public through media and school education.[25] The contemporary state educational program explicitly addresses the Holocaust as one of the mandatory topics of the history education at elementary and high schools, and explaining and documenting the topic of the Holocaust on a concrete example is a compulsory performance standard expected from pupils and students.[26] The artistic production related to the topic of the Holocaust has been rather vivid, even prior to 1989, when it was often substituting censored scholarly production.[27]

22 PAULOVIČOVÁ, Nina: The "UmasterablePast"? The Reception of the Holocaust in Postcommunist Slovakia, in: *Bringing the Dark Past to Light: The Reception of the Holocaust in Post-Communist Europe*, MICHLIC, Joanna – HIMKA, John-Paul (eds.), Lincoln 2013, 549–590.

23 For an account of the historiographical production on the Holocaust published in Slovakia during the 1990s see NIŽŇANSKÝ, Eduard: Slovenská historiografia v 90. rokoch 20. storočia o holokauste, in *Historický* časopis, 52, 2004, 2, 317–330.

24 Oral history and biographical narrative approach to study of the Holocaust has been well explored in Slovakia. It began with the project carried out in the cooperation with Yale University *Fates of Those Who Survived the Holocaust*, VRZGULOVÁ, Monika (ed.): *We saw the Holocaust*, Bratislava 2002, and continued with a number of different case studies and articles since then. From the most recent works see VRZGULOVÁ, Monika: *Nevyrozprávané susedské histórie*, Bratislava 2017 and PEKÁR, Martin: *Príbeh Juraja Szánta. Rozhovor o záchrancoch a obeti*, Košice 2018.

25 Apart from the formal education and official history textbooks, the topic of the Holocaust has been presented in different didactical materials published by various institutions (Milan Šimečka Foundation, Open Society Foundation, Museum of Jewish culture, Sereď Holocaust Museum, different regional didactical centers, etc.).

26 Online: http://www.statpedu.sk/files/articles/dokumenty/inovovany-statny-vzdelavaci-program/dejepis_nsv_2014.pdf (Downloaded 16 October 2017).

27 KAMENEC, Ivan: Fenomén holokaustu v historiografii, v umeleckej tvorbe a vo vedomí slovenskej spoločnosti, in: *Holokaust ako historický a morálny problém v minulosti a v súčasnosti*, Bratislava 2008, 111–117.

Since 2006 the denial of the Holocaust is defined as a criminal act by the law in Slovakia.[28] On the other hand, however, it is important to add that since the establishment of the Slovak republic in 1993, some part of the political elites demanded the reconstruction of the national past in line with the rising nationalism and isolationism of the first half of the 1990s, and sought those presentations of Slovak history that were believed to legitimize the newly established state. This led to a search for examples from the past which would somehow emphasize Slovakia's tradition of independence. Focusing on what was unique and exclusive in Slovak history often went hand in hand with the creation or revival of historical myths as well as the negative stereotyping of others.[29] In this context, it is necessary to mention the new interpretations of WWII in Slovak historiography that have emerged since 1993. Prior to the change of regime in 1989, the official communist historiography focused mainly on the topic of the Slovak national uprising as the main event of the war, which was depicted as a vigorous and successful national resistance, and its anti-fascist character was emphasized. While the diversification of the historical research within the topic of WWII is certainly welcomed and has brought about a lot of valuable outcomes, there are also visible certain efforts to rehabilitate the WWII Slovak state. Interpreting it as a solely positive period in Slovak history, as a source of the tradition of statehood and public commemorating of its heritage have gone hand in hand with the relativization of the Holocaust and its consequences in Slovakia. Glorification of the WWII Slovak state is not uncommon among professional historians (drawing from the tradition of the émigré historiography), and as such it is often accompanied by deliberated forgetting about the traumatic events that had a fatal impact on a considerable part of the population. One of the most vigorous discussions in Slovak historiography after the establishment of the Slovak Republic in 1993 was a reaction of the mainstream historical community centered around the Historical Institute of the Slovak Academy of Sciences, backed by the Slovak Union of Anti-Fascist Fighters and by representatives of the Jewish community living in Slovakia on the history textbook written by Milan Stanislav Ďurica, which was declared by them to as a work glorifying the WWII Slovak state and spreading a negative image of the Other, mainly of Hungarians, Czechs, Jews, and non-Catholics in general.[30] On the other hand, nationally-oriented sec-

28 Section 422d of the Criminal Law no. 300/2005 of the Code *"Who publicly denies, questions, doubts or approves of or tries to defend the Holocaust, the crimes of the regime based on fascist ideology, the crimes of the regime based on the communist ideology or crimes of a different similar movement, which by violence, threat of violence or threat of heavy harm aims towards repressing of fundamental rights and freedoms of persons, shall be punished by imprisonment in the duration of six months to three years."* Online: http://www.zakonypreludi.sk/zz/2005-300 (Downloaded 5 November 2017).

29 One of the first challenging of modern nationalist Slovak myths had its origins in the artistic production of the so-called Generation 1909 (especially in the works of Cyprian Majerník and Ján Želibský). These painters approached the heroizing and monumentalizing images of Slovak village and peasantry which had been established in the works of Martin Benka, Ján Hála, Štefan Polkoráb, etc. in an ironical manner. It was no coincidence that the members of the Generation 1909 were also reflecting war terror of WWII. They created not only visual report about executions and refugees, but their artistic approach implicitly linked sentimental heroization of Slovak village and dangerous autonomist efforts in interwar Slovakia and Slovak autonomy during WWII: MIGAŠOVÁ, Jana: Ironická naivnosť medzivojnových obrazov Generácie 1909, in: *Kapitoly k dejinám estetiky na Slovensku V*, Prešov 2013, 140–166.

30 The Response of Slovak Historians to M. S. Ďurica's book: A History of Slovakia and the Slovaks', originally published in the *Práca daily*, 19 April 1997, English version online: http://www.angelfire.com/hi/xcampaign/praca.html (Downloaded 20 November 2017).

tors of the public and certain such-minded institutions, as well as the Ministry of Education, the Slovak National Party and some Catholic circles, were defending the book and the interpretation of the past which it provided. The Ministry of Education, which was in the hands of the Slovak National Party and which introduced the controversial textbook into school education without prior consultations with scholars, kept the authoritarian approach and disregarded any objections from protesting historians or representatives of the Jewish community, and did not take part in any constructive dialogue with any representatives from the scientific or educational communities. It was only after the intervention of European Union institutions abroad that the Slovak government reluctantly withdrew support from the publication's use in schools. During the past thirty years we have seen historians questioning whether Holocaust really happened in Slovakia[31] and representatives of public life have repeatedly taken part in controversial events, such as promoting the commemoration of controversial historical figures related to the WWII Slovak state.[32] The so-called Lex Hlinka, which was a campaign resulting in adopting the law affirming the importance of Andrej Hlinka for the Slovak nation and its statehood tradition, was also perceived with disappointment, reservations and open disagreement from the members of the Jewish community, since Andrej Hlinka is often perceived as a symbol of the Slovak fascist movement[33]. A complex study on how these messages communicated by certain political elites and by a part of the community of historians influence the general public needs to be conducted, however, some of research completed so far indicates that the feelings of anti-Semitism have been present among the population in Slovakia.[34] This trend has been confirmed also in the recent Eurobarometer survey conducted by the European Commission, which demonstrated that fearing the Other is widespread in Slovakia.[35] Despite of entering the EU and the general request for the implementation of the European values and tolerance, it is not rare that the political elites are encouraging the views openly promoting hostile approach to the Others, be it either minorities, or more recently immigrants and refugees. Although the reason for this situation has been ascribed to the recent economic and refugee crises, negative responses to the Other are also partially a by-product of a long-term trend of ethnocentric and etatist messages communicated through some segments of school history education, certain media, some public spaces and also, in some cases, family education. Especially the youth is extremely vulnerable. Social networks have become influential tools in spreading all sorts of messages, often including hate speech, racist and xenophobic ideas and general excluding of the Other. An increasing number of cases of court cases with people, even MPs[36], publicly spreading extremist anti-Semitic and anti-Roma messages, document the general situation in the present-day Slovak society. Formally, the measures have been adopted on the state level, which seemingly contribute to the eradication of anti-Semitism, yet the reality constantly proves to be different.

31 Online: https://domov.sme.sk/c/4812406/do-upn-chce-popierac-holokaustu.html (Downloaded 4 December 2017).

32 Online: https://www.holocaust.cz/zdroje/clanky-z-ros-chodese/ros-chodes-2000/duben-3/kauza-tisova-tabula/ (Downloaded 7 December 2017).

33 Online: http://www.epi.sk/zz/2007-531 (Downloaded 15 December 2017).

34 PAULOVIČOVÁ, 559.

35 Standard Eurobarometer 84. Autumn 2015. Public Opinion in the European Union. Published by the European Commission in December 2015.

36 Online: https://dennikn.sk/1132293/mizik-ma-vysvetlovat-na-sude-extremisticky-status-radsej-mlci/ (Downloaded 16 December 2017).

Fighting for a "heroic" past: the politics of memory in Hungary

In the more liberal climate of the Kádár era in Hungary dissident writers already published about anti-Semitism in the samizdat journal *Medvetánc* in 1985. After the change of regimes it can be argued that the revival of the Holocaust studies went hand in hand with the rise of a new anti-Semitism. Economic re-structuring after 1989 effectively impoverished many people: in addition, according to the calculation of Mark Pittaway, more than 20 % of the workplaces were lost. In this climate the reorganized far-right could win many new supporters.

While there has been an abundance of the Holocaust literature after 1989, the Hungarian far right wing party, Jobbik, became the second major political party at the 2018 parliamentary elections in Hungary. As Mark Pittaway concluded in *The Oxford Handbook of Fascism*, in which he wrote the part 'Fascism in Hungary': "Its past may be complicated but, at the time of writing [2009], the radical right seems likely to have a future."[37]

The fact that Holocaust was silenced in the official discourse received a special emphasis after the collapse of state socialism when anti-Semitism was no longer a political taboo. However, it was not only the political-ideological control of the state, which ceased to exist but the whole history of the 20th century was seen in a different light, which had an impact on the history of Holocaust. Modern history has become a contested terrain, and a new ideological battle started for the appropriation of the national collective memory and for the development of a new, "authentic" narrative in the place of the discredited Communist history. Unfortunately, sometimes political-ideological interests even today precede the academic considerations. What is at stake is not only the interpretation of Holocaust but also the whole history of state socialism. After the collapse of state socialism, totalitarianism and the equation of Communism and Fascism became a fashionable ideology in Eastern Europe. This comparison even goes so far that the atrocities committed in one regime serve as an "excuse" for the atrocities committed under the other one. This is how it was possible to hold Endre Ságvári (a Communist, who died in 1944 while fighting with the gendarmerie) responsible for the atrocities committed under the Rákosi regime (the Stalinist regime in Hungary). The attempt to demonize Communism is often linked with finding an "excuse" for Fascism as if the latter would have been less evil.[38]

Recent historical studies also shed light to another dark and largely forgotten chapter of Hungarian history.[39] The Hungarian army, which was sent to the territory of today's Ukraine to exercise military control over the occupied territories, was engaged practically in a genocide against the local population. These studies and documentation triggered a fierce debate among historians, who argued that the documentation was based on Soviet "falsification" and it is an attack against Hungarian national consciousness and other scholars, who claimed that the clarification of the past should be part of the national historical consciousness.

Krausz's argument that the Hungarian army committed such atrocities that it can be described as "genocide" triggered fierce attacks against the professor. As he put it: "This

37 Republished in FÁBRY, Adam (ed.): *From the Vanguard to the Margins: Workers in Hungary, 1939 to the Present. Selected Essays by Mark Pittaway*, Leiden – Boston 2014, 275.

38 KRAUSZ, Tamás – BARTHA, Eszter (eds.): *Holokauszt: Történelem és emlékezet*, Budapest 2006; KRAUSZ, Tamás – BARTA, Tamás (eds.): *Az antiszemitizmus történeti formái a cári birodalomban és a Szovjetunió területein*, Budapest 2014.

39 KRAUSZ – VARGA.

volume objectively proves that the Horthy-regime bears a direct political and historical responsibility for the death of several hundreds of thousand people. The regime was responsible for a genocide. This explains the attacks against the book because it cannot be reconciled with the new legitimating narrative of the regime after 2010." And we are back to the politics of memory where Krausz represents the old-fashioned view that there is still common knowledge and there are historical facts that cannot be debated. As Christian Hartmann, an expert on the history of the WWII argued: "I think that the documents are credible. The Hungarian soldiers took part in many operations, which ended in a genocide. […] I think that the main motive of the atrocities was the aggressive and widespread anti-Semitism among the Hungarian soldiers."[40]

The significance of the book *Magyar megszálló csapatok a Szovjetunióban* (The Hungarian occupation armies in the Soviet Union) extends the borders of Hungary and Hungarian historiography. Tamás Krausz was the first historian in Eastern Europe, who documented the crimes of non-German soldiers, who assisted the Nazis in the genocide at Soviet territories. Fortunately, there are some historians, who follow his lead in Hungary: we can mention Ákos Fóris, who came to the same conclusion using German and Hungarian documents. He could also prove that the Hungarian elite was well informed about the crimes committed in the Soviet Union: one report even mentioned the tragic evidence of the mass murder of children (hundreds of baby carriages left behind…).[41] It is therefore simply not true that Hungary "fell" victim to the Nazi Germany – as contemporary right-wing interpretations suggest. It is also worth stressing that not even a single Hungarian soldier was punished for the mass rape of the local women and the murder of the Jews or the "simple" Soviet civilians by the Hungarian military courts – this further reinforces the shared responsibility of the power elite. This, however, is strongly denied in the contemporary, right-wing, "official" narrative – the best proof of this is the monument erected at Szabadság-tér, which also gives home to the monument of the Soviet victims. The "monument of the victims of the German occupation" as it is called, was widely criticized for its failure to demonstrate the complicity of the Hungarian authorities in the genocide; it in fact suggests that the country lost its independence and the Hungarian government therefore cannot be called into account – while the truth is that Horthy was governor during the time when the Jewry from the countryside was deported to Auschwitz, to a secure death.

While historians such as Krisztián Ungváry is critical of the present government, anti-Communism often puts them on the same platform in the judgment of the Soviet Union and the Red Army. As a loyal follower of the totalitarian theory, Ungváry often uses a double standard for the Western and the Soviet armies. While the Western soldiers are described as "heroes", who generously distribute chocolate among the local people, he never misses the opportunity to criminalize and demonize the soldiers of the Red Army.[42] In his attempt to win the WWII in retrospect, he even overlooks the fact that the backbone of the Wehrmacht was broken by the Red Army at Stalingrad – but as we know, there is no more common knowledge. Many like Ungváry even choose to believe in the theory of the "preventive war" – even though even Anglo-Saxon historians clearly declare this theory to be false.[43]

40 *Népszabadság*, 12 January 2014. Heimer György interjúja.

41 FÓRIS, Ákos: "A zsidók agyonlövése a megszállt területeken köztudomású": Hírek a megszállt keleti területeken elkövetett tömeggyilkosságokról a magyar polgári szerveknél, in: *Eszmélet*, 29, 2017, 115, 201–211.

42 UNGVÁRY, Krisztián: Üllő és simogatás között. Válasz Krausz Tamásnak, in: *Századok*, 148, 2014, 1, 229–233.

43 ROBERTS, Geoffrey: *Stalin's Wars: From World War to Cold War, 1939–1953*, New Haven – London 2006.

Furthermore, even though Ungváry recognizes that the Hungarian troops participated in – or at least "assisted" the Holocaust in the Soviet Union, he in fact relativizes the Holocaust with the argument that the Soviets were as "bad" – or even more "evil" than the Nazis because they "represented" a totalitarian state.[44] It is sad that the old racist arguments return – this time in a liberal masque.

The criminalization of "Communism" goes hand in hand with attempts to "whitewash" the Horthy-regime, which bears responsibility for Hungary's entry to WWII and the deportation of the Jewry from the countryside. To cite the renowned labour historian, Mark Pittaway, in this respect, however: "if paramilitarism was one element of the interwar Hungarian political scene relevant to the later emergence of fascism, then anti-liberalism and the hegemony of national Christian ideas within the political culture of interwar Hungary constituted another. Such attitudes generated forms of political discourse that stressed the unified and eternal nature of the Hungarian nation, its fundamentally 'Christian' character and emphasized that political leaders had a duty to 'defend' Magyars from their 'alien' enemies. In turn, such opinions led to a growing interest in *völkisch* ideas of 'race' and 'racial defence' and their translation into a Hungarian context during the 1920s, inspiring political movements that stressed the apparent Turanian origins of Magyars which embedded themselves in radical right-wing rhetoric."[45] While Pittaway was not a Holocaust-researcher, his arguments are in line with those, who highlight this essential continuity between the ideologies of the 1920s and 1930s – as it is also cannot be denied that the deportation of the Hungarian Jewry from the countryside occurred during the time when Horthy was (still) the governor of Hungary.

On the basis of Pittaway's life work one can reconstruct 20th century Hungarian social history. Weak liberal bourgeoisie, great agrarian poverty, an authoritarian regime, which sought for the revision of the Trianon treaty and supported a strictly "national Christian" ideology – these are the main characteristics of the interwar era. Anti-fascism and socialism promised panacea for the depressing poverty and political exclusion of many, the social and economic misery of the lower classes, and the anomalies of the Hungarian caste system inherited from the feudal order. Indeed, an unprecedented social mobility can be documented in the region, which did not only imply urbanization and extensive industrialization as peasants became workers but many peasants and workers were "uplifted" to the ranks of the intelligentsia and the nomenklatura. After the 1956 revolution workers received a real chance to become incorporated in the "middle class" – indeed, if not embourgoisement but "petty embourgoisement" can be observed in many working-class (and peasant) communities.

Many of these – however limited – social and economic results were lost after the change of regimes. The disappointment in the political left brought with itself the rejection of the left-wing alternatives to state socialism; and the lack of a strong trade union movement rendered any working-class resistance to privatization and neo-liberal policies illusory. The anger and frustration of the "little man" was channeled into the support of ring-wing populism. It remains to be a question whether there will be a (further) shift to this direction; but in any case, we can safely paraphrase the sad prognosis of Mark Pittaway: the radical right *does* have a future in Hungary.

44 UNGVÁRY, Krisztián: *A Magyar megszálló csapatok a Szovjetunióban, 1941–1944: esemény, elbeszélés, utóélet*, Budapest 2015. For a critique see: KRAUSZ, Tamás: "Úriember" megszállók és "jogtipró" partizánok? A magyar megszálló csapatok népirtó tevékenysége Ungváry értelmezésében, in: *Eszmélet*, 28, 2016, 109, 151–173. See also GÉMESI.

45 FÁBRY, 261.

Conclusion

As we have seen, the Hungarian and Slovakian histories and historiographies from 1939 both show remarkable similarities. During the war, the local elites and segments of the population actively or passively participated in the anti-Semitic measures, the persecution of the Jews, and eventually the deportations, which would have been practically impossible without the cooperation of the Hungarian and Slovakian authorities. If we compare anti-Semitic propaganda, we can also find remarkable similarities – the dispossession of the Jews was "embedded" in the political program of the right-wing political forces. This can be partly explained through the similar social structures: the national bourgeoisie in both countries were weak, and the bourgeois society and capitalist development were seen as "alien" or "Jewish" phenomena.

After WWII, Communist modernization promised panacea for the ills of capitalism in both countries. This era constitutes even today a much disputed terrain of historical debates and interpretations. We pointed out the theoretical weaknesses of neo-totalitarian thought, which became a "mainstream" interpretation in Eastern Europe after the collapse of Communist rule. While the Communist regimes used antifascist struggle as an integral part of their legitimizing ideologies, Holocaust was effectively silenced in these countries, and all victims were seen as victims of fascism. After the change of regimes, there was a de-tabooization of the topic in both Hungary and Slovakia, and a lot of quality research has been published, which utilized the newly discovered archival sources, which have become accessible to the researchers. Extensive oral history projects have been conducted, Holocaust museums were founded, and new diaries, memoirs and other ego-documents have been published – alongside an impressive number of monographs, analytical works and case studies. The research outcomes became available to different audiences, including pupils and students in school education: e.g. Holocaust is taught as an independent course at Eötvös Loránd University of Budapest as well as in Šafárik University in Košice.

All these results should be mentioned as positive outcomes of the politics of memory after 1989. Yet, however, there are visible tendencies in both societies, presently also greatly fuelled by extreme-right parties and easily channeled by social media, which contribute to the rise of anti-Semitism in both Slovakia and Hungary, as a way of coping with social and political frustration of the majority society. This obviously calls for a more serious approach to the topic of the remembrance of the Holocaust[46] and imagining the Others on the state levels.

