Liberal constitutionalism - between individual and collective interests

Edited by

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MONOGRAFIE

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Introduction

Can a democracy work without liberalism? Or in other words, is the concept of governing and being governed in turns sustainable without respecting individual rights? Or is a democracy doomed to be hijacked by authoritarian rulers, if not backed by robust mechanisms of individual rights protection, by a rule of law and as system, in which – as James Madison wanted – an ambition is made to counteract ambition and the abuses of government are controlled? A standard answer of the so-called 'Western' constitutionalism is still a clear 'no'.

The present volume offers study material on countries and historical situations, in which this clear 'no' faces challenges. It traces trajectories of democracy's development as it embraced and rejected liberal ideas. The contribution by Timea Drinoczi and Agnieszka Bien-Kacała does it with respect to Hungary and Poland, while the contribution by Tomasz Milej focuses on Kenya and Tanzania. But before embarking on the developments in particular countries, Wojciech Włoch takes the reader through the contemporary thought on the relationship between democracy and liberalism. He argues from the philosophical perspective that the liberal ideal of equal rights of individuals enables a democracy to thrive and prosper. Tomasz Milej takes up this point showing on the examples of Kenya and Tanzania how the attempts to base a democratic regime on illiberal pillars eventually lead to a collapse of the same. In this vein, Timea Drinoczi and Agnieszka Bien-Kacała make a strong case against theorising violations of constitutional stipulations and disenfranchisement of judiciaries as some new concepts of democracy or political constitutionalism as opposed to the legal one; one of the terms they prefer to describe the departure from the liberal democracy is abusive constitutionalism. On such a dialogue focuses Faith Kabata documenting a poor record of Kenya in implementing of the UN monitoring bodies recommendations and even obstructionism by

the state executive organs regarding civil and political rights. Her study shows that these rights were best implemented when individuals took their cases to the courts and that the biggest obstacle to the implementation was a lack of social and political internalisation of certain human rights provisions. Aren't those internalisation deficits the same ones that derailed the liberal democracy – at least temporarily – in Hungary and Poland? One could look from this perspective at the failure of the direct democracy instruments to enhance people's participation in public matters, as discussed by Zbigniew Witkowski and Maciej Serowaniec in the Polish context.

Those more general accounts are supplemented by three case studies on a sensitive area of clash between the collective and individual interest. The contributions by Lóránt Csink and Réka Török, by István Sabjanics and by Václav Stehlík examine the relationship between the national security concerns and the individual freedoms. Quite interestingly, Stehlík's research shows that the readjustment away from the individual movement rights towards the protection of national security concerns has also found its way into the case law of the Court of Justice if the European Union.

The editors

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Tomasz Milej, Maciej Serowaniec

Wojciech Włoch[*]

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The Democratic Paradox Revisited - how liberal constitutionalism supports democratic equality[1]

1. Introduction

Modern democracy is not a simple and immediate realisation of an abstract idea of democracy[2]. After the experiences of World War Two 'what emerged instead might best be described as a new balance of democracy and liberal principles, and constitutionalism in particular, but with both liberalism and democracy redefined in the light of the totalitarian experience of midtwentieth-century Europe'[3]. The model of democracy functioning in the so-called western states can be defined after F. Fukuyama as a combination of the principle of democratic accountability and participation, and the liberal principles of the rule of law

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

[2] Cf. R. A. Dahl, *On Democracy*, New Haven-London 1998, pp. 35-43, 84-99.

[3] J.-W. Müller, *Contesting Democracy. Political Ideas in Twentieth-Century Europe*, New Haven-London 2011, p. 129.

and the guarantee of individual rights[4]. The combination of these principles would constitute a systemic optimum for which no other alternative is available, as it closely links both institutional rationality and political legitimisation. In other words, liberal democracy is interpreted as 'the end of history', i.e. an optimal combination of principles and institutions[5]. And although the development of political orders is neither linear nor completely determined when it comes to the direction it follows, at the level of ideas liberal democracy is seen as the culmination of humanity's search for 'the ideal system of government'. Thus, it would offer a solution to the problem identified by I. Kant: 'the highest task which nature has set for mankind must therefore be that of establishing a society in which *freedom under external laws* would be combined to the greatest possible extent with irresistible force, in other words of establishing a perfectly *just civil constitution*'[6].