We introduced some major historical debates in both countries, which are eventually focused on the relativization of the Holocaust. Without deciding the debates, we would only like to add that many people in the contemporary Slovakia and Hungary decide to deny everything, which has been regarded as "common knowledge" because they think that then they should face the responsibility and crimes of their grandfathers and great-grandfathers. The suffering under Fascism is measured against the suffering under Communism as if the latter, indeed, would counterbalance (or outweigh) the tragedy of the victims of Fascism. Such arguments are fundamentally wrong. What is at stake is not who suffered more but rather the historical understanding of the many factors that led to the

46 See in this respect the article of Moishe POSTONE on the German politics of memory, which is even today relevant: Anti-Semitism and National Socialism. Notes on the German Reaction to "Holocaust", in: *New German Critique*, 1980, 19, Special Issue 1, 97–115.

dispossession and eventually to the deportation of hundreds of thousands of Hungarian and Slovakian Jews – with the assistance of the local authorities. The Western example of the formation of a national collective memory, which is conscious of its own history, should be indeed more observed in Eastern Europe in order to go beyond national sensitivities and national traumas (which is often translated as "we have suffered a lot, too") and understand our common history from a global point of view.

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Introductory parts to the constitutions of Visegrad Group countries. Their relevance, constitutional identity and relation towards European Constitutional Identity.

Mgr. Karol POPŁAWSKI

Abstract

Postponed article seeks to find an answer on legal meaning and role played by introductory parts of the Constitutions of Visegrad Group (Hungary, Czech Republic, Republic of Slovakia and Republic of Poland) countries – both in internal and external (European) aspect. They commonly expresses respect to freedom and human dignity and vast catalogue of principles and values known in European legal discourse. Preambles though are also main source of reconstructing *national identity* and *constitutional identity* and thus makes it worth referring to. Regional Constitutional Courts concerned preambles in their judgment several times and scope of their activities as well as methods are worth interpreting. Relation to international principles and values is also not a coincidence, as it is connected with the process of democratic transition in post – communism countries. Hence it refers to notions of *constitutional identity* and certain level of "openness" of Constitutions of the V4 countries on European law.

Keywords

preambles, introductory parts to the constitution, Visegrad Group countries, national identity, constitutional identity

Introduction

On 1989 countries of Central and Eastern Europe entered the path of a democratization. In regional countries it related to similar or even identical circumstances: crisis of autoritharian power, breakdown of the political system, appointment of the new government, introducement and establishment of democracy, appointment of the democracy power and new political (democratic) actors.[1] Parallely began process of "institutional and ideological

1 KUBAS, Sebastian: Dynamika procesu demokratyzacji Węgier. Próba określenia zjawiska w teorii [Dynamic of the democratisation process in Hungary. Assignement in theory], in: *25 lat transformacji w krajach Europy Środkowej i Wschodniej*, BARAŃSKI, Marek – WIŚNIEWSKI, Jerzy (eds.), Katowice 2014, 89.

integration with the West,"[2] which ended with huge accession into the European Union in 2004. Below article is objectively limited to the Visegrad Group countries, however conclusions (at least on the legal relevance of the constitutional preambles) can be assigned to each Central and East European country, which was under Soviet Union influence.

Western legal doctrine is sometimes indicating that mentioned transition could be seen as "massive transfers of material resources, know-how, political and economical model from the West to the East Europe".[3] Even first glance implies whole process to be one directional – from so called "old democracies" to "new democracies". Hence, it was better and more politically correct to determine that "Eastern countries have aspired to fill the empty space created by the breakdown of the communist system", but – from the beginning of post – communism transitional period – aimed on 'returning to Europe and its standards'.[4] Standards were thought to be common, but disturbed and distorted by communism regime. Fundamental for the European Union was though a belief on unity of principles and values characteristic to modern, democratic countries. Eventually it led to the conclusion on European common constitutional heritage, shared by countries of Europe. It also encompassed clear conviction that Central and Eastern European Countries share those principles and values, which needed only to be reinstated after the communism period.[5]

On that basis, principle of sovereignty came into the fore. It was both dimensional: as sovereignty and independence of the State as well as sovereignty of Nation. Recently regained sovereignty again was about to be challenged – now by the European entities (especially the European Union; hereinafter EU), with its principles of priority and direct application of EU's law.[6] Legal and political environment needed though a proper balance between *European and National Identity,* which was initially presented during works on the Treaty of Maastricht.[7] Now – on the basis of the art. 4 par. 2 of the so-called "Lisbon

2 GARLICKI, Lech: Constitutional Court of Poland 1982–2009, in: *The political origins of Constitutional Courts. Italy, Germany, France, Poland, Canada, United Kingdom*, PASQUINO, Pascquale – BILLI, Francesca (eds.), Rome 2009, 30.

3 ERIKSEN, Svein: Institution building in Central and Eastern Europe: Foreign Influences and Domestic Responses, in: *Review of Central and East European Law*, 32, 2007, 3, 333.

4 Ibidem, 334.

5 BARTOLE, Sergio: Comparative Constitutional Law – an Indispensable Tool for the Creation of Transnational Law, in: *European Constitutional Law Review*, 13, 2017, 4, 601–602. Huge differences concerning legal culture extorted real and advanced participation of monitoring and advisory bodies (especially Venice Commission and Organisation for Security and Co-operation in Europe. They were scrutinizing whole process, maintaining permanent advisory activities in which were establishing modern democratic standards, which ought to be achieved. See: JOWEL, Jeffrey: The Venice Commission: disseminating democracy through law, in: *Public Law*, 2001, 675–676.

6 Interestingly on that aspect in English: TATHAM, Allan: *Central European Constitutional Courts in the Face of EU Membership. The influence on the German model in Hungary and Poland*, Leiden 2013, 210–218. Among Polish authors: BANASZAK, Bogusław: Limitation of Sovereignty by the European Integration – The Polish Approach, in: *Ius Gentium: Comparative Perspectives on Law and Justice*, Dordrecht 2016, 102. GARLICKI, Lech: Constitutional Law, in: *Introduction to Polish Law*, FRANKOWSKI, Stanisław (ed.), Hague 2005, 5–8.

7 Treaty on European Union on 29 July 1992, *Official Journal of the European Communities*, C 191, vol. 35, 29 July 1992, 1–110. Need of ascertaining European Identity on the international scene was pointed in art. B of the Maastricht Treaty, but direct respect to National Identities of the Member States resulted from art. F, but it was conditional – if only system of government of the Member States is founded on the principles of democracy. Preceding motives were mentioned in the preamble of the Treaty, where Member States (alongside many other fundamental principles and values f.e. of free market) emhasized importance of "the ending of the division of European continent and the need to create firm bases for the construction of the future Europe". It was also desired to deepen solidarity between people of Europe – while respecting their history, culture and their traditions.

Treaty"[8] – *national identity* is presented as an obligation to "respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State". In parallel, we should also emphasize the concept of *constitutional identity*.

Particularly notions of *national identity* and *constitutional identity* were used in the same contexts and meaning, which shall be treated as incorrect. Simplifying, *national identity* being itself a principle of EU law, is based on a "liberal concept for the respectful treatment of the members of a multinational political community" whereas *constitutional identity* is about exercising several principles of the constitutions of the EU Member States, fundamental for the sovereignty concept.[9] It does not mean *a priori* accept to primacy of internal legal orders and is rather pragmatic vision of different actors of international legal discourse interested in protecting their sovereignty. Bearing in mind circumstances of the transformation period, shall be emphasized that abovementioned process needed time and at the same time did not give such time. Legal unification was though one thing, but completely different was opening societies on pending changes. Described period for countries of Central and Eastern Europe was sometimes called "perfect for constitutional engineering". Thus important was guaranteeing proper understanding of the whole process and such role – inevitably – had to be played by the introductory parts to the constitutions. It is however dominant theory, that preambles are the easiest way to proclaim principles and values particulary important from "past and present" of the countries.[10] Hence it plays crucial, system-building role by balancing relations between values. By explicit reference to the history of the country and its legal system, introductory parts to the constitutions of post-communism countries also includes "rejection of the previous communist system".[11] Then it leads to complex and demanded process of establishing new – free and democratic – *national identity.*

Subject of considerations

Articles refers to the countries of Central Europe, which are situated in the scope of Visegrad Group (Czechia, Hungary, Poland and Slovakia). Analysis will be sharpened to the in-

8 Consolidated versions of Treaty on European Union and the Treaty on the functioning of the European Union, *Official Journal of the European Union*, C 202, vol. 59, 7 June 2016, 1–388. Concept of the National Identity was significantly deepened, however Preamble to the mentioned Treaty sustained in similar form. Worth attention is a concept of the EU, which is "drawing inspiration from the cultural, religious and humanist inheritance of Europe", which is basis of inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.

9 CLOOTS, Elke: National Identity, Constitutional Identity, and Sovereignty in the EU, in: *Netherland Journal of Legal Philosophy*, 45, 2016, 2, 82–84.

10 GARLICKI, Lech: Wstęp [Introduction], in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom V [Constitution of the Republic of Poland. Commentary. Vol. V]*, GARLICKI, Lech (ed.), Warszawa [Warsaw] 2007, 2.

11 GWIŻDŻ, Andrzej: Wstęp do Konstytucji – zagadnienia prawne [Introduction to the Constitution – legal aspects], in: *Charakter i struktura norm Konstytucji [Character and structure of the norms of the Constitution]*, TRZCIŃSKI, Janusz (ed.), Warszawa [Warsaw] 1997, 169.

troductory parts to the constitutions of Czechia, Hungary, Poland and Slovakia in the way they refer to the issue of the *national* and *constitutional identity.*[12] That significantly limits scope of considerations, but answers the need of sustaining methodological correctness. As *Konrad Zweigert* pointed, one of the main faults in comparative studies is not having certain scope of research and lack of conclusions.[13] They are made in the end of the article. Furthermore, mentioned countries share similar transitional experiences and were following the same path of integration with the EU. Noticeably they recent history refer to common traumatic experiences connected with breaching human rights and rule of law in post communist countries. Obviously author sees the fact that ascertaining similar history of V4 countries could be accepted only superficially. General factors – which we divide on external and internal – were rather similar, but intensity and model of transformation (also the intellectual one) were different.[14] In Hungary transformation was initiaded by higher (intelligentsia – scientist) social group and in middle 50s (20th century) Hungary created rather liberal form of communism regime.[15] In Poland transformation process was inspired by the working class. In parallel, abovementioned countries had to create legal system from the beginning, which was sometimes seen as "recalling rudiments of law".[16] Passing time urged Czechia to create – except strict constitutional act – also a Charter of Fundamental Rights of the Czech Republic. Czech authors states such distinction aimed on recreating commonly broken rights and freedoms as soon as possible.[17] It can be assumed, the level of breaching fundamental human rights and aspiration of the society to live in a free and democratic country were the main factors of transformation. Basically, it was similar in Slovakia, although there was no need for dividing a constitution or a charter of rights. However, attention is drawn to the common aspiration of these countries to adopt the principles and ideas of Western liberal democracies.[18] According to the reconstruction of the system of legal guarantees for the protection of the lawful system – preambles express also the need to rebuild the economic system, and, subsequently, to build a common identity of the whole, sometimes divided society.[19]

12 According to terminological differences (especially concerning Hungary) it should be better – in order to maintain correct terminology – to say not about preambles, but introductory parts of the constitutions. However, I will use those terms interchangeably.

13 DE CRUZ, Peter: *Comparative law in a Changing World*, New York 2007, 8.

14 KUBAS, 92. As an external factors, author presents especially political changes in USA and Soviet Union (election of R. Regan for President of the USA, election of M. Gorbachev on General Secretary of Soviet Union), which – as a result – weakened the Soviet Union. According that, recent elits of "satelite states" had to change methods of governing the country. That lead to an internal factor, which was: disappointment of vast social groups as well as economical difficulties – resulting with strengthening the opposition.

15 Ibidem, 92–95.

16 BAŁABAN, Andrzej: *Polskie problemy ustrojowe. Konstytucja, źródła prawa, samorząd terytorialny, prawa człowieka [Polish political system dilemmas. Constitution, sources of law, local government, human rights]*, Kraków [Cracow] 2003, 42.

17 KUDRNA, Jan: Two Preambles in the Czech Constitutional System, in: *Acta Juridica Hungarica*, 52, 2011, 1, 24. Despite that, such solution created also the possibility to solemn proclamation of the meaning of human rights and its protection in Czech constitutionalism.

18 KINANDER, Morten: Comparing Courts: The Accountability Function of the Constitutional Courts of Poland and Hungary, in: *Review of Central and East European Law*, 39, 2014, 2, 153.

19 MŁYNARSKA-SOBACZEWSKA, Anna: Normatywizacja pamięci zbiorowej w preambułach do konstytucji państw postkomunistycznych, in: *Przegląd Prawa Konstytucyjnego*, 18, 2014, 2, 239.

Introductory parts to the constitutions of Visegrad countries possess a specific, unique character, which enables them to play different roles in a theory of law and whole legal discourse. Analysis also has to be complex and include many factors. Recreation of the legal system from the ideologically oriented communist law, balance between past and upcoming future, level of an inspiration from historical experiences and also integration with Europe – main principles and values emerging from that process, forces the researchers to maintain deepened studies.[20] As it was once stated, "monocausal explanations […] that focuses exclusively on: political and legal culture, institutional design or actor-based behavior" shall be a subject of criticism.[21] Obviously complete, methodological correctness – from legal and social point of view – is reaching far beyond of the form of typical scientific article. That is why the analysis is concerned on the introductory parts as part of legal text partially answering all of above issues. Mainly I will focus on the way it has been used to determine *national* and *constitutional identity*, which reflected process of integration with the EU, including reflection on the legal relevance of the introductory parts to the constitution. In author's opinion such scientific approach will help to maintain methodological correctness, as the main factors of the process were almost identical for each of analyzed country. Potential, internal differences in attitude towards integration process as well as historical approach, would make the research more valuable.

What exactly are the preambles?

Preambles are significantly specific, but immanent part of legal text.[22] They are situated in the beginning of the legal text, usually after the title. On that basis, one can assume its legally binding character (which though can not be interpreted as complete legal relevance).[23] It would be mistaken to identify preambles only as content of the constitutions, however they are used mainly in basic laws. Liav Orgad – an author of fundamental work on the introductory parts to the constitutions – stated the preambles shall be rather identified through their content rather than specific location.[24] In this sense they are sometimes used

20 See: MADEJA, Andrzej: Komparatystyka konstytucyjnoprawna. Antecedencje, ewolucja, przewidywanie kierunku rozwoju [Comparative Constitutional Law. Origins, Evolutions, Possible Development], in: *Studia Iuridica Toruniensia*, 6, 2010, 134–141.

21 KINANDER, 150. In fact author made such conclusion comparing practice of Constitutional Courts of Poland and Hungary. He correctly emphasized that even if one factor will be absolutely comparable and correct, rest will probably fail in the context of similarity.

22 KUTLESIC, Vladen: Preambles of Constitutions – a comparative study of 194 current constitutions, online: https://constitutional-change.com/preambles-of-constitutions-a-comparative-study-of-194-current-constitutions/ (Downloaded 1 September 2019). Subject of the analysis is the content of almost every preamble of modern constitutions. It points common features and values, regional similarities and differences between some constitutions (especially of Middle – East European countries and Near East countries). Considering data presented here, only 54 on 194 Constitutions does not contain introduction, which equals about 72 %.

23 More on that: BAŁABAN, 42. Author points that preamble occuring after title of legal act (Constitution) prejudges, it is an internal part of such act. Other authors points that preambles are changed in the same proceedings as whole constitution, which makes it immanent part of constitution. E.g.: BISZTYGA, Andrzej: Zmiana Konstytucji jako źródła prawa o najwyższej mocy prawnej [Changing the Constitution as the act of highest legal power], in: *Zmena Práva*, BÁRÁNY, Eduard (ed.), Bratislava 2013, 90.

24 ORGAD, Liav: The preamble in constitutional interpretation, in: *International Journal of Constitutional Law*, 8, 2010, 4, 716.

(but in limited scope) to creation of "metanorms" – so strictly speaking principles, which creates shape of whole country as well as regulating lower – order laws.[25] Preambles are written sequentially in solemn language, which is far from the strict criteria of law making. It also reflects on its vague legal relevance.[26] Hence occurred theory, that preambles – in its form and content – creates risk of using them in "propaganda purposes."[27] Such assumption may be based on clear historical references, typical in the content of preambles. Some scientists proclaim them to be "declaration of independence".[28] Hence we can state, that preambles are created also to ignite certain social changes or attitude. It was obvious even one hundred years ago, during initial negotiations on the preamble to the constitution of the *League of Nations.*[29] As it was correctly pointed "few of them 'peoples of the world' will study in detail provisions of the constitution. Many could not understand them in any case (…) These purposes and means should be fully and clearly stated in the preamble, which should be in effect a declaration of principles". However, just as preambles can foster integration by forging a common identity, so also they can be disintegrative, driving people apart and contributing to social tension.[30]

Modern preambles could be found different length and rather similar content, which we can divide into 5 categories. First is the entity of the Sovereign, being in particular "specifying source of sovereignty". Second, usual part of the preambles are the *historical narratives*. As *L. Orgad* rightly observed it tells "specific stories that are rooted in language, heritage and traditions. These stories shapes the common identity (we)".[31] Third are the supreme goals of the state and society. Among them we shall point f.e. human dignity, justice, democracy (at least in European zone), sovereignty of state and nation. Fourth and most interesting from the scope of this analysis is proclamation of *national identity.* It shall be understood continuously as actual identity typical for certain constitutional system, but also future aspirations (usually established by international organizations). Fifth is a reference to God and religion.[32] Such conclusions were made upon introductions to the constitutions from the whole world countries. Furthermore, it is worth noticing specific of the constitutional preambles of the Central Europe countries. There are undoubtedly the same inclinations – which displays in content of almost every preamble of their constitutions.[33] Reasons of such regularity is not exactly known. It is sometimes relating to common, traumatic experiences

25 KAMIŃSKI, Antoni – KAMIŃSKI, Bartłomiej: Inżynieria konstytucyjna w postkomunistycznych przemianach ustrojowych [Constitutional engineering in post communism political chages], in: *Ruch prawniczy, ekonomiczny i socjologiczny*, 78, 2016, 2, 251.

26 BANASZAK, Bogusław: *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary]*, Warszawa [Warsaw] 2012, 4.

27 GWIŻDŻ, 169. Cited author presented reserved attitude towards using preambles in the legal discourse, which was probably resulting from instrumental way of treating preambles during communism.

28 Ibidem, 173.

29 See: DAVIS, Charles Hall: Preamble to Constitution of the League of Nations, in: *Virginia Law Register*, 5, 1919, 1, 16.

30 ORGAD, 731.

31 Ibidem, 717.

32 Ibidem, 716–718.

33 MŁYNARSKA-SOBACZEWSKA, 240. Author suggest that practically only exception is introduction to Basic Law of Hungary from 25 April 2011.

connected with breaching human rights and rule of law in post-communist countries. It is noticed, that protection of recently evolved reality, creates new duties in the system of protecting law, which sometimes "reminds rudiments of law – abidingness".[34] Pointing typical elements in the content of the introductory parts to the constitutions of V4 countries, we indicate: certain attitude to passed years, a declaration of change in values, all issues related to the rule of law, issues of liberty and human rights. According to the reconstruction of the system of legal guarantees for the protection of the lawful system – preambles express also the need to rebuild the economic system and – what was already mentioned – creation of the national identity.

Here it would be justified to make couple of remarks on the legal relevance of the preambles to the constitutions, but from general perspective. Again, *L. Orgad* has created typology, which should be treated as correct and binding. Thus, he emphasized the preambles could possess following character: ceremonial – symbolic (being kind of a justification of the whole act – not only instructing, but also persuading), interpretative (as a tool for correct understanding the meaning of the statute, but never prevailing over articulated part of the constitution), substantive (in word, serving independent sources for rights and obligations).[35] Regional researchers (*T. Stawecki*) states that constitutional preambles (in the Basic Laws of these states) are not directly applicable and require further substantiation (similary f.e. *P. Holländer*), by which they presents its interpretative role.[36] Hence *K. Stoichev* (judge of the Bulgarian constitutional court) says that introductory parts in general do not have binding juridical character, although expressions referring to democracy and human rights are so-called "interpretation directives". On the other hand, *V. Sinkevicius* points out that not all standards are possible to be forwarded in an articulated form. He states, therefore, that the preamble does not only express philosophical and political categories, but also legal ones.[37] Analyzing the countries of the Visegrad Group, it should be admitted that they essentially share the above stance, which does not mean that it does not suffer any harm.

Introductory parts to the constitutions of the Visegrad Group countries: its meaning, legal relevance and way they reconstruct national and constitutional identity

Constitutions of mentioned countries were passed in different periods. Slovakia and Czechia passed constitutions much earlier than Poland and Hungary. Republic of Poland sustained works on the new constitution about five years, during which governmental composition was significantly changing.[38] Without any doubts, it influenced whole act – reflecting

34 BAŁABAN, 42.

35 ORGAD, 722–726.

36 MAŚNICKI, Jędrzej – STAWECKI, Tomasz: Wykładnia i stosowanie konstytucji w aktach prawnych państw Europy Środkowej i Wschodniej [Interpretation and application of Constitution in legal acts of the Countries of Central and Eastern Europe], in: *Wykładnia konstytucji. Inspiracje, teorie, argumenty [Interpretation of the Constitution. Inspirations, theory, arguments]*, STAWECKI, Tomasz – WINCZOREK, Jan (eds.), Warszawa [Warsaw] 2014, 130–158.

37 Ibidem, 140–145.

38 Starting from 7 September 1992 (date of establishment of Constitutional Commission of National Assembly) until 17 October 1997 (which is the date, new Constitution on 2 April 1997 came into force).

on the content of the preamble. Situation in Hungary is though completely different, as Fundamental Law of Hungary is one of the youngest constitution in whole EU. Thus, preambles will be presented chronologically, as the content of the introductory parts.

Introduction to the Constitution on 1 September 1992 of the Slovak Republic[39]

Polish doctrine specifies the above introduction laconically, stating that it has the nature of justification.[40] In the initial passages, the preamble indicates the Sovereign which is made the Slovak Nation. Slovak doctrine, however, differs the notion of the Nation in the ethnic meaning (included in the preamble) and the Sovereign – the author of the constitution, which are citizens.[41] It further includes a reference to past years, although the vision of the past "is quite vague", where the vision of the state and its history gave way rather to the will of conciliation and the effectiveness of enacting a new constitution.[42] It does not refer directly to human dignity, although it guarantees the freedom of life and development. Preamble emphasizes the right to self-determination of nations, including connection with citizens of the state belonging to national minorities and ethnic groups. It also includes a clause on international integration expressing hope for "lasting and peaceful cooperation with other democratic states". This has the dimension of both coexistence (regarding relations with other states) as well as conciliation (in the form of a call for unity between a nation and members of national minorities). It can also be assumed that preamble proclaims the features of *national identity*, among which it indicates: "peaceful coexistence and cooperation both inside and outside the state, democracy, freedom, spiritual culture and economic prosperity".[43] It also does not explicitly express the idea of human dignity, at most referring to it by conclusion. In the preamble the assumptions typical for the principle of subsidiarity can be seen – also not explicitly named in the introduction.
Slovak literature rarely refers to the introduction and its meaning. The exception here is *T.* Ľalík, who first of all indicates the interpretative value of the introduction to the Constitution of the Slovak Republic.[44] This is in line with the position of Slovak commentators quoted

39 Constitution on 1 September of the Republic of Slovakia, "Zbierka zákonov Slovenskej republiky" no. 244 from 1998 as amended.

40 SARNECKI, Paweł: Systematyka konstytucji [Systematics of the Constitution], in: *Charakter i struktura norm Konstytucji [Character and structure of the norms of the Constitution]*, TRZCIŃSKI, Janusz (ed.), Warszawa [Warsaw] 1997, 28.

41 ĽALÍK, Tomáš: Preambula k Ústave SR a jej význam [Preamble to the Constitution and its meaning], in: Ústava *Slovenskej republiky 20 rokov v národnom* a *európskom pohľade*, Bratislava 2012, 211–212. Authors own translation. Online: https://www.academia.edu/14583732/Preambula_k_%C3%9Astave_SR_a_jej_v%C3%BDznam. The reason for such situation may be the occurrence of many national minorities in Slovakia. The author even states that citizenship is, to some extent, a prerequisite for integration / becoming a Sovereign. It rightly notes, however, that this concerns the impact on the political and legal aspect. In the axiological aspect, in relation to the common relation to a specific heritage of history, the Nation is all in an ethnic sense. It results from the phrase used in the preamble of "We – Slovak Nation".

42 MŁYNARSKA-SOBACZEWSKA, 239.

43 ĽALÍK, 214.

44 Ibidem.

there. However, the large reserve of the Slovak Constitutional Court, which referred to the preambles twice, is noticeable. In the first judgment (Pl. 8/96), the Tribunal accepted the interpretative nature of the preamble, but without granting it "the value of independent legal significance."[45] In the second one (I. ÚS 30/99), referring to the preambles indirectly, stated that "they are not essential elements of any normative act and are not relevant for the assessment of its normative content".[46] Assumption on interpretative role of the preamble shall be considered as correct. Even despite the fact that later judgment of Slovak Constitutional Court withdrew that standpoint. However, it happened in highly unusual case, which was focusing on the aspect of amnesty granted by the Slovak President. Whole issue was glowingly political and – in such aspect – focusing upon the preamble with its typical, generic ambiguity, could be considered controversial.[47] Consequently, interpretative role of the introduction to the Constitution of the Slovak Republic, would better fit international standards and even regional tendencies.

Then, one thing more we need to consider is the *national* and *constitutional identity*, which occurs from the content of the preamble. Slovak Constitutional Court has partially abandoned formal way of understanding democracy and the rule of law, which means that each decision could be subject to constitutional review.[48] Furthermore, principle of the rule of law (certainty of law, justice etc.) was somehow connected with ideological of neutrality.[49] On 30 January 2019 Slovak Constitutional Court gave its ruling directly on *constitutional identity*.[50] Fundamental for its content was a conclusion, that "material core of the Slovak constitution" rest on the democracy and the rule of law. Such assumption was though accompanied with the particularly unique right of the Constitutional Court to determine the core – in accordance to occurring changes. Maybe on that basis, Court by defining the *constitutional identity* included also clear division of powers and independence of the judiciary power.[51]

Recalling presented above conclusions of Ľalík, *national identity* though focus on "peaceful coexistence and cooperation both inside and outside the state, democracy, freedom, spiritual culture and economic prosperity", which is obviously different from the concept of the *identity* established by the Constitutional Court. Certainly one aspect common (and the most important) for the Slovak *identity* is the principle of democracy – mainly in its material aspect. In Court's opinion Slovak Constitution can weight certain values, but always prior would be rule of law, legal certainty and proper division of powers. Those are unbreakable principles of the whole political and legal system of the Slovak Republic. Foreign researchers and EU bodies should also consider the preamble's concept of *nation-*

45 Decision of the Constitutional Court of the Slovak Republic, Ref. File No. *I ÚS 8/96*, of 30 January 1996.

46 Decision of the Constitutional Court of the Slovak Republic, Ref. File No. *I ÚS 30/99*, of 28 June 1999.

47 One of the aspect there was an amnesty (prerogative typical for the President of the Republic) granted by the Prime Minister in highly controversial cases (national referendum in May 1997 or kidnapping son of the President).

48 Decision of the Constitutional Court of the Slovak Republic, Ref. File No. *PL. ÚS 7/2017*, of 31 May 2017.

49 Decision of the Constitutional Court of the Slovak Republic, Ref. File No. *PL. ÚS 12/01*, of 4 December 2007. Mentioned judgment was issued in a crucial case on the right to abortion.

50 Decision of the Constitutional Court of the Slovak Republic, Ref. File No. *PL. ÚS 21/2014*, of 30 January 2019. Judgment concerned legality of certain process of amending the constitution.

51 Here it is noteworthy that 4 judges voted separately – mainly because of the conviction that Constitutional Tribunal in case *ÚS 21/2014* has exceeded its competences.

al identity, understood as peaceful cooperation, freedom, spiritual culture and economic prosperity. Especially in way it presents potential limits of EU actions in the domestic legal order of Slovakia.

Introduction to the Constitution on 16 December 1992 and Charter of Fundamental Rights and Freedoms of the Czech Republic[52]

Providing legal text with preamble is rare in Czech legislation. It occurs most often in a situation of passing new, fundamental in its content and structure, law – especially in conditions of certain legal discontinuance.[53] Czech researchers argued that the preamble includes political, historical and social declarations. Hence they sometimes deprived it of its normative nature, excluding (precisely questioning) its integrity with respect to the whole text.[54] This argument, however, can not stand, because there is no evidence that it is the expression of the dominant part of the representatives of the doctrine. The introduction to the Constitution of Czechia, was placed after the title, which in combination with the fact of creating it – at the same time and mode as the article part – determines its integrity with the entire act. Polish doctrine includes the statement that the introduction to the Constitution of the Czech Republic has a teleological nature.[55]

Introduction to the Czech Constitution retains typical characteristic – at least if we consider regional countries. It is written in a unique, lofty form, being in a form of an oath. Indicates the Sovereign (Citizens of the Czech Republic), which, however, is important for the heritage of post-communist states "praising the undeniable values of dignity and freedom" and the equality and freedom of Citizens. Also expresses the will to join the Czech Republic to the "family of European and world democracy." In addition, it makes reference to the need to protect "cultural, material and spiritual wealth." Most importantly, the preamble to the Constitution of the Czech Republic expresses the principle of the rule of law as crucial for the world of liberal democracies by saying "determined to follow the proven principles of the rule of law". Seemingly enigmatic definition of human rights on the basis of the introduction to the Constitution of the Czech Republic comes from the division into the Constitution and the Charter of Fundamental Rights. Charter refers to the commonly occurring human and democratic values, while underlining the self-governing traditions of Slovakia and the Czech Republic. An important part is also the reference to the experience of previous years.

Referring to the content of the analyzed preamble, it shall be stated that Czech Constitutional Court was numerously interpreting principle of the rule of law. In the judgment *ÚS 50/04*, Court set a limit for the transfer of powers of state bodies to the Community.[56]

52 Resolution of the Presidency of the National Council of Czech Republic on 16 December on announcing Charter of Fundamental Rights and Freedoms as part of constitutional order of Czech Republic. "Sbírka zákonů České republiky" 1993 no. 1 from 28 December 1992, 17–23 (further: Charter of Fundamental Rights and Freedoms).

53 KLÍMA, Karel: *Constitutional Law of the Czech Republic*, Plzeň [Pilsen] 2008, 101.

54 KUDRNA, 22.

55 SARNECKI, 39.

56 Decision of the Constitutional Court of the Czech Republic, *Pl. ÚS 50/04: Sugar quotas*, of 8 March 2006. In this case Constitutional Court did not refer to preamble directly, however it granted rule of law – explicitly mentioned in the preamble.

Mentioned limits could not, however, harm the principle of primacy of Community law fundamental to EU law. Court also concluded that the Czech Court in its interpretation can not disregard the principles of Community law, which partly motivated the potentially higher "standard of protection of fundamental rights" within the Community. Furthermore, in judgment *ÚS 19/08* (so called "Treaty of Lisbon" case), Court, analyzing the compatibility of the Treaty of Lisbon with the Czech constitutional order, stated that the EU, by virtue of the treaty shaping its new subjectivity, largely implements values well-known to Czech Constitution and expressed explicitly in its preamble as well as the preamble to the Charter of Fundamental Rights and Freedoms.[57] Thus it based on assumptions that values based on respect for human dignity and freedom stem from the essence of humanism and shape the Czech constitutional system. Court also found an explicit connection between the provisions of the article part of the Constitution of the Czech Republic and the Charter of Fundamental Rights and Freedoms – mainly Art. 1. It is noticed in the Polish doctrine that the verdict was inspired by the Polish jurisprudence of the Constitutional Tribunal – in case K 18/04.[58] Paradoxically, researchers stated even that – according to the unclear legal nature of the Charter of Fundamental Rights EU – Czech internal system of human rights protection could be weakened.[59] Relation towards European integration could be found in the judgment *ÚS 66/04* regarding the European Arrest Warrant.[60] On its basis, the Court concluded that there was a constitutional principle according to which the provisions of national law, including constitutional provisions, should be interpreted in accordance with the principles of European integration and cooperation between Community bodies and Member State authorities. Therefore, if there are several possible interpretations of the Constitution, including the Charter of Fundamental Rights and Freedoms, and only some of them allow the fulfillment of the Czech Republic's obligation resulting from its membership of the European Union, it is necessary to adopt such an interpretation. It is important, however, that the doctrine of mutual responsibility was expressed on the basis of the ruling, which states: If Czech citizens are beneficiaries of benefits related to their status as EU citizens, it is natural to accept a certain scope of responsibility appropriate to these benefits. At the same time, the starting point for reflections on this subject was for the Czech Constitutional Court the assumption that the EU countries enjoy an equal high level of values and mutual trust, "based on the principles of democracy and the rule of law."

This does not mean that the preamble has only been applied to matters concerning interstate relations. It is worth paying attention to the judgment *ÚS 557/09*.[61] One of the more

57 Decision, of the Constitutional Court of the Czech Republic, *Pl. ÚS 19/08: Treaty of Lisbon I*, of 26 November 2008.

58 WÓJTOWICZ, Krzysztof: Traktat akcesyjny: wyrok z dnia 11 maja 2005 – K 18/04 [Accesion treaty: Judgment on 11 May 2005 – K 18/04], in: *Na straży państwa prawa. Trzydzieści lat orzecznictwa Trybunału Konstytucyjnego [Securing rule of law principle. Thirty years of jurisdiction of Polish Constitutional Tribunal]*, GARLICKI, Lech – DERLATKA, Marta – WIĄCEK, Marcin (eds.), Warszawa [Warsaw] 2016, 506–507.

59 See also: WITKOWSKA-CHRZCZONOWICZ, Katarzyna: Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w sprawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z Lizbony, sygn. Pl. ÚS 19/08 [Judgment of the Constitutional Court on 26 November 2008 on the conformity of the Treaty of Lisbon with Czech constitutional order, sign. Pl. US 19/08], in: *Przegląd Sejmowy*, 17, 2009, 2, 272–273. Author recalls the position of the Czech Senate, who even spoke about the risk of pressure on the internal system of values, but also on the institutions of the European Union on national systems.

60 Decision of the Constitutional Court of the Czech Republic, *Pl. ÚS 66/04: European Arrest Warranty*, of 3 May 2005.

61 Decision of the Constitutional Court of the Czech Republic, *I. ÚS 557/09: Limitation of Legal Capacity*, of 18 August 2009.

important elements of the judicial argumentation was the content of the preamble. It has been said there that the human dignity so deeply rooted in the axiology of the whole constitution and expressed in the preamble (and specific articles), allows only the full use of the attributes of humanity, realizing oneself and expressing one's personality and needs.[62] Hence, while reconstructing *constitutional identity* in Czech, it shall be emphasized it was focused on the principle of sovereignty. In this sense, Czech Constitutional Court presented similar standpoint as Polish Constitutional Tribunal and German Federal Tribunal. It is though based on the minimal standard of the protection of the fundamental principles. EU law is granted primacy as long as it guarantees higher or – at least – the same level of mentioned protection. Furthermore, Czech *constitutional identity* stresses out the reciprocity of such relation. Preamble contains also certain and explicit reference to the rule of law, which also shall be found fundamental. *National identity*, which we could derive from the content of the introduction to the Constitution of the Czech Republic is rather similar to that mentioned in Slovak Republic. However Czech *identity,* unlike the Slovakian, is more oriented on the discontinuance and expresses clear rejection of the communist period. In parallel, issue of European values and compliance of both (internal and external) legal systems is still on the fore. However, in Czech we could have observed an attitude oriented on particularity of values and its regional interpretation – typical for Poland and Hungary.[63] Discussion on values always open a space for discussion concerning weighting the values, but it always demand at least minimal consensus. Thus, it could occur from the correct interpretation of *national* and *constitutional identity*, grasped in the content of the preamble.

Introduction to the Constitution on 2 April 1997 of the Republic of Poland[64]

The introduction consists of 229 words (or according to another characteristic: 23 lines)[65] concerned in two complex sentences.[66] It is characterized by sublime style and emotionality. It contains a common reference in Central European countries to the period of change after 1989, by pointing to the regained possibility of sovereign and democratic determination on the fate of the Homeland.[67] It defines the Sovereign, which the Nation – in the

62 The essence of this judgment was the determination of the legitimacy of limiting the legal capacity of the applicant. In its judgment, the court outlined the non-constitutional activities in which the applicant was treated objectively, preventing effective protection of his rights (for instance: it concerned the arbitrary limitation of the ability to independently conduct their affairs in connection with certain mental problems).

63 ŠVEJDAROVÁ, Sylva – BORSKÁ, Jana: The refugee crisis and "European values", paper presented on 3rd International Multidisciplinary Scientific Conference on Social Science & Arts, SGEM 2016, Vienna, 6–9 April 2016.

64 Constitution on 2 April 1997 of the Republic of Poland passed by National Council on 2 April 1997, (Dz. U. 1997 no 78 item 483 as amended), further: Constitution of Poland.

65 GARLICKI, Wstęp, 8.

66 STRZĘPEK, Kamil Andrzej: *Znaczenie prawne wstępu do Konstytucji RP z 1997 r. [Legal meaning of the preamble of the Constitution of Poland of 1997]*, Warszawa [Warsaw] 2013, 67.

67 The preamble of the Constitution of the Czech Republic of 16 December 1992 contained the phrase "in the era of renewal of the independent Czech state" and on the basis of the Charter of Fundamental Rights and Freedoms of 16 December 1992, the well-known Polish doctrine reveals the "bitter experience" from times when human rights and fundamental freedoms were suppressed in our "homeland"; in the preamble of the Constitution of the Slovak Republic of 1 September 1992, it was taken to mean "a century of hundred years' experience of fighting for national existence and its own statehood"; The Fundamental Law of Hungary of 25 April 2011 in words of the National Faith Statement (which is in fact the preface to the Fundamental Law) is undoubtedly a

political sense – is made. Nation shall be interpreted as the totality of citizens referred to in art. 4 par. 1 of the Constitution of the Republic of Poland of 2 April 1997. Among the universal values it proclaims truth, justice, goodness and beauty. At the same time, preamble expresses the awareness of the need to cooperate with all nations "for the benefit of the Human Family". Other, important constitutional values (having separate from the preamble normative meaning) are also mentioned in the introduction: freedom and justice, cooperation of authorities, social dialogue and the principle of subsidiarity, which is to strengthen the rights of citizens and their communities. There were also calls – included in the second sentence – to respect the "innate and inalienable dignity of man" and the right to freedom and solidarity with others.

In the Polish legal system, the introductory part to the constitution has a significant interpretative dimension, which does not mean its complete legal relevance.[68] The dominant view concerns full legal significance of the preamble's content, but relating to individual, certain sentences, which usually concerns principles of the legal system.[69] Only in special circumstances, legal meaning can be granted to descriptive fragments of the preamble. This is though exceptional and exceeds from the scope of below analysis. Thus we shall rather see preamble as a "bridge" between natural law and positivist law, application of which creates the opportunity to correctly interpret the Constitution.[70]

Polish doctrine of constitutional law, following the studies of legal philosophers, states that Polish Constitution includes catalogue of values of greater (than temporally legal) heritage due to their "timelessness".[71] This confirms that the constitutions (and preambles of the Visegrad Group countries) express the axiology of values known to international doctrine and judicature. Among the most important preamble lists: dignity, truth, justice, goodness and beauty. The creators of the preamble themselves stressed that the source of Polish culture is, on the one hand, the Christian heritage of the Nation, but also the universal human values. However, they are known and rooted in the culture of Western Europe.[72] Hence, seeking for the *national* and *constitutional identity clauses*, we need to determine fundamental decision of the Polish Constitutional Tribunal (hereinafter: CT) on

vanguard, because all the above argumentation presents in a very descriptive manner, hence we find there the statement "We do not recognize the communist constitution of 1949", "Our present freedom began with the revolution of 1956", "We confess that after the decades of the 20th century leading to the moral crisis we have an irresistible need for spiritual and intellectual renewal."

68 See: SZMYT, Andrzej: Zakres i treść Konstytucji RP z 1997 r. [Scope and content of the Constitution of Poland from 1997], in: *Zeszyty Prawnicze BAS*, 36, 2012, 4, 230. Author states that the preamble is suitable for spontaneous use "in a very narrow range". In the author's opinion, it expresses the so-called historical, cultural, political and religious imponderables, but "acting and expressing the base on which the whole Constitution rests". E.g.: BANASZAK, *Konstytucja …*, 3.

69 GARLICKI, Wstęp, 8. In the author's opinion, they should be used directly. Others should be interpreted in conjunction with the appropriate extend contained in other provisions of the Constitution. "Most often in this context attention is paid to the principle of subsidiarity expressed in the preamble, effective functioning of public authorities, and the principle of social dialogue."

70 PIOTROWSKI, Ryszard: The Importance of Preamble in Constitutional Court Jurisprudence, in: *Acta Juridica Hungarica*, 52, 2011, 1, 36.

71 PIECHOWIAK, Marek: Elementy prawnonaturalne w stosowaniu Konstytucji RP [Natural-Law Elements in Application of the Constitution of the Republic of Poland], in: *Przegląd Sejmowy*, 94, 2009, 5, 75.

72 We should rather mention values well-established in Europe and known for ages. Even Greek philosophers knew and described: truth, justice, goodness and beauty. They are wrongly identified with the Christian circle of values. The definition of values as universal is perceived in the category of tautology.

"Lisbon Treaty".[73] In early parts of the decision, Polish CT focused upon changing concept of sovereignty, which is inseparably connected with the process of European integration. Tribunal admitted, that – being a member state of the EU, each country somehow limits it sovereignty – which then was followed by conclusion that respecting primacy of the EU law order and implementation of its rights does not mean rejection of the priority of the internal legal order. Thus, while defining *constitutional identity* CT narrowed its content to the concept of "competences, which can not be shared with the European Union" and has to be exercised exclusively by the certain Member States. Such catalogue contended: duty to respect human dignity and constitutional order, principle of country's obedience, principle of democracy, rule of law, principle of social justice, principle of subsidiarity and duty to respect better realization of constitutional values and injunction of non shareable competences of executive power or competences to create other competences.
It is worth stressing also reflection on the position and legal relevance on the "international integration clause".[74] It operates in the rank of a principle based on a specific "co-use" of the preamble clause regarding the awareness of cooperation with all nations for the benefit of the Human Family and art. 9 of the Constitution of the Republic of Poland stating that "Rzeczpospolita adheres to its binding international law". The above-mentioned ruling results from the interpretation made by the Constitutional Tribunal, which stated that "assessment of compliance of international agreements with the principle of specificity of law" must take into account the specificity of the requirement of cooperation with all countries for the benefit of the Human Family.[75] It creates a directive to conduct a "favorable" interpretation of international law, which takes into account its specificity. According that even the clause "opening the Polish State" to broadly understood international law is being mentioned.[76] Mentioned sentences of the introductory part to the Constitution and article 9 of the Constitution were stated the basis for passing on competences "on some issues" in the mode of art. 90 of the Constitution of the Republic of Poland of 2 April 1997. However, this was a separate position, because most often the CT only referred to the passage "for the benefit of the Human Family" as a general directive for the functioning of state policy – for example in the judgment K 18/04 and Kpt 2/08.[77] In the opinion of the doctrine, there were even standpoints that cooperation should be reduced to creating common international legislation. Therefore, it encourages action to guarantee the implementation of the values known to European legislation first locally and then all over the world (even within the UN).[78]

73 Decision of the Constitutional Court of Poland, *K 32/09*, of 24 November 2010.

74 Decision of the Constitutional Court of Poland, *K 18/04*, of 11 May 2005.

75 Decision of Constitutional Tribunal of Poland, *SK 6/10*, of 21 September 2011.

76 Decision of Constitutional Tribunal of Poland, *K 33/12*, of 26 June 2013. It is worth noting, however, the dissenting opinions to the judgment cited, in which the judges clearly indicate the limits of transfer of competences under Art. 90 of the Constitution of the Republic of Poland of 2 April 1997.

77 Decision of Constitutional Tribunal of Poland, *Kpt 2/08*, of 20 May 2009.

78 WÓJTOWICZ, Krzysztof: …świadomi *potrzeby współpracy…, Preambuła Konstytucji Rzeczypospolitej Polskiej [...concern of the need of cooperation…, Preamble of the Constitution of the Republic of Poland]*, Warszawa [Warsaw] 2009, 83–84.

Particular attention should also be given to the principle of subsidiarity, which was implemented in the preamble to the Constitution of the Republic of Poland directly from EU law.[79] The principle of subsidiarity is primarily "to strengthen the rights of citizens and their communities". As stated by the Constitutional Tribunal in one of its rulings, this principle plays the role of a constitutional directive "in defining the tasks and powers of public authorities and distributing tasks between them".[80] Different ruling was given on the basis of judgement K 62/08[81], where, referring to the principle of subsidiarity Constitutional Tribunal stated that, it "circles the direction of public authorities' desired by the legislator". Subsidiarity assumes active participation of the state, obliging it even to "take appropriate action". Among them, it is advisable to mention due diligence in the course of conducting the legislative procedure, which, in the opinion of the Tribunal, by refraining from launching the so-called participation instruments violates the principle of subsidiarity.[82] In Polish legislation, it can be assumed that "the principle of subsidiarity is a social concept that only justifies or non justifies the actions taken". This would justify the CT's common admission that the specific actions "remain or do not comply with the principle of subsidiarity".
Preamble consists also principle of solidarity linked with art. 2 of the Constitution of the Republic of Poland (the rule of law), being itself the basis for the interpretation of the systemic changes. It was even stated that "solidarism proclaims the conformity and commonality of interests of all individuals and social groups within a given community, as well as the obligation to participate in burdens for society. It assumes a mutual understanding between individuals, social groups and the state." There is also a catalog of cases in which the substantive scope of the principle of solidarity coincides with the principle of subsidiarity. It allows for mending the situation of individual entities and then "supporting" their situation "in the light of constitutional values and the desired image of social relations".[83]
Polish *constitutional identity* is then partially open concept. On that basis, it would be justified to extend it on the principles mentioned exclusively in the introduction to the constitution. Both were already mentioned and those are: subsidiarity and solidarity with others. Thus, we shall recall next two principles: ensurement of diligence and efficiency in the work of public bodies and cooperation between the public powers. Its belonging to the *constitutional identity* is based on simple assumption, that if preambles to the constitutions are one of the main sources of *national* and *constitutional* identity, principles established exclusively in their content, should also be part of it. Certain level of openness on European and International integration, grasped in words of the preamble "aware of the need for cooperation with all countries for the good of the Human Family", also should be included in the analyzed concept. *National identity* is though mainly implemented in last sentence of the preamble. Being itself a specific "call upon those who will apply this Constitution

79 Below I refer to the principles creating constitutional identity and mentioned exclusively in the content of the preamble to the Polish Constitution.

80 Decision of Constitutional Tribunal of Poland, *K 29/00*, of 8 May 2002.

81 Decision of Constitutional Tribunal of Poland, *SK 62/08*, of 12 April 2011.

82 More: Decision of Constitutional Tribunal of Poland, *K 31/06*, of 3 November 2006; Decision of Constitutional Tribunal of Poland, *K 37/06*, of 8 April 2009.

83 Decision of Constitutional Tribunal of Poland, *K 28/11*, of 20 December 2012. See also: Decision of Constitutional Tribunal of Poland, *P 25/06*, of 6 February 2007.

for the good of the third Republic" and concerning: respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.
Eventually, it is worth stressing recent actions introduced by Polish Constitutional Tribunal, which were connected with vast political controversies. None of recent judgments refers plainly to *constitutional identity*, but it can not be excluded that in future – in strict connection with political circumstances – such judgment will be found necessary. Kind of recapturing notion of the *national identity* is judgment K 1/17.[84] In this judgment CT stated that the possibility of primacy of so-called "cyclical gatherings" restricting the right to non-recurring gatherings falls within the above scope. The criteria for the recognition of an assembly as cyclical is: the identity of the organizer, the route and frequency of gatherings (at least 4 gatherings per year), "relevant past" (at least 3 years of meetings or at least a common manifestation of beliefs), aim – an important event related to history of Poland. It clearly presents national oriented *identity* and creates serious threat of subjective interpretation of the right to organize and participate in assembly – depending on the will of governing bodies. Interference in the European values and principles of freedom of assembly is obvious. However, Polish Constitutional Tribunal, considered legislator's activities proportionate. One of the factors of the ruling was increased procedural requirements related to the status of a cyclical gathering[85] and laconic "new, previously unknown situations". It even appointed selectively the judgments of the European Courts and Tribunals, which in the circumstances of the case should be regarded as seeking precedents, confirming a controversial verdict. The verdict itself – despite its large volume – does not provide reasonable grounds for dividing the view of the Constitutional Tribunal. *A priori* assumption that gatherings notified in advance, which would take place in a place similar to the one in which "cyclical meetings" are held, was completely unfounded.[86] It is also contrary to the need for a narrow interpretation of restrictions on the law of assemblies. Especially if we compare it with the clause used by Constitutional Tribunal in its justification, in which it made a clear reference to the clause of the preamble: "securing everything what is valuable from over one thousand history of the state". This part of the introduction to the constitution never before possesed any legal relevance. Thus, we can witness the process of recapturing at least the *national identity*, example of which is limited right to organize assemblies if they not proclaims profound aim significant from Polish historical or national perspective. Somehow it is breaching founds of *constitutional identity* established by CT in its judgment on 2010 – in the scope of mutual relation between Polish and European legal orders or minimal guarantees of human rights.

84 Decision of Constitutional Tribunal of Poland, *Kp 1/17*, of 16 March 2017.

85 The nature and subject of these assemblies (patriotic, praising the history of the state) were also not without influence for the Constitutional Tribunal. It is worth mentioning that in order to strengthen the interpretation held, the Constitutional Tribunal even referred to the descriptive parts of the preamble to the Constitution of the Republic of Poland of 2 April 1997 – concerning f.e. cultural heritage or historical experience, which thereby established legal validity.

86 See: separate votes of: Justice M. Pyziak – Szafnicka.

National Avowal to the Fundamental Law on 25 April 2011 of Hungary[87]

The constitutional system of Hungary until 2011 was based on a prior act of constitutional rank, which was the Basic Law of 1949. Until then, a laconic introduction which emphasized the temporariness of the entire act was being used.[88] However, the legislator did not avoid certain declarations by stating the adoption of the principle of rebuilding the state "into a legal state, implementing a multi-party system and a social market economy" is proclaimed. Situation has changed significantly, when new Fundamental Law on 2011 came into force. Hungary – perhaps due to the prolonged process of transition and political transformation – wanted to express its condemnation of the communist period. Even, the name of the introduction to the Fundamental Law, which is called the National Avowal, has been changed. Nevertheless, despite all unique qualities of the Fundamental Law of Hungary, it shall be emphasized it is relatively modern act, which implements vast catalogue of modern rights.[89] In a sense, here lies different "spirit" of their Constitution, as an act passed and exercised more than 20 years after formal beginning of the transitional period in Central and Eastern Europe.

The structure of the introduction draws attention because it consists of 30 sentences. Following the other introductions to the constitutions of the countries of the region, it defines the Sovereign, who are the members of the Hungarian Nation, refers to human dignity, which is the "basis of human existence" and combining it with freedom, as well as makes (in the third paragraph) a clear historical reference. In addition, it includes new elements such as the principles of sustainable development and protection of future generations, the need to help weaker people and, consequently, to ensure prosperity, security, order, justice and freedom. It expresses many contemporary values: dignity, solidarity, equality, the need for international integration and environmental protection.

Simultaneously, National Avowal contents a lot of historical references. It is pointless to refer to it directly, thus I will present it subjectively. Those are: deeply rooted Christian heritage (and reference to Saint Stephen or "Christianity preserving Hungarian nationhood"), intellectual achievements and unique language, honour to the achievements of the historic constitution and protection of the identity rooted therein, strong and harsh disapproval of "suspension of Hungarian historic constitution due to foreign occupations" – especially during the communism period, which shall be found non – existing (by words on restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed). The scope of the reference to history, however, is perceived as high. Some see this as an earlier, inadequate resolution of past events taking place in Hungary, heightened by a sense of injustice, which in the 20th met the Hungarian nation.[90]

87 Fundamental Law of Hungary on 25 April 2011, *Konstytucje państw Unii Europejskiej*, "Wydawnictwo Sejmowe", Warsaw 2011.

88 BORSKI, Maciej: Konstytucja nowych Węgier czy nowa Konstytucja Węgier? Próba analizy [The constitution of a new Hungary or the New Constitution of Hungary? Attempt of an analysis], in: *Przegląd Prawa Publicznego*, 2013, 4, 20.

89 Ibidem, 36. Among them Hungarians indicate: effective implementation of the EU Charter of Fundamental Rights and environmental protection regulations, sustainable economy and guarantees not to allow excessive indebtedness of the state.

90 Ibidem, 20–21.

Introductory parts to the legal acts, were commonly used and accepted in Hungary – mainly due to their interpretative function.[91] Their history could start from 13th century, with its main role played in 20th century. Therefore, on the limited content of below article, I focus on legal relevance of the National Avowal and – partially – relevance of former, transitional preamble. It proclaimed the adoption of the principle of rebuilding the state into a "legal state, implementing a multi-party system and a social market economy". This is an expression of the rules known to European law. In addition, it was lined with the interpretation of the Hungarian Constitutional Court, which clearly defined the preamble as the basis for the introduction of "the rule of parliamentary democracy" (*judgment 15/2007*) as well as the free market economy (*judgment 19/2009*). The previous preamble was then used as a justification for the changes in the political system.[92] It does not mean it had clear legal relevance.[93] Hungarian researchers, express a lot of skepticism about its phenomenon, stressing that such an editorial favored judge activism. This has reduced citizens' trust in the existing legal system, which was often based on a extensive interpretation of the law.[94] It was also connected with an issue of – known to Hungarian doctrine of law – legalism and attachment to strictly linguistic interpretation of law.[95]

Situation has changed with implementing new Fundamental Law and its introduction – National Avowal. It was possible to assume that by creating a new constitution the Hungarian constitutional legislator would decide to take into account the introductory part – as for example in other countries of the region. Following legal considerations, it should be stressed that in accordance with art. R para 3, National Avowal should form the basis for the interpretation of the Fundamental Law and its aims (among which, first and foremost, it should refer to "the historical part of the constitution"). In its light the attitude to the communist period is highly negative. The judgment of the Hungarian Constitutional Tribunal, ref. No. 45/2012[96] is an example of such attitude. The subject of this judgment was the assessment of compliance with the Fundamental Law for changes introduced in the period of subsequent amendments, by comparing them with the current legal status. It has been stated that many articles and even the preamble to Constitution on 1989 violated the principle of legal certainty. The provisions of the new introduction are quoted as expressing the principle that the new Fundamental Law establishes the foundations of the legal order.

91 TRÓCSÁNYI, László: *Wokół prac nad Ustawą Zasadniczą Węgier. Tożsamość konstytucyjna a integracja europejska [Among works on the Hungarian Fundamental Law. Constitutional Identity towards European integration]*, Warszawa [Warsaw] 2017, 41–49.

92 Decision of the Constitutional Court of Hungary, *19/2009*, of 25 February 2009. Where reference is made to the preamble as guaranteeing the introduction of free market mechanisms – then still in the Republic of Hungary. See also: Decision of the Constitutional Court of Hungary, *15/2007*, of 9 March 2007. When Constitutional Tribunal established preamble "as the basis to implement" parliamentary democracy; online: http://public.mkab.hu/dev/dontesek.nsf/0/DA9E7BA92F85F868C1258382003F5D3B?OpenDocument&english.

93 See: TRÓCSÁNYI, 47. And judgments presented there.

94 See: LUPO, Nicola: What Hungarian Constitutional Experience Can Teach European Constitutionalism, in: *Challenges and pitfalls in the recent Hungarian constitutional development. Discussing the New Fundamental Law of Hungary*, SZENTE, Zoltán – MANDÁK, Fanni – FEJES, Zsuzsanna (eds.), Paris 2015, 114–129.

95 FEKETE, Balázs: The National Awoval: More than a Conventional Preamble to a Constitution, in: *Challenges and pitfalls in the recent Hungarian constitutional development. Discussing the New Fundamental Law of Hungary*, SZENTE, Zoltán – MANDÁK, Fanni – FEJES, Zsuzsanna (eds.), Paris 2015, 11–12.

96 Decision of the Constitutional Court of Hungary, *45/2012*, of 29 December 2012.

Nevertheless, National Avowal appeared rarely in the case-law of the Constitutional Tribunal of Hungary.[97] National Avowal opens legal discourse on the content of the "historical constitution of Hungary", but still has to be interpreted cautiously.[98] Furthermore its extensive interpretation shall be considered as faulty.

Crucial remarks on that stems from the decision of the Hungarian Constitutional Court on 5 December 2016.[99] On its basis, *constitutional identity* of Hungary was defined. Constitutional Court established two limits for conferred or jointly exercised competences: sovereignty review and identity review. First was basing on assumption the exercise of power (within the EU) may not result in the loss of the ultimate oversight possibility of the people over the public power recognized by the Fundamental Law. Second creates a catalogue of principles, which creates the *identity.* Interestingly mentioned catalogue meant to be open including f.e. freedoms, division of power, republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarism, equality before the la, recognition of judicial power, protection of nationalities that are living in Hungary. Furthermore, *constitutional identity* was extended also on the areas "shaping citizens' living conditions" – among which pointing: areas in which linguistic, historical and cultural involvement of Hungary can be detectable. Factors important in detecting the *constitutional identity* are also content of the article R.3 of the Fundamental Law, National Avowal and historical constitutions they refer to. Such broadened interpretation on the *constitutional identity,* equals it with the *national identity* – being itself a tremendous material for analysis.

European Constitutional Identity in relation towards constitutional preambles of V4 countries and identity they create

In the course of changes after 1989 related to the democratization process of Central European countries, these countries undertook tedious efforts to join existing and emerging international structures. As shown above, this was reflected even in the introduction to their constitutions. This process involved a change in legislation, compliance with international obligations and, above all, acceptance of the foundations of the axiology of European principles and values. As a result, they have become an immanent part of the legal system. Principle of a judicial interpretation of favorable European law – has intensified this process. However, one should consider how – basing on the introductory parts to the constitutions of these countries – the principles and values were implemented. It is worth referring to the notion of "shared values" mentioned in the preamble of the Charter of Fundamental Rights, which should be shared between countries for a peaceful future.[100] Among these, one should indicate "inviolable and inalienable human rights as well as freedom, democracy, equality and the rule of law." It is impossible not to refer to art. 2 TEU, on the basis of which "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of

97 Conclusion concerns only judgements translated into English.

98 TRÓCSÁNYI, 51–52.

99 Decision of the Constitutional Court of Hungary, *22/2016*, of 5 December 2016.

100 WRÓBEL, Andrzej: *Karta Praw Podstawowych Unii Europejskie. Komentarz [Charter of Fundamental Rights of the European Union. Commentary]*, Warszawa [Warsaw] 2013, 15.

persons belonging to minorities." Its meaning is complied with the preamble to the TEU, where main focus is paid to the principle of democracy – mentioned to be source of inspiration among "universal values of the inviolable and inalienable rights of human person, freedom, equality and the rule of law". In the TEU preamble all of the signatories to the Treaty, confirm their "attachment to the principles of democracy", which is also "desired to enhance democratic and efficient functioning of the institutions". Values shall be shared by the Member States in a society "based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men". The above can be achieved by deepening the international integration process, which is associated with the concept of the so-called "European identity." However, it is limited by the EU's obligation to protect *national identity* (defined in Article 4 passage 2 TEU).[101] Maintaining proper relation is though difficult. It is indicated that a uniform understanding of values and principles such as freedom, proportionality and dignity in all 28 EU Member States is practically impossible and thus generating interpretational conflicts.[102] One of the ways of their elimination may be a kind of interpretation of "preferences" proposed by experts in European law. It should rely on appropriate selection of methods and means of interpretation depending on the situation. According to this theory, when it will be better to stick to the characteristic doctrine of a given state, it should be used. The same applies to the interpretation of principles and values developed in case law and international doctrine.[103] However, this requires a kind of openness to international law and treating it as a "friend" and not an "enemy".

Indicating common European values is one thing, other is taking an attempt to define *European Constitutional Identity*. Specialists on the EU law list them in five categories, which aims to present what is contained in European law heritage.[104] First of all is the "fundamental role of the reason in public life", which means the society (and ruling bodies) shall arrange its activities among aims, which is found – *at least* by the majority – as fair and right. Hence so important is the unity of values among the EU member states.[105] Second is the concept of individual liberty, which is simply a freedom of one entity, ending were began freedom of others. Third, but not less important is toleration of other and not using towards others any kind of moral or factual disapproval – especially concerning language, religion, culture, conceptions of life. Fourth and also fundamental is protection of the democracy principle, founded on unshakeable right of the majority to rule, which though respects rights of the minorities.[106] Common *identity* need further exercising, basing mainly on:

101 Ibidem, 16.

102 KAMIŃSKI, Ireneusz Cezary: Karta Praw Podstawowych jako połączenie praw i zasad – strukturalna wada czy szansa? [Charter of Fundamental Rights as a combination of laws and principles – structural defect or a chance?], in: *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym [Charter of Fundamental Rights …]*, WRÓBEL, Andrzej (ed.), Warszawa [Warsaw] 2009, 38.

103 KONCEWICZ, Tomasz Tadeusz – WARYLESKA, Katarzyna: Przemyśleć Europę i jej prawo dzisiaj, to zadać właściwe pytania… [Re-thinking Europe and its today's right, is to form a proper questions…], in: *Ochrona praw Obywatelek i Obywateli Unii Europejskiej [Protection of rights of the Citizens of the European Union]*, BARANOWSKA, Grażyna – BODNAR, Adam – GILSZCZYŃSKA-GRABIAS, Aleksandra (eds.), Warszawa [Warsaw] 2015, 97.

104 SADURSKI, Wojciech: *European Constitutional Identity?*, Florence 2006, 1–22.

105 Ibidem, 9–10.

106 Ibidem, 11–13. Having significant experience on the *common law,* presented author stresses also difference between European identity and American Identity. It is: positive functions of the State (in European context), which is securing citizens and their social rights, methods of protecting democracy against anti-democratic views (also in favour of European attitude).

protection of the core of human rights, the stabilization of normative expectations as well as connection to the values, interests and convictions of those affected.[107]
On that basis, we shall indicate each of the analyzed preambles to the constitutions of the Visegrad countries, proclaims *European Constitutional Identity* offishly. Even if we consider solemn expression on democracy, individual liberty and – partially – specific roles played by the State, as an example of proclamation of European Constitutional Identity, other parts are not sufficiently answering its content. However, it stems from typical roles played by the preambles. As it was already presented introductory parts to the constitutions plays integrative roles, building internal community. European context – in the preambles – is rather reserved – usually grasped in one sentence. Thus open and controversial is arising subject of potential "Hungarian abuse of constitutional identity", which is in fact national constitutional pariochalism.[108] Recently it is emphasized that constitutional pluralism – and notion of *constitutional identity,* resulting from it – "invites a legal chaos in which national courts could […] pick and choose which EU laws their states need to follow and which they do not".[109] Some remarks were made on the basis of National Avowal, which ambiguity was also considered a "serious threat to democracy". Potentially this could lead to a progressive separation of internal rights and their interpretation and EU law.[110] But, it is not certain on what basis authors makes above assumption. Fact that just after entering EU, Hungarian Constitutional Court presented open and sufficient level of "openness" on the EU legal order, does not mean in parallel, that now Hungary has abandoned its *constitutional identity.* Especially while Hungary passed completely new Fundamental Law on 2011. Situation of abandoning recent *identity*, could have rather occurred in the Republic of Poland, whereas Constitutional Tribunal changed way of its interpretation without changing act in general.

Conclusion

Countries of the Visegrad group share similar experiences connected with the process of entering the EU. It happened in the same time and circumstances – on 1 May 2004. They also faced the same difficulties and presented similar approach in implementing Western legal standards – defined as common European heritage or "unity of values". Even preambles of mentioned countries, in the scope of the content and established values, are significantly similar. Furthermore, way of reconstruction the *national* and *constitutional identity* points same principles – with certain differences concerning Hungary. Rulings of the Constitutional Courts of Poland, Czechia and Slovakia was focusing on the procedural aspect of sovereignty. However, it maintained certain level of minimum "openness" on the EU legal system. EU law was found prior as long as it guarantees at least the same security for basic laws important from the State's perspective. Identity was also perceived

107 VON BOGDANDY, Armin: Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area, in: *Jean Monnet Working Papers Series*, 2014, 16, 41–42.

108 HALMAI, Gábor: Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of article E) (2) of the Fundamental Law, in: *Review of Central and East European Law*, 43, 2018, 1, 41–42.

109 KELEMEN, Daniel R. – PECH, Laurent: *Why autocrats love constitutional identity and constitutional pluralism. Lesson from Hungary and Poland*, Leuven 2018, 8.

110 KELEMEN, Katalin: The New Hungarian Constitution: Legal Critiques from Europe, in: *Review of Central and Eastern European Law*, 42, 2017, 1, 7–8.

from the scope of the minimal procedural requirements of democratic country – basic on rule of law, respecting proper division of powers and independence of judiciary power. In this sense it complied with doctrinal way of defining *European Constitutional Identity* and proclaimed reservation of particular principles to be exclusively exercised by the State. Preambles played important role in that process, f.e. by expressing need to co-operate with other countries or expressing explicit respect to principles and values known Western democracies. Other attitude characterized Hungary, where Constitutional Court focused upon material aspect of *identity.* Main assumption was, that Hungarian constitutional system will last until Constitutional Court will defend state's sovereignty, historical constitution and *national identity*. Thus, it presented EU legal order not as complying, but competing Hungarian legal order. To make it more complex, it shall be added, that ruling on *constitutional identity* in Hungary was made in case of "asylum seekers". Hence it shall be emphasized preambles to the constitutions of Visegrad countries secures mainly *national* and *constitutional identity.* Aspect they relates to the *European Constitutional Identity* is reserved and occurs only in the proclamation of plain respect for democracy.

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Threats to the image of the Polish Army

Grzegorz KLEIN, PhD.

Abstract

The article presents the most serious threats to the image of the Polish Army. The beginning of the research period was adopted in 2009 as the moment of starting the process of professionalization. It was a period in which missions outside the country were a particularly important threat to image. In the light of public opinion, nowadays the most serious threat is the partial politicization of the image of the army.
After identifying the most serious image threats, the problem of researchers was formulated and expressed in the question: how people and institutions responsible for creating the image of the Polish Army should counteract to the most serious image threats?
In this article, the recapitulated research was accompanied by the hypothesis that in order to counteract the most serious image threats, there should be an extension of civilian meaning and democratic control over the army. This control should include actions of state authorities protecting the military from the negative image-related effects of political decisions and ongoing political rivalry.

Keywords

Polish Army, army, Poland, image of the army, civilian and democratic control

Introduction

In his previous research on the image of the Polish Army, the author formulated the assumption according to which the image of the army is not only a value in itself, but also has a useful dimension. A good image can support the military operations even in such areas as: recruitment, modernization, information fight, strategic communication, crisis situations. Thus, for the research conducted in the field of national security, the following question is of great significance: how should people and institutions responsible for the image of the Polish Army use image opportunities, take image challenges, reduce image risks and counteract image threats?[1] The research recapitulated in this work concerned the last of the mentioned issues, counteracting image threats.
In these studies, the time frame of 2009–2019 was adopted, starting with the year in which the process of professionalization of the Polish Army began. The basic element of this process was the full professionalization of the army (suspension of basic military service). One of the elements of this process was a change in the way people and institutions responsible

1 A similar perception of image issues may accompany reflections on shaping the image of other institutions ensuring security.

for the image of the army act (including the launch of information and advertising activities encouraging professional and voluntary military service).
The research was based on a secondary analysis of the Public Opinion Research Center (CBOS), an institution which, on the basis of representative research groups, regularly (at least twice a year, in March and September) examines social assessments of the activities of public institutions in Poland (including the Polish Army). Each of the above mentioned studies was conducted on a nationwide representative random research group.[2]
The following table and chart present social assessments of the activities of the Polish Army in the period considered:

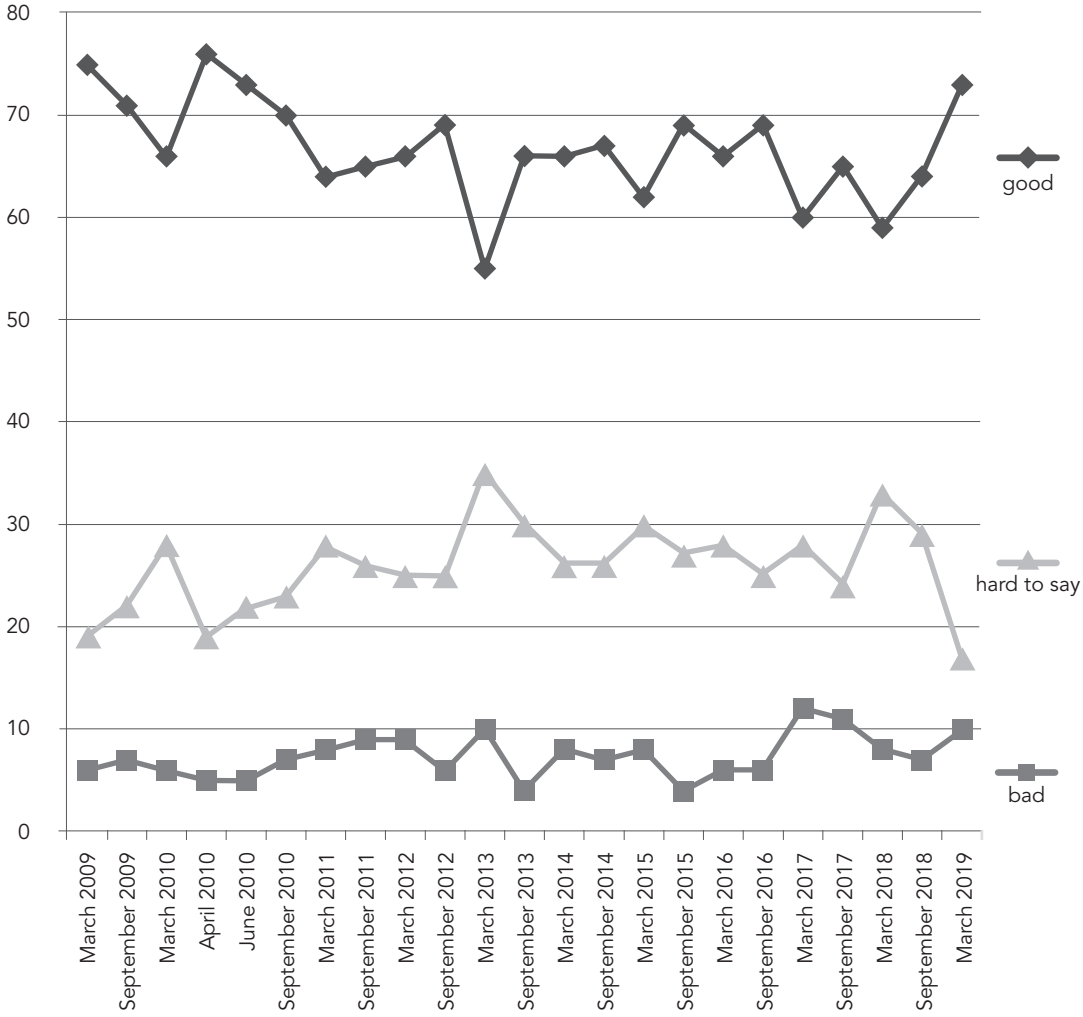
Table 1 Social evaluation of the activities of the Polish Army in 2009–2019

Evaluation of the activity army/ date	Good	Bad	Hard to say	Research sample
March 2009	75 %	6 %	19 %	977
September 2009	71 %	7 %	22 %	1,085
March 2010	66 %	6 %	28 %	995
April 2010	76 %	5 %	19 %	1,051
June 2010	73 %	5 %	22 %	977
September 2010	70 %	7 %	23 %	1,041
March 2011	64 %	8 %	28 %	948
September 2011	65 %	9 %	26 %	1,075
March 2012	66 %	9 %	25 %	1,013
September 2012	69 %	6 %	25 %	985
March 2013	55 %	10 %	35 %	1,057
September 2013	66 %	4 %	30 %	908
March 2014	66 %	8 %	26 %	1,093
September 2014	67 %	7 %	26 %	942
March 2015	62 %	8 %	30 %	1,056
September 2015	69 %	4 %	27 %	972
March 2016	66 %	6 %	28 %	1,033
September 2016	69 %	6 %	25 %	981
March 2017	60 %	12 %	28 %	1,018
September 2017	65 %	11 %	24 %	984
March 2018	59 %	8 %	33 %	1,090
September 2018	64 %	7 %	29 %	1,021
March 2019	73 %	10 %	17 %	1,044

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016, 10; 44/2019, 10, CBOS, Warszawa [Warsaw]

2 Detailed information on the methods of conducting research can be found on the website of CBOS Foundation: Metody realizacji badań (Research realization methods), online: https://www.cbos.pl/PL/badania/metody_realizacji.php; Research, online: https://www.cbos.pl/EN/research/research.php.

Figure 1 Social evaluation of the activities of the Polish Army in 2009–2019



Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016, 10; 44/2019, 10, CBOS, Warszawa [Warsaw]

The above data does not allow to distinguish the mentioned image threats. In order to identify them, it was necessary to conduct an in-depth analysis including annex tables[3] and to analyze CBOS surveys relating to the social assessment of the involvement of the Polish Army in missions in Iraq and Afghanistan.

The first part of this paper presents general remarks concerning the shaping of the image of the Polish Army. The ways of understanding this issue by military and civil decision-makers

3 The annex tables are not available for each of the tests provided in Table 1 and Figure 1. The article contains an analysis based on all tables provided by CBOS.

after 1989 were discussed. This part also includes a list of the most important opportunities, challenges and threats to the image of the Polish Army after 2009, as well as an introductory description of image threats.
In the second part of the article, the analysis of the involvement of the Polish Army in specific missions abroad was made, and therefore the activities that at the beginning of the period considered were the biggest threat image.
The third part is a secondary analysis of CBOS research on image threats related to the partial politicization of social assessments of the Polish Army's activities after the change of government in 2015.
The last part presents the basic ways of understanding civil and democratic control over the army and its legal bases in Poland. This part also includes a postulate to change the way of civilian perception and democratic control, so that through it civilian decision-makers can protect the military against image threats having a political dimension.

Shaping the image of the Polish Army: general remarks

The author's research so far has enabled to distinguish two periods in shaping the image of the Polish Army after 1989. They are separated by the process of professionalization of the Polish Army. This process was initiated by a political decision issued in 2007, which culminated with a fundamental element in 2009. It was the year in which the compulsory military service was suspended. The professionalization of the army also meant a change in the approach to shaping the image of the Polish Army. Civilian and military decision-makers had to take action to attract candidates for professional soldiers from the labour market. This forced, among others, the need to undertake activities promoting service in the army (these activities were carried out, among others, in the media). The process of shaping the image of the Polish Army as a professional and modern institution, which ensures security and is an attractive employer, has begun.
Before the professionalization process, the Polish Army hardly took any actions shaping the image. The actions taken were mostly related to celebrating holidays (state or individual units). These activities lacked a coherent and long-term vision. This was, among others, a result of the military decision-makers' conviction that activities of the army in the media space may be associated by journalists with propaganda from before 1989, and therefore the army should not be promoted in the media.
The adopted division may be reflected in the state of Polish scientific literature in the field of reflection on shaping the image of the army – before 2009 few publications appeared and they were mainly advisory in nature (e.g. they contained advice on how to organize a press conference). It was only professionalization that resulted in an increase in the interest of researchers in the subject of military image.[4]
The applied division does not mean that after 2009 the activities of military and civilian decision-makers in terms of creating the image of the army were characterized only by professionalism. An example is the approach to provisions regulating information activities in the military. In the decision issued in 2009 by the Minister of National Defence con-

4 KLEIN, Grzegorz: *Kształtowanie wizerunku Wojska Polskiego jako instytucji zapewniającej bezpieczeństwo*, Warszawa [Warsaw] 2019, 15–16, 20, 29–30.

cerning the information policy of the Ministry of National Defence, it was assumed that the Director of the Press and Information Department of the Ministry of National Defence would be responsible for implementation of these activities. After the change of government in 2015–2016, structural changes were introduced in the Ministry, as a result of which the Press and Information Department ceased to exist. The Decision in its wording (thus entrusting responsibility to the Director of the non-existing Department) was valid in March 2019, when a new Decision was issued.[5]

Research conducted so far by the author has enabled to classify the process of professionalization into a group of image challenges, i.e. activities that may become in time image opportunities (image of a modern, professional army) or threats (risks related to e.g. social perception of modernization programs, their purpose and related costs). Other image challenges include creation of the Territorial Defence Forces, i.e. a volunteer formation, which in the opinion of supporters, may strengthen the potential of the Polish Army and, in the opinion of critics, weakens this potential (by operating "at the expense" of operational units). Moreover, this formation has a politicized image resulting from the formation of the former Minister of National Defence, Antoni Macierewicz – this politician evokes extremely different emotions in Polish society, his biggest opponents treat the Territorial Defence Forces as the "Macierewicz Army" or the "PiS Army".

Image chances result from the fact that the image of the Polish Army is rooted in the society, thus they are based on Polish history and culture. However, the image threats (after 2009) are mainly missions outside the country and politicization of the army in the perception of a part of the media and society.[6]

The first of image threats resulted primarily from the mission nature in Iraq and Afghanistan. The first one from the very beginning, the second one after a few years of relatively low involvement, had an unambiguous combat dimension. This was related to the risk of losses among Polish soldiers. At the beginning of the first mission there were 2,500 Polish soldiers in each shift (2003–2004, in later years the number of contingents was decreasing). During this period 22 soldiers and one officer of the Government Protection Bureau died. The second mission at its peak (2010–2012) consisted of about 2,500 soldiers within each contingent. During this mission 43 soldiers and 2 employees of the army were killed. These losses were all the more unacceptable for the society, because (as shown in the CBOS survey cited hereafter) the majority of society did not believe that these missions would contribute to peace. The majority of Poles did not see any reason why Polish soldiers had to take part in such large numbers in distant and dangerous missions. Moreover, these missions showed deficiencies in the equipment and training of Polish soldiers and aggregated significant costs.

The second of the image threats results from deepening of political divisions within the Polish society. Until the change of government, the army was assessed in a similar way

5 Decision of the Minister of National Defence No. 108/MON of 7 April 2009 on the principles of implementing the information policy of the Ministry of National Defence, Official Journal of the Minister of National Defence, 2009, No. 7, item 82; Decision of the Minister of National Defence No. 47/MON of 26 March 2019 on the principles of implementing the information policy and functioning of the social communication service in the Ministry of National Defence, Official Journal of the Minister of National Defence, 2019, item 56; KLEIN, *Kształtowanie…*, 104–105.

6 Ibidem, 183–200.

by respondents declaring right-wing and left-wing views. On the basis of research results quoted below in this paper, it should be concluded that the image of the army has been partially politicalized. It can be assumed that this results not only from the actions of politicians, but also from the media, which by favoring particular political options, create messages that strengthen social divisions.
The media also contributed to shaping public opinion on the first threat. The author's research on the media discourse concerning the missions in Iraq and Afghanistan allowed the following conclusion to be drawn: "The media wrote about missions mainly in the context of problems – human losses, costs, equipment shortages. To this end, the military and those in power were criticized for their inability to convince the public that such involvement is necessary".[7]

Image threats related to the missions of the Polish Army in Iraq and Afghanistan

In order to identify the image threat associated with the missions in Iraq and Afghanistan, the results of CBOS surveys concerning:

- support for the participation of Polish soldiers in the NATO operation in Afghanistan;
- whether the NATO mission in Afghanistan will contribute to the preservation of peace in this country;
- whether the mission in Afghanistan should be continued or completed;
- the type of engagement of Polish soldiers in the mission in Afghanistan;
- the risk of attacks on Poland by Muslim fundamentalists in connection with the missions in Iraq and Afghanistan;
- support for the participation of Polish soldiers in operations in Iraq;
- the level of government reporting on its intentions in the context of the mission in Iraq and Afghanistan;
- participation of the Polish Army in international military missions (such as missions in Iraq and Afghanistan) in relation to the economic potential and financial capabilities of Poland.

In February 2009, 22 % of CBOS respondents supported the participation of Polish soldiers in the NATO operation in Afghanistan (5 % "I strongly support", 17 % "I rather support"). In September 2009, 20 % of respondents expressed their support (5 % "I strongly support", 15 % "I rather support"). In the surveys of November 2010, 17 % of respondents expressed their support (6 % "I strongly support", 11 % "I rather support"). Starting from 2007,[8] support never exceeded 22 %, the lowest – in December 2007 it was 14 %.
Lack of support for the participation of Polish soldiers in the NATO operation in Afghanistan in February 2009 was expressed by 73 % of respondents (29 % "I rather do not support", 44 % "I definitely do not support"). In September 2009, 76 % of respondents declared a lack of support (28 % "I rather do not support", 48 % "I definitely do not support").

7 KLEIN, Grzegorz: Obraz Wojska Polskiego w prasie w świetle zaangażowania w misje poza granicami kraju, in: *Zeszyty Naukowe Bezpieczeństwo i Administracja*, 2014, 4, 219.

8 This question was asked to respondents in January, June, July, September, October and December 2007, February, April and September 2008, February and September 2009 and in November 2010.

In a study from November 2010, 79 % of respondents expressed no support (26 % "I rather do not support", 53 % "I definitely do not support"). Lack of support, the respondents most often declared in December 2007 (83 %), and the least frequently in September 2007 (72 %). The answer "hard to say" in February 2009 was declared by 5 % of respondents, in September 2009 and in November 2010, 4 % of respondents chose such a response. The highest percentage of "hard to say" answers (6 %) is the study from September 2007, and the lowest (3 %) is the study from December 2007.

With almost the same intensity, the CBOS asked the respondents a question about whether the NATO mission in Afghanistan would contribute to the preservation of peace in this country.[9] In September 2009, an affirmative answer was expressed by 17 % of respondents (2 % "definitely yes", 15 % "rather yes"). In November 2010, 16 % of respondents chose such a response (3 % "definitely yes", 13 % "rather yes"). The highest percentage of respondents chose this answer in September 2007 (21 %), the smallest (16 %) in June and July 2007 and in November 2010.

In September 2009, 71 % of respondents said that the NATO mission in Afghanistan would not contribute to the preservation of peace in this country (44 % "rather not", 27 % "definitely not"). In November 2010, 71 % of respondents also chose the answer (40 % "rather not", 31% "definitely not"). Most often, respondents declared such an answer in October 2007 (73 %), and the least frequently in September 2007 (61 %).

In September 2009, 12 % of respondents chose the answer "hard to say", in November 2010 this answer was declared by 13 %. Respondents chose this answer most often in September 2007 (18 %), least frequently in September 2009.

In June 2009, 65 % of respondents said that the mission in Afghanistan should be terminated, 27 % said that the mission in Afghanistan should be continued, 8 % chose the answer "hard to say". In September, the answers were at 77 %, 16 % and 7 %, respectively.

In November 2010, when asked about the type of engagement of Polish soldiers in missions in Afghanistan, 60 % of respondents said that they should not participate in this mission, 30 % declared that they should not conduct military activities, 7 % said they should continue their activities in an unchanged form (thus along with conducting armed operations), and 3 % of respondents chose the answer "hard to say". In the research carried out in 2007, the responses were at 60 %, 32 %, 5 %, and 3 %, respectively.

In November 2010, the CBOS asked respondents whether the involvement of Polish soldiers in the mission in Afghanistan could cause attacks by Muslim fundamentalists in Poland.[10] No worries were declared by 35 % of respondents (8 % "I'm not afraid", 27 % "I'm not rather afraid"). Respondents usually chose this answer in November 2010, the least often in November 2007 (27 %).

In November 2010, 56 % of the respondents were of the opposite opinion (45 % "I'm rather afraid", 11 % "I'm very afraid"). Respondents usually chose the answer in November 2007 (65 %), and the least frequently in November 2010.

9 This question was asked to respondents in June, July, September and October 2007, February, April and September 2008, September 2009 and November 2010.

10 This question was also asked in November 2007 and in April and September 2008. In the first two studies, the question also concerned the involvement of the Polish Army in the mission in Iraq.

The answer "hard to say" was chosen in November 2010 by 9 % of respondents. Respondents most often chose this answer in April 2008 (10 %), least often in September 2008 (7 %).[11]

Even before the professionalization process began (marking the beginning of the research period), the CBOS asked respondents a question about their support for the mission of the Polish Army in Iraq.[12] The maximum level of response "I support" is January 2004 (42 %), the smallest level is June 2007 (15 %). The answer "I do not support" the respondents most often chose in June and October 2007 (81 %), the least often in September 2003 and January 2004 (53 %). The answer "hard to say" was most often chosen by the respondents in September 2003 (7 %), most seldom in October 2004, March 2005, August and October 2007 (3 %).[13]

Also before the professionalization process began, the CBOS asked the respondents how they assessed the government's informing about its intentions, including on the participation of Polish soldiers in missions in Iraq and Afghanistan. Regarding the mission in Iraq, 21 % of the respondents considered the information measures sufficient (2 % "definitely sufficient", 19 % "rather adequate"), the opposite opinion was 70 % of respondents (45 % "rather inadequate", 25 % "definitely insufficient") and 9 % chose the answer "hard to say". Regarding the mission in Afghanistan, the government's information activities were sufficiently recognized by 18 % of respondents (2 % "definitely sufficient", 16 % "rather adequate"), the opposite was 73 % of respondents (43% "rather inadequate", 30 % "definitely insufficient") and 9 % chose the answer "hard to say".[14]

In 2009, the CBOS asked the respondents a question regarding the participation of the Polish Army in international military missions (such as bears in Iraq and Afghanistan) in relation to the economic potential and financial capabilities of Poland. According to 56 % of respondents, this share was too large, 17 % considered this share as adequate, 10 % was too small, and 17 % chose the answer "hard to say".[15]

The research results quoted above can be considered individually, but in the context of image threats, it is cognitively valuable to synthesize them. If we formulate a one-sentence synthesis of the social assessment of the Polish Army's involvement in activities such as missions in Iraq and Afghanistan, this sentence could read as follows: the majority of Polish society is against such missions, recognizing that they do not bring peace, they endanger Poland; it's expensive, and government does not inform them about it. This sentence is a simplistic affirmation with a journalistic connotation, but its syntax allows for the unambiguous inclusion of this type of mission in the catalogue of potential threats to the image of the Polish Army.

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11 Own study based on: Komunikat z badań (Statement of research) number: 127/2009 (research sample: 1086); 159/2010 (research sample: 999), CBOS Warszawa [Warsaw].

12 This question was asked between August and December 2003, each month of 2004, in January, February, March, May and December 2005, January 2006 and January, June and October 2007.

13 Komunikat z badań (Statement of research) number: 162/2007 (research sample: 1385), CBOS Warszawa [Warsaw], 2.

14 Komunikat z badań (Statement of research) number: 134/2007 (research sample: 859), CBOS Warszawa [Warsaw], 2.

15 Komunikat z badań (Statement of research) number: 144/2009 (research sample: 1086), CBOS Warszawa [Warsaw], 6.

In Polish strategic documents, such as the National Security Strategy (2014), the development and cooperation within NATO and cooperation with the US was considered one of the priorities of the Polish security policy.[16] One can assume that the development of this cooperation is prioritized by the most important political parties in Poland. This is evidenced not only by public declarations of politicians, but also by their approach to relations with the USA and allied cooperation within NATO in the context of the mission in Iraq and Afghanistan. The beginning of these missions was the SLD government, which was then continued during the coalition of the PiS-Samoobrona-LPR and the PO-PSL coalition. This allows us to assume that if in the future a military alliance would emerge under the auspices of the US or NATO, the mission, in line with measures taken in Iraq or Afghanistan, Poland's participation in such a mission can be considered probable. If so, then the potential threats to the image of the Polish Army related to involvement in such missions will become valid again. It would therefore be valuable to work out ways to counter such threats.

Threats related to the partial politicization of social assessments of the activities of the Polish Army

Secondary analysis of CBOS surveys on the evaluation of the activities of the Polish Army depending on the political views declared was carried out in three parts. The first part presents the answers "hard to say", in the second assessment "good", in the third answer "bad". In each part, answers of respondents declaring centrist, left views and right views were presented separately. Within each of these groups, there were divided into two periods – from 2009 to 2015 and from 2016 to 2019.[17] A comparison of these periods was also made, thus showing how the average responses changed after each change in each group government, which took place at the end of 2015.

Answers "hard to say":

Subjects declaring centrist views:

Table 2 Answers "hard to say" among declaring centrist views, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
20 %	22 %	13 %	22 %	25 %	17 %	30 %	31 %	25 %	24 %	27 %	19 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

16 "Membership in Euro-Atlantic and European cooperation structures strengthens the security of the Republic of Poland. NATO is the most important form of political and military cooperation between Poland and the allies. The European Union supports the socio-economic development of Poland and strengthens its position in the world. The most important non-European partner of Poland remains the United States of America", *National Security Strategy of the Republic of Poland*, Warsaw 2014, pts. 6, 9.

17 Research samples were quoted in Table 1.

Table 3 Answers "hard to say" among declaring centrist views, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
23 %	25 %	22 %	29 %	24 %	13 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019, CBOS, Warszawa [Warsaw]

Table 4 The average answer "hard to say" among declaring centrist views, 2009–2015 and 2016–2019

The average answer "hard to say" among declaring centrist views	2009–2015	2016–2019
	23 %	23 %

Source: own elaboration

Subjects declaring leftist views:

Table 5 Answers "hard to say" among declaring leftist views, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
18 %	21 %	13 %	20 %	19 %	17 %	30 %	24 %	15 %	24 %	28 %	22 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 6 Answers "hard to say" among declaring leftist views, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
28 %	25 %	21 %	31 %	29 %	15 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019; CBOS, Warszawa [Warsaw]

Table 7 The average answer "hard to say" among declaring leftist views, 2009–2015 and 2016–2019

The average answer "hard to say" among declaring leftist views	2009–2015	2016–2019
	21 %	25 %

Source: own elaboration

Subjects declaring right-wing views:

Table 8 Answers "hard to say" among declaring right-wing views, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
13 %	14 %	17 %	25 %	24 %	20 %	29 %	25 %	23 %	21 %	26 %	24 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 9 Answers "hard to say" among declaring right-wing views, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
21 %	24 %	20 %	26 %	21 %	13 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019, CBOS, Warszawa [Warsaw]

Table 10 Average of answers "hard to say" among declaring right-wing views, 2009–2015 and 2016–2019

Average of answers "hard to say" among declaring right-wing views	2009–2015	2016–2019
	22 %	21 %

Source: own elaboration

Respondents declaring central views of the answer "hard to say" for the years 2009–2015 and 2016–2019 expressed at the same level. Among respondents declaring left-wing views, the average of such answers increased by 4 percentage points. In the respondents declaring right-wing views, the average rating "hard to say" dropped by 1 percentage point. The presented changes do not allow to formulate the conclusion that there has been a politicization of the social assessment of the activities of the Polish Army.

Answers "good":

Subjects declaring centrist views:

Table 11 Answers "good" among declaring centrist views, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
73 %	69 %	81 %	73 %	67 %	74 %	61 %	66 %	68 %	70 %	68 %	77 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 12 Answers "good" among declaring centrist views, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
69 %	61 %	64 %	59 %	67 %	76 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019, CBOS, Warszawa [Warsaw]

Table 13 Average of "good" answers among declaring centrist views, 2009–2015 and 2016–2019

Average of "good" answers among declaring centrist views	2009–2015	2016–2019
	71 %	66 %

Source: own elaboration

Subjects declaring leftist views:

Table 14 Answers "good" declaring among leftist, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
74 %	67 %	82 %	71 %	70 %	68 %	58 %	73 %	72 %	70 %	64 %	72 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 15 Answers "good" declaring among leftist, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
66 %	51 %	57 %	56 %	54 %	63 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019, CBOS, Warszawa [Warsaw]

Table 16 Average of "good" answers among declaring leftist views, 2009–2015 and 2016–2019

Average of "good" answers among those declaring leftist views	2009–2015	2016–2019
	70 %	58 %

Source: own elaboration

Subjects declaring right-wing views:

Table 17 Answers "good" declaring among right-wings, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
81 %	79 %	77 %	64 %	67 %	72 %	59 %	69 %	68 %	70 %	63 %	73 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 18 Answers "good" declaring among right-wings, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
73 %	70 %	74 %	68 %	75 %	81 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019, CBOS, Warszawa [Warsaw]

Table 19 Average of "good" answers among declaring right-wings views, 2009–2015 and 2016–2019

Average of "good" answers among declaring right-wings views	2009–2015	2016–2019
	70 %	74 %

Source: own elaboration

In the case of declaring centrist views, the average "good" answer for 2009–2015 and 2016–2019 decreased by 5 percentage points. Among the declaring leftist views, the average of such answers dropped by 12 percentage points. In the declaring right-wing views, the average "good" answer increased by 4 percentage points. The presented changes, especially those concerning the respondents declaring leftist views, allow to formulate the conclusion that there has been a partial politicization of the social assessment of the activities of the Polish Army.

Answers "bad"

Subjects declaring centrist views:

Table 20 Answers "bad" declaring among centrist views, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
6 %	9 %	6 %	5 %	8 %	9 %	10 %	3 %	7 %	7 %	6 %	4 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 21 Answers "bad" declaring among centrist views, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
8 %	14 %	14 %	11 %	9 %	11 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019; CBOS, Warszawa [Warsaw]

Table 22 Average of "bad" answers among declaring centrist views, 2009–2015 and 2016–2019

Average of "bad" answers among declaring centrist views	2009–2015	2016–2019
	7 %	11 %

Source: own elaboration

Subjects declaring leftist views:

Table 23 Answers "bad" declaring among leftist views, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
8 %	11 %	5 %	9 %	12 %	14 %	12 %	3 %	13 %	6 %	8 %	6 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 24 Answers "bad" declaring among leftist views, 2009–2015

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
6 %	24 %	22 %	13 %	17 %	22 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019, CBOS, Warszawa [Warsaw]

Table 25 Average of "bad" answers among declaring leftist views, 2009–2015 and 2016–2019

Average of "bad" answers among declaring leftist views	2009–2015	2016–2019
	9 %	17 %

Source: own elaboration

Subjects declaring right-wing views:

Table 26 Answers "bad" among declaring right-wing views, 2009–2015

March 2009	Sept. 2009	April 2010	March 2011	Sept. 2011	March 2012	March 2013	Sept. 2013	March 2014	Sept. 2014	March 2015	Sept. 2015
6 %	7 %	6 %	11 %	9 %	9 %	12 %	6 %	8 %	9 %	10 %	4 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 42/2009; 126/2009; 54/2010; 30/2011; 108/2011; 39/2012; 44/2013; 130/2013; 36/2014; 131/2014; 42/2015; 131/2015, CBOS, Warszawa [Warsaw]

Table 27 Answers "bad" among declaring right-wing views, 2016–2019

March 2016	March 2017	September 2017	March 2018	September 2018	March 2019
6 %	6 %	7 %	6 %	4 %	5 %

Source: own elaboration based on: Komunikat z badań (Statement of research) number: 43/2016; 32/2017; 124/2017; 40/2018; 121/2018; 44/2019, CBOS, Warszawa [Warsaw]

Table 28 Average of "bad" answers among declaring right-wing views, 2009–2015 and 2016–2019

Average of "bad" answers among declaring right-wing views	2009–2015	2016–2019
	8 %	6 %

Source: own elaboration

In the case of declaring centrist views, the average answer "bad" for the years 2009–2015 and 2016–2019 increased by 4 percentage points. Among the declaring leftist views, the average of such responses increased by 8 percentage points. In the declaring right-wing views, the average answer "bad" dropped by 2 percentage points. The presented changes, especially those concerning the respondents declaring leftist views, allow to formulate the conclusion that there has been a partial politicization of the social assessment of the activities of the Polish Army.

Before 2015, the average scores for each group in each category were similar. Answers "hard to say" (average before 2015): center views 23 %, leftist views 21 %, right-wing views 22 %; "good" responses respectively: 71 %, 70 %, 70 %, "bad" answers respectively: 7 %, 9 %, 8 %. Since 2016, there are clear differences in the average ratings of respondents declaring left and right views.

The whole of the data presented in this part of the article clearly shows that after the change of government in the autumn of 2015, there was a partial politicization of the social assessments of the Polish Army.

Civil and democratic control over the army in the context of the most serious image threats

Civil and democratic control over the army can be understood as "[...] subordination of the armed forces to the democratically elected political authorities of the state". It consists of several elements:

- it is the responsibility of the civil authorities to create the foreign and defense policy of the state, including deciding on defense doctrines, alliances and military budget;
- subordinating the army to central authorities means that these authorities can make structural and personnel changes in the army;
- in senior military positions, the principle of term is binding, and military positions in the civilian defense center can not be occupied by military personnel;
- civilian authorities are responsible for issues such as modernization, level of armaments, and supervision (it is also the responsibility of the public);
- there is a clear division of competences within the civil authorities.[18]

The legal bases of civil and democratic control over the Polish Army were contained in the Constitution of the Republic of Poland: "The Armed Forces maintain neutrality in political matters and are subject to civil and democratic control".[19]
In the literature on the subject, it is assumed that neutrality in political matters consists of three main elements:

- "not conducting political activities in the army;
- failure to follow political criteria in military activities;
- the military's resistance to any external intervention aimed at using it in political activities".[20]

The constitutional bases of civil and democratic control over the army are also the powers of the President of the Republic of Poland regarding the Polish Army. Of particular importance are the first two paragraphs of Article 134: "1. The President of the Republic is the Supreme Commander of the Armed Forces of the Republic of Poland. 2. During peace, the President of the Republic shall exercise supremacy over the Armed Forces through the Minister of National Defense". In the following paragraphs of this article, the legislator granted the President of the Republic of Poland the power to appoint the Chief of General Staff and commanders of the Armed Forces and, during the war and at the request of the Prime Minister, the Supreme Commander of the Polish Armed Forces.[21] In addition, in the light of Article 134, the President of the Republic of Poland, at the request of the Minister of National Defense, gives the military grades specified in law.[22]

18 STAŃCZYK, Jerzy: Główne założenia demokratycznej kontroli nad siłami zbrojnymi, in: *Problematyka demokratycznej kontroli nad siłami zbrojnymi w wybranych państwach WNP a standardy zachodnie i doświadczenia polskie*, STAŃCZYK, Jerzy (ed.), Warszawa [Warsaw] 1999, 11–12.

19 Constitution of the Republic of Poland of 2 April 1997, Dz.U. 1997 No. 78, item 483 with changes, art. 26, pts. 2.

20 SOKOLEWICZ, Wojciech: *Wojsko i Konstytucja*, Warszawa [Warsaw] 2015, 65–67.

21 During the war, the appointment of the Supreme Commander of the Polish Armed Forces is obligatory. In the event of the introduction of martial law, the President of the Republic of Poland has the option (not obliged) to appoint the Supreme Commander of the Polish Armed Forces. The Act of 29 August 2002 on Martial Law and on the competences of the Supreme Commander of the Armed Forces and the principles of its subordination to the constitutional organs of the Republic of Poland, Dz.U. 2002 No. 156 item 1301 with changes, art. 10, point 2, par. 4.

22 Constitution of the Republic of Poland of 2 April 1997, Dz.U. 1997 No. 78, item 483 with changes, art. 134.

The principle of civil and democratic control in addition to constitutional authorization has also been expressed in statutes. Of particular importance is the first article of the Act of 14 December 1995 on the Office of the Minister of National Defense: "The Minister of National Defense heads the government administration department and defends the national authority, through which the President of the Republic of Poland exercises supreme control over the Armed Forces of the Republic of Poland; hereafter referred to as "Armed Forces". 2. The Minister of National Defense performs his tasks with the help of the Ministry of National Defense, hereinafter referred to as the "Ministry", which includes the General Staff of the Polish Army".[23]

Legal solutions and practice clearly indicate the full subordination of the Polish Army to democratically elected civil authorities. At the same time, civil authorities generated, generate and in the future may generate image threats for the army. Examples of such threats have been demonstrated in the previous part of the article. These threats are the result of political decisions that are taken independently of the military – this leads to a situation in which the military does not take decisions and is burdened with their image costs. At the same time, Army has limited possibilities to counteract the negative image effects of political decisions. It can (and should) carry out information and promotional activities, presenting itself as a professional and non-politicized institution. However, he can not be an active player in political activities. The constitutional principle of "neutrality in political matters" makes it impossible for the military to undertake political activities that can combat the image threats posed by political decisions. The military can not take action to change the social perception of the army resulting from political views.

Actions that the army can not undertake, can take civilian authority. If power generates political threats to the army and the military can counteract these threats to a limited extent, the responsibility for depoliticising the image of the army should rest with the rulers. Civilian authority should not only steer and control the army, but should also protect it from the image-related effects of political decisions. A way to implement this postulate could be to introduce two independent communication divisions within the Ministry of National Defense. One would be responsible for the content related to informing about the activities of the army and its promotion. The second would be responsible for political messages independent of the army, aimed at providing the army with protection against the negative effects of political decisions.

Conclusions

The article analyzes the most important threats to the image of the Polish Army in 2009–2019. It was shown that these threats are related to the political sphere – they concern political decisions (such as socially unacceptable participation in missions in Iraq and Afghanistan) and partly politicized social evaluation of military activity. The way of understanding and the legal basis of civil and democratic control over the army in Poland is also presented.

The work assumes the hypothesis that in order to counteract the most serious image threats, there should be an extension of civilian meaning and democratic control over the

23 The Act of 14 December 1995 on the Office of the Minister of National Defense, Dz.U. 1996 No. 10, item 56 with changes.

army. This control should include actions of state authorities protecting the military from the negative image-related effects of political decisions and ongoing political rivalry.
In the author's opinion, this hypothesis was verified positively. Threats to the image of the army resulting from political reasons were, are and potentially will be real. The military may, due to the inability to engage in political affairs, oppose such threats only to a limited extent. Thus, the prevention of political threats should rest on civil authority. The military as an institution established to defend the state and citizens (regardless of their views) can not be a subject of political struggle. Civilian authority should therefore protect the military against the effects of its political decisions.

References

Komunikat z badań (Statement of research)

- Komunikat z badań (Statement of research) number: 134/2007, CBOS Warszawa [Warsaw]
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Detours in Hungarian administrative criminal justice

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Abstract

One of the key directions of change in the Hungarian administrative sanctioning system is represented by a shift from the classic, subjective sanctions that are difficult to be enforced by the authorities towards objective sanctions. This change has impacted the offenses established by the local governments specifically, which revived first in the form of decrees regulating anti-social behaviors, and subsequently that of peaceful public coexistence and the sanctions included therein. The process was also supervised by the Constitutional Court, however, the antecedents reach all the way back to the period preceding the change of regime in Hungary, when the legislator at first attempted to preserve the unity of offenses, which may be seen as a melting pot of numerous anti-administrative and petty crimes; then subsequently we could witness a degree of restoration despite all efforts in which the offenses have again assumed the characteristics of criminal law.
This paper provides an overview of the process that led not necessarily to the complete withdrawal of the Hungarian offense law but its termination in the classic sense of the term, while the elements of the legal institution continue to live on as other types of administrative sanctions and helped the institution of administrative criminal law survive.

Keywords

offenses, administrative criminal law, local governments, administrative sanctions, peaceful public coexistence

Introduction

The history of administrative criminal justice in Hungary goes back to misdemeanors, which used to be part of the trichotomy of criminal law and were considered crimes, while in the case of offenses the relationship with state administration, public administration became more emphatic. Therefore, the two areas could not be identified with each other automatically and legal scholarship did not find a common name for the area either until the 1970s when Gábor Máthé established the term of administrative criminal justice. The latter expresses problems related to questions of both substantive (misdemeanors or offenses) and procedural (court or public administrative jurisdiction) nature in this area.[1]

1 MÁTHÉ, Gábor: Von der Übertretung bis zur Ordnungswidrigkeit – Entwicklung der Rechtsinstituts in Ungarn, in: *A közigazgatási büntetőbíráskodás fejlődése az utolsó 100 évben*, MÁTHÉ, Gábor – RÉVÉSZ, Tamás (eds.), Budapest 1986, 84.

At the same time, administrative criminal law cannot be identified either with misdemeanors or the entirety of offenses because while the latter categories also appear in statutory law, this is mostly a theoretical construct. The terminology itself has been used in legal studies for more than one hundred years based on the work of James Goldschmidt, who argues that administrative criminal law is the entirety of those regulations on the basis of which the state administration imposes a penalty as an administrative consequence of infringing an administrative measure.[2]

The history of administrative criminal justice in Hungary and internationally has been characterized by constant changes as the relationship of this legal field with criminal law and administrative law has generated such a tension that kept it moving continuously. In this respect the Hungarian processes resembled the practice of other East-Central European countries going through a democratic transition, whereby misdemeanors were distinguished from other administrative sanctions. At the same time, Hungarian misdemeanor law (as noted at several points in this study) was for a long time based on the German regulation. The separate legal regulation of misdemeanors was first used in Germany in the field of economic law, when due to the economic trends of the postwar era such a quick and simple procedure had to be created that enabled decisions about a large number of cases within an adequate (administrative) framework.[3] The conceptual separation of criminal law and misdemeanor law, which brought about a major breakthrough in the development of administrative criminal law, was also related to economic law. First, the act on economic crimes was established in 1949 based on the method of Schmidt Eberhard arguing for the quantitative separation of misdemeanors, then in 1952 the act on misdemeanors was created. As a result of decriminalization processes in transport law, however, the rules of procedure of the 1952 act had to be fundamentally revised so as to maintain the distinction between misdemeanors and crimes, thus the 1968 act that is still effective today was born (hereafter referred to as OWiG).[4]

The need for change in Hungary was driven mostly by the requirements of the rule of law that have started such a multi-stage codification process the steps of which contribute to the better understanding of the concept and intersections of the legal field of offenses, and they necessarily lead to a rearrangement within administrative sanctions. The paper provides an overview of this process. When writing this paper I had the honor of getting access to those manuscripts by the Demokratikus Helyi Közigazgatás Fejlesztéséért Alapítvány [Foundation for the Development of Democratic Local Public Administration] that were collected by the major representative and expert of the field, Gábor Máthé, thus besides publicly available publications, I also had the opportunity to read a part of materials made in the Ministry of the Interior during the preparatory phase of codification.

2 GOLDSCHMIDT, James: *Das Verwaltungsstrafrecht*, Berlin 1902, 577.

3 GÖHLER, Erich: *Gesetz über Ordnungswidrigkeiten*, München 1992, 2.

4 KATHOLNIGG, Oskar: A kisebb súlyú bűncselekmények Németországban. A szabálysértésekről szóló törvény, in: *Magyar Jog*, 43, 1996, 8, 485–486.

The era of the change of regime

Hungary codified offenses for the first time with Act I of 1968. The theories justifying the inclusion of the law on offenses within administrative law only apparently covered the paradox of administrative criminal law but did not put an end to the question of searching for criteria of distinction; they only pushed it from differentiation within criminal law to the border of administrative law and criminal law. Deregulation and the need for regulations as a result of the change of regime called attention to numerous contradictions and hiatuses. The re-regulation of the field was considered to be inevitable in the 1980s already, thus in 1986 the first codification committee was established which first operated within the Ministry of Justice and as of 1990 in the Ministry of the Interior.[5] Codification took yet another turn in 1990 as due to Government resolution no. 2019/1990. (HT.11.), which commissioned the Ministry of Justice to survey the Hungarian legal system and for the purposes of harmony examine the consequences expressed by the case law of the European Commission on Human Rights, as a result of which, the codification of the legal field of offenses continued in the Ministry of the Interior.

In terms of professional preparation, in which numerous theoreticians and practicing experts participated, the following main issues could be outlined:

- the relationship of the offense law and criminal law, the concepts of diversion and back-channeling;
- the relationship of offense law and international guarantee requirements, with special regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter as: Convention);
- in connection with the offense forum system, the clerk[6] as an acting authority and the offense statutory rights of local governments.

Diversion and back-channeling theories

The theories of diversion and back-channeling practically try to answer the question related to the positioning of offenses (formerly misdemeanors) within the legal system and closely linked to this to that of the forum system. The roots of the dilemma reach all the way back to the public administration reform of 1901. It occurred at this time already in terms of codification that in all cases of administrative competence (then misdemeanors) a judicial forum should act at least in the appeal phase but the problem was at that time also that due to the high number of misdemeanors this would have meant too much of a burden for the courts.

At the time of the repeated codification of the law on offenses, the collision of the two theories came into the focus again.[7] While representatives of the idea of back-channeling

5 MÁTHÉ, Gábor: Közigazgatási büntetőjog vagy "Janus-arcú" büntetőjog?, in: *Magyar Közigazgatás*, 51, 2001, 6, 323.

6 The clerk is chief executive in the Hungarian local self-government system, and s/he heads the office of the body of representatives.

7 MÁTHÉ, Gábor – PAPP, László: *Javaslat A magyar szabálysértési jog továbbfejlesztésére, figyelemmel az Európai Emberi Jogi Egyezmény szövegére és az Emberi Jogok Európai Bíróságának joggyakorlatára*, Ministry of the Interior: Budapest 1991, (Manuscript).

argued for the separation of the law on offenses and the returning of certain acts into criminal law, the followers of the theory of diversion argued for the maintenance of a separate law on offenses. The essence and feasibility of the particular theories, however, is to be found in the impact of the concepts on the forum system specifically, as according to back-channeling all of the petty offenses should be decided by a court, while according to diversion it is enough if a court participates in the appeals procedure. Diversion also argues that there is a relatively high number of cases with floating borders among offenses due to which the separation of criminal and anti-administrative actions is impossible and any demarcation carries in itself the possibility of necessary restoration.
When discussing the relationship between the law on offenses and criminal law, we also need to mention the reflections on the former qualitative[8] and quantitative[9] theories that was carried out mostly by Gábor Máthé who showed that the dual nature of the legal institution had been present ever since its establishment. Máthé studied the former theories also from the perspective of the approaching codification, as a result of which, he argued for the unity of the legal field.[10]

The question of international guarantees

The consideration of international guarantees and the practice of international courts was a decisive factor in codification, which indirectly also affected the development of the Constitutional Court's case law.[11] The feasibility of the requirements specified in the Convention for the Protection of Human Rights and Fundamental Freedoms was preceded by careful deliberation as the Ministry of the Interior indicated it in 1990 already that the feasibility of the principle of fair trial stipulated by Article 6, Section 1 represents a problem in connection with the law on offenses, as it prescribes judgement by an independent, impartial court in connection with criminal law cases and this in the case of offenses means that the right to turn to a court is made general. Despite the fact that the government had already started the preparations for the repeated codification of the area of offenses, it could be anticipated that the new law would not be promulgated before the announcement of the Convention.
The preliminary studies concentrated on the outcomes of the similar cases of the court so far, with special emphasis on the Öztürk and Belilos cases. In connection with the case of Abdulbaki Öztürk[12], the court, after the examination of the entire system of the German regulation, established that no clear line can be drawn between criminal law and the law on offenses as certain endeavors for decriminalization are always present in criminal law. Therefore, which branch of law a specific state categorizes a certain action in cannot be a determining factor in itself, it can only be one of the elements of the governing criteria.

8 ANGYAL, Pál: *A közigazgatás-ellenesség büntetőjogi értékelése*, Budapest 1931.

9 MOLNÁR, Miklós: *Adalékok a közigazgatási jogi szankció hazai elmélettörténetéhez*, Budapest 1990.

10 MÁTHÉ, Gábor: Megoldhatatlan-e a szabálysértési felelősség, in: *Belügyi Szemle*, 1989, 2, 3–9.

11 VITKAUSKAS, Dovydas – DIKOV, Grigoriy: *Protecting the right to a fair trial under the European Convention on Human Rights*, Strasbourg 2012.

12 Case of Öztürk v. Germany, online: http://hudoc.echr.coe.int/eng?i=001-62111 (Downloaded 9 October 2019).

Besides the classification within branches of law, the nature of the act and the sanction shall also be studied, which in most cases includes the deprivation of liberty or financial penalties (fines). If in the latter case the preventive or repressive nature can be identified, the stipulations of the Convention shall be used even in the case of a minor infringement of the law. At the same time, the Court does not perceive the decriminalization processes to be contrary to the Convention if the state provides the appropriate legal guarantees.[13]
The Belilos case[14] affected Swiss law in connection with which the court[15], on the one hand, confirmed its opinion expressed in a former case (Albert and Le Compte), according to which the review shall cover both questions of fact and law, and on the other hand, it concluded that the interpretative statement does not exclude the jurisdiction of the court in its case.
Based on the two cases above, the preparatory study conducted by the Legal Department of the Ministry of the Interior concluded that the system of offenses has to be transformed in a way that judicial review shall be guaranteed and it shall apply both to the review of facts and legal issues.[16] To ensure an approach involving different points of view, several scholars were involved.[17] At the meeting of the Club of Criminal Lawyers on 28 February 1992, Márta Bittó explored the question of compatibility between the law on offenses and the Convention. Based on the transcript of the lecture, she argued that a reservation was necessary, however, she also expressed her concerns in the sense whether the Court could invalidate it in a particular case.[18] The written memo of the meeting, however, included an extended version of the conference presentation which already included an international comparative survey with regard to the reservations concerning the Convention, based on which Bittó outlined risks in connection with the possible annulment of the reservation, also emphasizing that it was not certain at all that such a case would reach the court.[19]
In the end, Hungary added a reservation to Article 6, Section 1 of the Convention stipulating the principle of a fair trial with reference to the law on offenses. Later, in a scholarly publication Bittó argued that no reservation with such a content could have been added to the Convention;[20] on behalf of the Ministry of the Interior Krisztina Berta reflected on the article, explaining that the opinion expressed in the article was unfounded

13 TAUBNER, Zoltán: Manuscript, Ministry of the Interior: Budapest, May 1991. See also MOLE, Nuala – HARBY, Catharina: *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights*, Strasbourg 2001, 2006, 68–69 and VITKAUSKAS – DIKOV, 17.

14 Case of Belilos v. Switzerland, online: http://hudoc.echr.coe.int/eng?i=001-57434 (Downloaded 9 October 2019).

15 See also MOLE – HARBY, 31.

16 BÁN, Tamás: Manuscript, Ministry of the Interior: Budapest, 6 May 1991.

17 PAPP, László: *A szabálysértési jog kialakulása és fejlődése, a hatályos szabálysértési jog jellemzői, a kodifikáció tendenciái hazánkban*, Ministry of the Interior: Budapest 1992, (Manuscript), 1–16.

18 BITTÓ, Márta: Szabálysértési Eljárás kontra Emberi Jogi Egyezmény. Keynote speech at the meeting of the Club of Criminal Lawyers on 28 February 1992 titled "Opportunities of administrative criminal justice under the rule of law", Budapest 1992, (Manuscript), 1–12.

19 Memo of the lectures delivered at the meeting of the Club of Criminal Lawyers on 28 February 1992, Club of Criminal Lawyers: Budapest, 16 March 1992, (Manuscript).

20 BITTÓ, Márta: A bírósági eljáráshoz való jog és a magyar szabálysértési fenntartás, in: *Magyar Közigazgatás*, 43, 1993, 5, 270–277.

or was not based on appropriate foundations.[21] At the same time, based on the rather extensive jurisprudence of Article 6, it could be anticipated that such a regulation would be in harmony with the stipulations of the Convention in which judicial review is guaranteed in questions of fact and law alike.

Offense authorities, activities of local governments

During the preparatory stage, a discussion paper written in 1997 in the Ministry of the Interior examined the work of the "local government" offense authorities specifically. The document also started out from the traditional postulate that offenses are two-faced acts, thus one part of them are anti-administration, while another part belong under petty criminal law. However, the procedures by local government-like bodies have centuries-long traditions as based on the 1879 Act on Misdemeanors and the implementing regulations[22] several such public administrative bodies acted both at the first and second degree. The acting of local public administrative bodies as authorities for offenses did not end during the council system either although at that time the state administrative bodies made decisions about offenses; then after 1990 the competence law settled the fundamental questions that considered the clerks of small towns, cities, cities of county rights, and the capital district to be the authorities responsible for offenses in general. It occurred at that time already that the solution was not well founded theoretically as even though the clerk was not an administrative body, it had a dual role; but typically such cases of a public administrative nature should be given to it in terms of sanctions that involve a degree of interest by the local government. The latter one is usually absent in the case of offenses, thus the discussion paper proposed that the clerk should not be a general offense authority but at most it shall be able to act only in the case of offenses related to the local government as in the position of a general authority it has to deal with the most diverse cases.[23]

The discussion paper examined the procedure of clerks as authorities responsible for offenses based on statistical data as well between 1990 and 1996. In this process, it was established that with the exception of 1994 the number of accusations showed a slight increase every year (2–5 %), however, within this the number of accusations due to offenses stipulated by local government decrees increased continuously and to an ever growing extent. Similarly, the amount of fines imposed increased to a significant extent (at first by 13 %, then in the subsequent period by as much as 46 % compared to the preceding year). Based on data concerning termination, they also concluded that successful investigation exhibited an improving tendency in consideration of the fact that an increasingly smaller proportion of cases started based on the accusations were terminated.[24]

21 BERTA, Krisztina – MÉSZÁROS, József: A szabálysértési jog átfogó felülvizsgálatáról, in: *Magyar Közigazgatás*, 43, 1993, 5, 278–289.

22 38.547/1880. BM. and the subsequent 65.000/1909. BM.

23 BEKÉNYI, József – KINCSES, Ildikó – MÁTHÉ, Gábor – PAPP, László: Az önkormányzati szabálysértési hatóságok tevékenysége, a szabálysértési tényállásokat megállapító rendeletek. Discussion paper. Ministry of the Interior: Budapest, November 1997, (Manuscript).

24 Ibidem, 11–19.

The studies specifically touched upon the regulatory practice of local governments regarding offenses, also discussing its theoretical foundations. In this regard the starting point was that local governments can enact decrees based on statutory authorization and for the settlement of local social conditions. Although not clearly, the discussion paper included the decrees on offenses within the first category, as based on the definitions of the act on offenses the local government may establish an offense, thus the authorization in this regard may be considered to be of a general nature.

The typical topics before the effective date of Act II of 2012 were the following:
- water supply and the local regulation of water supply;
- regulations concerning the settlement's coat of arms, flag, and other symbols;
- maintenance and use of cemeteries;
- keeping animals, with special regard to dogs;
- use of public areas;
- order of markets and fairs;
- use of public services, with special regard to the chimney sweeping services;
- public sanitation.

It may be established based on the above that the offenses regulated by the local governments already covered a relatively broad set of local issues and, in particular cases regulated the order of peaceful public coexistence, from which the paper highlighted and introduced several offenses with a representative purpose. These also included some cases that were still regulated by council decrees, however, the given local government did not want to repeal them in consideration of the fact that they would not have had the competence by that time to regulate the legal relationship serving as its basis. Among the local government cases there are several that the authors considered to be dormant, indicating that based on these no sanctioning or procedure had been initiated for a long time, thus they proposed their repeal (along with the council decrees in general). The differing legislative quality of local government decrees was also typical, as some used multiple sanctions and at the same time did not differentiate the maximum amount of the fine between the different actions. Due to all of these anomalies, this proposal already pushed for the limitation of local government offenses, possibly by establishing specific scopes of cases, and at the same time, it also suggested for consideration that instead of offenses another legal institution (e.g., administrative fines) should be introduced that could be used to react to the local circumstances and whereby the fine would be credited to the imposing authority.
This latter issue, however, was implemented based on the 2012 Act on Offenses and the new local government regulation in two steps, also due to the decision of the Constitutional Court. Thus first it were Article 51, Section (4) and Article 143, Section (4), Point e) of Act CLXXXIX of 2011 on Local Governments of Hungary (hereafter as the Act on Local Governments) that authorized local governments to regulate and sanction anti-social behavior, then Constitutional Court decision no. 38/2012 (XI. 14.) annulled the mentioned authorization, and subsequently based on Article 143, Clause (4), point d) of the Act on Local Governments, the local governments specify the basic rules of peaceful public coexistence as well as the legal consequences of any failure to comply with these, as administrative sanctions.

The results of codification between 1997 and 2012

Before 1999

In 1996, the Ministry of the Interior and the Ministry of Justice made a joint proposal for the Government on the concept for the regulation of the law on offenses. The preparatory material also introduced the standpoint related to the independence of offense law, the possible scope of regulatory stipulations with which regulation on the legislative level is possible together with the preservation of the competence of public administrative bodies. In this sense the concept considered the legislative power of the government to be problematic, while it argued that the power of local governments to regulate local public order and behaviors posing a threat to the order of administration should be preserved due to the tasks of the local government.[25] As a result of preparation, the Government accepted Government resolution no. 1078/1996 (VII. 19.) on the concept of the regulation of the offense law, which listed the most important elements of the regulation in 12 points. In terms of the development of the offense law in Hungary and the creation of the new code, Constitutional Court decision no. 63/1997. (XII. 12.) also had a major impact as it made the ratification of the law including the new guarantees a must. In its decision the Constitutional Court established that the Parliament did not perform the re-regulation of the field of offenses in line with the stipulations of the Constitution, and at the same time it annulled several sections of the former code, deducing the need for judicial review based on two different stipulations of the Constitution, separately for cases of a criminal and administrative nature.

Some justices added dissenting and parallel opinions to the resolution. One of the most often quoted of these is László Sólyom's parallel opinion, also joined by János Németh and Tamás Lábady. The opinion contested the applicability of Article 50, Section (2) of the Constitution in the case of offenses and called attention that in the case law of the Supreme Court the resolutions on offenses do not qualify as administrative resolutions either as they do not judge cases of an administrative nature. The separation is problematic and difficult to implement according to the already introduced professional opinions as well, what is more, it is not relevant in terms of the need for judicial review either; moreover, the opinion also mentions that cases involving offenses shall be taken to administrative or criminal courts within the scope of review.

A significant part of former scholarly publications shared the above ideas as opposed to the majority opinion of the decision. Gábor Máthé considered the mixture of the organizational and procedural approaches to be self-contradictory, while the constitutional rationale to be an example of formal logic, with the dogmatic foundations missing.[26] Péter Kántás also criticized the artificial separation, while Marianna Nagy did not agree with the opinion of the Constitutional Court either, arguing that the requirement for judicial review could be deduced exclusively form Article 50, Section (2) of the Constitution also, in consideration of the fact that the opinion of the Supreme Court in connection with offenses is not consistent from a theoretical point of view.[27]

25 Proposal, 6-92/1996, Ministry of the Interior – Ministry of Justice: Budapest 1996, (Manuscript).

26 MÁTHÉ, Közigazgatási…, 325.

27 NAGY, Marianna: *A közigazgatási jogi szankciórendszer*, Budapest 2000, 80–86.

The code of 1999 and seeking the way

The ratification of the 1999 code was surrounded by great expectations already due to the aforementioned, but it could not meet such expectations despite the long preparatory phase. Similarly to the former stipulations, the law maintained the unity of substantive and procedural law as a result of which it received a lot of criticism and the idea of amending it occurred practically right after enactment.[28] The categorization of offenses within the legal branches was not clear based on the new code either, as the regulation continued to maintain the duality of the field as also confirmed by the Constitutional Court. In connection with the scholarly debate related to the law[29], the advantages and disadvantages of diversion and back-channeling were revisited but the determination of the bases of responsibility was also among the debated conceptual questions.[30]

Similarly to the earlier ones, the 1999 law included a formal definition of offenses instead of a substantive one and it regulated the scope of norms regarding offenses in line with the historical legal traditions in Hungary. The latter was also criticized by legal publications. Péter Kántás disputed the broad competence of the government in establishing offenses, however, the competence of local governments also carried in itself certain problematic elements. There was also debate about the order of the types of punishments, actual confinement, expulsion, and the practical utilization of work of public interest.[31]

Soon afterwards, Parliament resolution no. 71/2004. (VI. 22.) also stated the objective of reviewing the law, along with its re-creation. Although formerly a draft was written in the Ministry of the Interior, no novel amendments were made, nor was a new law accepted. They claimed that the reason for this included circumstances that "could not be anticipated" in advance and the transformation of the system of legal consequences to be applied, the main objective of which at the time was to eliminate confinement as a punishment.[32]

Among the problems to be solved, one could find the unification of the fragmented authority system that called for the making of a new law; a good opportunity for this was presented by the reform of the criminal law and the new codification. Due to the social and economic changes, however, such new circumstances have also occurred that required a significant reform of the offense law and the establishment of new legal institutions. This includes the requirements articulated with regard to traffic patrol that were aimed at the reduction of traffic accidents. This included the draft aimed at the objective liability of the vehicle's operator that was finally added to Act I of 1988 on the Administrative Rules of Road Transport by Act CLXXV of 2007. Although the law stipulated this way does not belong to the terrain of offense law anymore, the connection is still obvious: the legislator reclassified the so far subjective sanction into an objective one with reference to prevention and improving success.

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28 HAJDÚ, Mária: A szabálysértési jogalkalmazás gondjai, in: *Magyar Jog*, 51, 2002, 4, 241.

29 KÁNTÁS, Péter: Mérlegen az új szabálysértési törvény, in: *Belügyi Szemle*, 47, 1999, 10, 18–19 and ZÁMBÓ, Géza: Jogalkalmazói nézőpontú észrevételek a szabálysértésekről szóló 1999. évi LXIX. törvény módosítására vonatkozó tervezethez, in: *Magyar Közigazgatás*, 52, 2002, 4, 220–229.

30 SPITZ, József – SZABÓ, Sándor: Jogalkalmazói pillanatfelvétel az új szabálysértési törvényről, in: *Magyar Jog*, 48, 2001, 1, 7–23.

31 KÁNTÁS, Mérlegen..., 18–26.

32 Report: Report no. J/15234. of the Republic of Hungary, Budapest, 29 March 2005, 30.

As the Constitutional Court in its decision 63/1997. (XII. 12.) argued for liability based on guiltiness in the case of offenses, the presumption of guiltiness was not possible within the system of offenses. Constitutional Court decision no. 498/D/2000. partly answered the question whether reclassification within objective sanctions was a constitutional solution in line with the rule of law, showing that the legislator had broad discretion in the process of regulating the conditions and extent of using the sanction.
It was Constitutional Court decision 60/2009. (V. 28.) that decided expressis verbis on the necessity of the specific preventative objective in the field of transportation, as it considered those objective sanctions based on legal regulations to be constitutional also that were known in the legal system before as sanctions with a subjective basis. The Constitutional Court confirmed that objective liability in itself was not unconstitutional and it was not in conflict with the principle of the rule of law. For the purposes of enforcement, the state may use sanctions among which objective sanctions encourage and facilitate legal certainty. The legislator has discretion to decide what kind of a liability scheme it establishes within the framework of the given branch of law, thus it also has the option to create new legal fields besides the already existing branches, reflecting on new social phenomena this way also. The objective sanctions that are independent of guiltiness, however, need to meet the following criteria: the sanction or the norm including the presumption of liability shall be clear and have a fair content and it should be possible to challenge the presumptions used.

New paths of Act I of 2012

Act II of 2012 that was created as a result of preparation has brought about clear changes in the field of administrative criminal justice as it clearly pushed the legal field in the direction of criminal law, while it also reduced the number of offenses by terminating the right of local governments and other public administrative bodies to regulate offense sanctions and prescribing that offenses may only be established by law.
The shift towards criminal law, however, can also be seen in other areas. Thus, for example, instead of a reference to anti-administration among the regulatory objectives of the Preamble, the practical objectives of the administrative sanction appear that are broader than the theoretical objective[33] and the text is also much more reminiscent of the codification approach established by Act XI of 1879[34] that emphasized the preventive nature and smaller weight of misdemeanors compared to crimes, also acknowledging the aims for decriminalization.
The move away from administrative law is also reflected by the novel, substantive definition that has two key starting points: possibility for punishment based on law and threat to society. The former is a novelty in the law on offenses as during the close to 200-year-long history of the legal area it had never happened that the legislator would have prescribed determination by law exclusively and thus enforce the principle of nullum crimen sine lege also in the case of administrative criminal justice. As a result, one of the founding stones for the classic interpretation of administrative criminal law is not enforced, namely

33 MADARÁSZ, Tibor: *Az államigazgatási jogi szankció fogalma és fajtái*, Budapest 1989, 37–42.

34 SZATMÁRI, László: *Bírság a magyar államigazgatásban*, Budapest 1990, 81–84.

determination by public administration. The inclusion of the threat to society as part of the definition represents a direct and closer relationship with criminal law, as theoretically it could even bring up the question of quantitative demarcation.
The stricter sanctioning system also indicates a closer link to criminal law that is not expressed only in terms of degree but also in the introduction of new types of punishment and the changes in the conditions of utilization. The legislator strengthened the role of confinement while they do not attempt the collection of unpaid fines anymore. The attributes as an independent legal institution are further strengthened by the fact that the ne bis in idem principle is enforced by the new code not only in terms of crimes but also other administrative sanctions. The existence of independent substantive and procedural rules also have a similar effect, while last but not least a new quantitative decriminalization also occurred that reduced the number of crimes against property by close to a quarter.
The Constitutional Court in its decision 38/2012. (XI. 14.) claimed about the process that offenses lost their role in sanctioning anti-administrative behavior and its "petty criminal law" nature became dominant. Thus the restoration of the trichotomous criminal law system came within reach that was considered to be difficult to implement previously.
The amendment of the effective law on offenses with Act XLIV of 2018 recently shook yet another pillar of the legal field that may now be termed "administrative" criminal justice in quotation marks only as it also terminated the exclusively alternative nature of confinement as a punishment.

Local government legislation: peaceful public coexistence, the vision of administrative criminal justice

Parallel and also in response to the new law on offenses, such rules have been added to Act CLXXXIX of 2011 on Local Governments that made the enactment of rules on antisocial behavior possible for the representative body of the local government. This, however, was annulled rather quickly by the Constitutional Court in its decision no. 38/2012. (XI. 14.), qualifying the authorization to be of a bianco and unbounded nature. According to the explanation of the decision, establishing such a punishment, sanction as a legal consequence of an unlawful conduct that provides an opportunity for exercising coercive measures by the state, shall not be considered part of local public affairs. Such rules can be adopted by local governments only if authorized by law and within its scope, and it is in line with the requirements of the rule of law only with substantive legal guarantees prescribed by law.
Until annulment, the local governments adopted several hundred regulations, which concerned mostly such issues of neuralgic importance from the point of view of constitutional law as scavenging and begging and only one-eighth of the regulations included any other affairs. Based on the decision of the Constitutional Court, the local governments had to annul these decrees, which was also supervised by the State Territorial Representative, also expressing that they consider the establishment of original norms regulating and sanctioning local community life based on the fundamental law to be undesirable.

At the same time, Article 32, Section (2) of the Fundamental Law of Hungary[35] specifically stipulates that the local governments, acting within their functions, can regulate such social relations independently that are not regulated by any other law, thus the sanctioning regulations can be in harmony with the Fundamental Law. The basic responsibilities and functions of local governments are partly governed by the Fundamental Law and partly by the Act on Local Governments, and based on Article 4 of this act the stipulation of these laws may fall within the scope of defining the conditions of cooperation with the population in connection with the notion of local public affairs. In Article 143, Section (4), point d) of the Act on Local Governments, the legislator expressly authorized the local governments to specify the basic rules of peaceful public coexistence as well as the legal consequences of any failure to comply with them.

The practice of regulating and sanctioning peaceful public coexistence was spreading among local governments and the regional government offices tried to act against it and even the Commissioner for Fundamental Rights conducted an investigation.[36]

Finally, the Constitutional Court had to answer the question related to the harmony of this practice with the Fundamental Law. Constitutional Court decision no. 29/2015. (X. 2.) confirms that the basic rules of peaceful public coexistence are composed of both written and unwritten rules, among which there is space for sanctioning regulations enacted by the representative body also, in line with the first limb of Article 32, Section (2) of the Fundamental Law. Such a type of regulation, according to this body, does not violate the principle of subordination to the act on public administration or that of legal certainty or separation of powers due to the framework type of authorization. As a general rule, it is also the Curia that has authority to review these decrees, also maintaining the competence of the Constitutional Court in cases violating the Fundamental Law. Thus it can also be reviewed whether the regulations are in harmony with the Fundamental Law or not, whether the constitutional values and principles specified in Article I of the Fundamental Law were infringed, if the regulation meets the requirement of necessity and proportionality, and also whether the local circumstances substantiate the regulation of prohibited behavior and their legal consequences.

Later, besides the initial theoretical and practical problems, the conformity of the establishment of the new legal field with the Fundamental Law was confirmed by the Constitutional Court several times. In its decision no. 3/2016. (II. 22.) the Constitutional Court stated again that it could not be presumed ab ovo that the local governments would practice the broad regulation enacting opportunity granted to them by law in an abusive manner. Although the Curia did not exclude the option that a regulation would have such an outcome, it also stated that these cases could be averted by the courts and the Constitutional Court.

Constitutional Court resolution no. 7/2017. (IV. 18.) did not even doubt the legal basis of the decrees regulating peaceful public coexistence but explored another aspect starting out from the fact that a local government decree may be adopted for the provision of a task or service on the scale of a local government within the scope of local public affairs that may even affect fundamental rights, if it is in compliance with the limitation included

35 Constitution of Hungary has been called the Fundamental Law (of Hungary) since 2012.

36 Commissioner for Fundamental Rights, 1992.

in Article I, Section (3) of the Fundamental Law. The parallel opinions provided a more nuanced approach in this regard also, confirming that local governments may adapt rules affecting fundamental rights on the level of regulations as only the most important rules belong to the field of legislation.

Conclusion

Based on the above, while the offense law established by Act 16 of 1953 maintained its clearly administrative nature until 2012, and based on Act II of 2012 it continuously shifted towards criminal law, the administrative criminal law of local governments was revived. Due to the above-mentioned regulatory elements of the currently effective code, with special regard to offenses that may be regulated only by act, the classic administrative criminal law in the Goldschmidtian sense cannot be found anymore among the effective offenses. The shift towards criminal law and the break with administrative-like foundations was further strengthened by the changes in 2018, which stipulate the punishment of habitual residence in public areas (widely known as homelessness) only with confinement under the conditions stipulated by law.

Parallel with this process, the administrative sanctions of local governments have appeared as new elements. The summarizing paper written in the Ministry of the Interior in 1997 also foreshadowed the solution that the offenses regulated by local governments should be replaced by another legal institution, whereby the local government could react to local infringements of law by regulating local relations and in which the fine would be credited to the imposing authority. The first attempt in this regard involved the authorization for the regulation of antisocial behavior, after the termination of which the opportunity opened for the regulation of peaceful public coexistence where fines are imposed on those who infringe the local rules. In this regard, by means of the regulation and sanctioning of peaceful public coexistence, a new type of administrative sanction has been created and the legislator has so far only reflected on it by touching upon certain elements. Thus at the beginning, by fitting the substantive rules among the public administration procedural rules, the legislator specified the types and degree of sanctions that may be used in the law that brought the offense law into effect (modifying the rules of the administrative procedures). The rationale of the act unambiguously states that the legislator created the option for administrative fines instead of the removed offenses. Ultimately, the new area gained recognition with Constitutional Court decision no. 29/2015. (X.2.). Currently, Act CLXXIX of 2017 on the Temporary Rules for Sanctioning Administrative Offenses and Amending Certain Laws in Connection with the Reform of Administrative Procedural Law and Repealing Certain Stipulations of Law stipulates the upper limit of the administrative fine that may be established based on the decree of the local government's representative body, which in the case of natural persons amounts to HUF 200,000, and in the case legal entities and organizations without a legal personality amounts to 2 million Forints. Moreover, it also stipulates[37] the use of the principle of proportionality, this way reflecting on the former differentiability, according to which the local governments usually threaten every violation of law with the maximum sanction.

37 Article 3, Section (2) of Act CLXXIX of 2017.

Although the offense law has not ceased to exit yet, it has lost its original attributes due to the termination of administrative legislation, which was further strengthened by the non-alternative option of confinement used in connection with habitual residence in public areas; thus the legal area, even if not on the level of laws but that of theory, is shifting more and more towards the implementation of criminal law trichotomy.

As opposed to this, the sanctions adopted by the local governments represent a continuously transforming and extending area. The decrees enacted by the local governments in Hungary can still be found in the section of the National Legislation Database (Nemzeti Jogszabálytár) including local government decrees under a separate heading. I have already introduced the practice of the Curia and the Constitutional Court related to these in my paper titled the "Local Governments and the Concept of Good Governance",[38] thus in this article I focus mostly on theoretical considerations.

In setting the paths, the regional government offices also got an important role besides the local governments and they perform the control of the enactment of regulations within the scope of legal supervision practiced by the Government and based on their initiatives the Curia and the Constitutional Court may also act; however, in this area the activities of the Commissioner of Fundamental Rights also play a major role. The theoretical foundations are still absent to a great extent in this regard, but it is already certain that the essence of the legal institution, the right of the local governments to enact administrative sanctions was preserved for the future. The point of this right is exactly the wide scope and authorization itself as the essential basics were established by the legislator first with the above-mentioned regulation of the administrative procedure. It can also be concluded from these substantive rules that the procedure has to be conducted in line with the rules of general administrative proceedings, just as the type and degree of the sanction is also clarified, similarly to the fact that a natural person and a legal entity may both be involved in the procedure. It derives from the rules of the Act on Local Governments that the regulatory local government decree may authorize a local government body, typically the clerk, to utilize the sanction.

In terms of which social relationship it includes within its regulatory scope and which of these it sanctions, however, the local government can decide within a broad framework. It also derives from the foundations stated above that the sanction is of a material but objective nature, and the prosecution of legal entities cannot be excluded either.

The designation of the fundamental right framework is among the issues to be clarified, also in consideration of the fact that the regulation of local governments may also affect certain fundamental right issues. In this regard it will ultimately be the task of the Constitutional Court to specify the borderlines from case to case. Conflicts with other laws may represent an additional point of dispute, which, however, may potentially emerge in the case of all local government decrees; however, because of this it really cannot be presumed ab ovo that the decrees would be unlawful. The examination of this at the preparatory stage is the task of the clerk, while in the case of adopted regulations that of the regional government offices, while based on their initiative the Curia acts in disputed matters. In order to avoid any infringement of fundamental rights, however, even a case law catalogue could be compiled or best practices could be shared in this topic with the involvement of the clerk.

38 ÁRVA, Zsuzsanna: Local governments and the Concept of Good Governance, in: *Curentul Juridic*, 78, 2019, 3, 53–65.

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REVIEWS

Emőd VERESS – Zsolt KOKOLY

Jogászképzés a Bolyai Tudományegyetemen 1945–1959 [Legal studies at the Bolyai University of Kolozsvár/Cluj 1945–1959]

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Transylvania: a land of rich cultural heritage, with a diverse population and in the last 150 years the Game of Thrones of universities. The population of Transylvania which was part of the Austro-Hungarian Empire at the end of the 19th century consisted of Romanians, Hungarians, Saxons, Swabians, Jews, and Armenians. At that time the language in which public administration was organized was mostly Hungarian. At the time the first university opened its gates in Kolozsvár[1] the Romanian community aspired for higher education in their own mother tongue as well. Thus the saga of universities began.

I would like to present the book with the title: *Legal studies at the Bolyai University of Kolozsvár/Cluj (1945–1959)* authored by Emőd Veress and Zsolt Kokoly. Both authors are teachers at the Faculty of Law of the Sapientia Hungarian University of Transylvania. The topic of the work is the story of the short-lived *Bolyai University* which used to be a Hungarian-language university in Romania.

On its 300 pages the book focuses on the history of the *Faculty of Law and Economic Sciences*, although quite some research is presented concerning the foundation and the forced dissolution of the Bolyai University.

A history of higher education in legal sciences commenced in Transylvania in 1774 when Austrian Empress Maria Theresa founded a university in the city with legal academy, for the first time. Soon the academy was downgraded into a high school until 1863 when it again reverted into a university. From the year 1866 the course lengthened to four years and the language of education changed to Hungarian.

This academy constituted the foundation of the Faculty of Law and State Sciences of the newly created *Royal Hungarian Franz Joseph University*, founded in 1872.

At the end of World War I, when Transylvania became part of Romania, the university first moved to Budapest, and a few years later to Szeged. Using the remaining infrastructure of the Royal Hungarian Franz Joseph University at Kolozsvár/Cluj the King Ferdinand I University was established with Romanian as the teaching language.

Between 1940 and 1944 Northern Transylvania along with Kolozsvár was annexed back to Hungary so the university moved back to the city from Szeged, while the King Ferdinand I University was relocated to Sibiu, Romania.

1 The name of the city is Cluj in Romanian and Klausenburg in German.

It is easy to observe that historically the nation who controls Transylvania is the only one to have a university: between 1872–1919 only Hungarians, between 1919–1940 only Romanians and between 1940–1944 only Hungarians again. The reason is simple, every ethnic group considers higher education as a tool for achieving their national goals. For a nation to have a university is not only a linguistic question, it is more about control. Higher education can give both a mental and physical frame where thoughts and capital can be managed.
Surprisingly, after the return of the King Ferdinand I University from Sibiu in 1945, the same year a Hungarian institution of higher learning was established by the name of *Bolyai University*. How was this possible taking into consideration the aforesaid? This could happen because of political interest, and prosperity of that time. Unfortunately, it was not based on an enduring compromise, because it failed to solve the question of minorities in the country. This was just a stop-gap measure.
After World War II, the Hungarian university which moved back to Kolozsvár did not cease to exist. However, the new Romanian regime in Transylvania closed down the Royal Hungarian Franz Joseph University. Because of the political climate after the war; the Soviets used Transylvania as a ramp to the Romanian government; they established a new Hungarian institution.
The second reason why this new university was born was due to Stalin's minority policies. The new Romanian regime had to prove to the Soviets that they are handling the question of minorities in a socialist way.
As the third reason we could mention is the idealism of the Hungarian political left. They believed in the justification of a Hungarian university – in Romania – in this new, socialist era and they acted accordingly.
Because in the formation of this institution prosperity played a major role, it was quite predictable that it would not be longstanding. The new, socialist regime viewed the university as an undesired one; this is why its coming into existence was fraught with hardship. With other words its fate was sealed from the beginning. Even so it kept functioning for 14 years as an independent academy until 1959 when it was forcibly merged with the Romanian Victor Babeș University.
Although, this establishment was remarkably important for the Hungarian community in Transylvania, from the point of psyche it was not ideal. In Romania after 1945 a totalitarian dictatorship started to be built. This meant that only one idea was tolerated, and this was the Stalinist one. The law academy had one political goal to raise a new generation of socialist lawyers. The old ones, especially the judges and the prosecutors, had to be eliminated because they were not trustworthy, and they were the remnants of an old system. The new lawyer generation had to implement the socialist jurisdiction, it was more important to impose death-sentences and adjudicate in show trials. Indoctrination was an absolute necessity in that period.
In fear that the Hungarian Revolution from 1956 could spill over to Romania as well, the regime took severe actions. One of them was the forced merger of the Bolyai University – as a possible threat – with the Babeș University, thus the Babeș-Bolyai University was formed. Most of the faculty members from the Faculty of Law were taken over by the new institution, but new Hungarian teaching staff was never employed. This was a deliberate, guided maneuver. So in 1959 the education returned to the rule the nation who controls Transylvania is the only one to have a university.

The authors really put the effort into presenting the special situation of a Hungarian university in Romania. They argue that there is a necessity for teaching law in Hungarian in Romania for the ethnic Hungarians because it is more efficient to learn something in the mother tongue and then translate that knowledge to other languages. The students who graduated at the Bolyai University prove that this is possible. Many of the graduates, who learned the law of Romania in Hungarian, became successful lawyers while the official language at the courts was Romanian.
My personal suggestion to the authors is that they should continue the good work and extend their research. It would be interesting to examine what the new leadership in 1945 in Bucharest thought about the foundation of the Bolyai University or how did the Soviets blackmail the regime.

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