The purpose of this article is to attempt to answer the question whether the combination of liberal constitutionalism and democracy is accidental, or whether it is possible to observe an important connection between the two elements. In the first part I discuss the so-called democratic paradox resulting from the tension between the principle of democratic self-determination and liberal limitations connected with the rule of law and the guarantees of the rights of an individual. Indeed, modern democracy is

[4] Cf. F. Fukuyama, *The End of History and the Last Man*, New York-Toronto 1992, p. 42 et seq.
[5] Ibid., p. xii.
[6] I. Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, [in:] I. Kant, *Political Writings*, trans. B. Nisbet, Cambridge-New York-Port Chester-Melbourne-Sydney 2003, pp. 45-46.

a mixed system consisting of democratic procedures contained in the constitutional framework of the representative system. Part two of the article deals with the tension between radically understood democracy and constitutionalism. From the point of view of democracy as such, any – also constitutional – limitation of the democratic will is seen as undemocratic. Is constitutionalism therefore irreconcilable with democracy? In the third part I point to such an understanding of constitutional liberalism as emphasises the role of civil rights as constitutive elements of the democratic system. In this approach, liberal constitutionalism is a form of reinforcement of civic subjectivity. Liberal constitutional rights are to facilitate democratic participation and the protection of pluralism. Thus, an affirmation of pluralism leads to perceiving liberal constitutionalism as being closely related to democracy.

2. The paradoxical nature of liberal democracy

The combination of the two traditions of liberalism and democracy does not need to be seen as indispensable or inevitable. 'On one side we have the liberal tradition constituted by the rule of law, the defence of human rights, and the respect of individual liberty; on the other the democratic tradition whose main ideas are those of equality, identity between governing and governed, and popular sovereignty. There is no necessary relation between those two distinct traditions, but only a contingent historical articulation'.[7]. According to Ch. Mouffe, contemporary liberal democracies not so much as combine the above two principles as rather subject democracy to liberal principles.

[7] Ch. Mouffe, *The Democratic Paradox*, London-New York 2000, p. 2-3.

They are characterised by a democratic deficit by accentuating the idea of the rule of law and the rights of the individual at the expense of the idea of sovereignty of the people. 'For people in the West – as F. Zakaria writes – democracy means 'liberal democracy': a political system marked not only by free and fair elections but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property'[8]. Here, on the other hand, democracy is understood in a narrow procedural sense as a process of selection of the 'governing'[9]. From such a point of view, the system opposite to liberal democracy, i.e. the so-called illiberal democracy, would also be affected by a deficit, only of a different kind. Illiberal democracy would constitute a political system allowing for free and fair elections, however exhibiting a deficit in the area of the rule of law and the division of powers, thus failing to ensure protection of the fundamental freedoms of speech, association, religion, and property. Assuming the position of Ch. Mouffe one may say that the choice of a particular model of liberal or illiberal democracy entails a deficit in the sphere of democracy or liberalism. Mouffe argues that the tension between liberalism and democracy is permanent and a full reconciliation of these elements is impossible[10]. Any interpretation of the above two components of modern democracy points to a specific hegemony that is not 'natural and alternativeless' and that can be questioned.

[8] F. Zakaria, *The Future of Freedom*, New York-London 2007, p. 17.
[9] Cf. Ibid., pp. 18-19. Cf. the topic of procedural democracy D. Held, *Models of Democracy*, Cambridge 2008, pp. 125-157; cf. also A. Przeworski, *Democracy and the Limits of Self-Government*, New York 2010, pp. 111-112.
[10] Ch. Mouffe, *The Democratic Paradox*, p. 5.

A specific threat to democracy is seen in such a form of hegemony as negates the dispute between liberal freedom and democratic equality[11] that is inscribed in the essence of democracy and presents itself as the 'ultimate and natural' form of democratic policy. Its negative effect rests in the fact that the possible claims against the current *status quo* are interpreted as anti-democratic, which allows anti-democratic forces to take them over and direct them not towards current hegemony, but against 'democracy in general'. From this perspective, the threat to democracy consists in the elimination of antagonisms from the forum of democratic policy and placing an exaggerated emphasis on the role of deliberation and agreement. Indeed, the nature of democratic policy in Mouffe's view is paradoxical and should be understood 'not as the search for an inaccessible consensus – to be reached through whatever procedure – but as an 'agonistic confrontation' between conflicting interpretations of the constitutive liberal-democratic values'[12]. Assuming that Ch. Mouffe's observations are correct one may ask whether from the paradoxical nature of democratic policy it results that the perspective of a 'procedure-based consensus' should be abandoned in favour of 'agonistics', or whether what is meant is an establishment of a certain form of a balance between them?

[11] P. Rosanvallon also notes that the development of modern democracy involves an 'inversely proportional' development of the importance of political and social citizenship, the people in a political and social sense. 'The 'people', understood in a political sense as a collective entity that ever more powerfully imposes its will, is less and less a 'social body'. Political citizenship has progressed, while social citizenship has regressed', P. Rosanvallon, *The Society of Equals*, trans. A. Goldhammer, Cambridge–London 2013, p. 1. The process of extension of democratic rights would occur at the expense of democratic equality.

[12] Ch. Mouffe, *The Democratic Paradox*, p. 9.

Is such a balance at all possible? Does the antagonism that makes every agreement inconclusive and impermanent mean that any form of policy regulation through liberal principles threatens an expression of various positions and political postulates? In other words, does liberal constitutionalism suppress pluralism or rather establish the framework for its peaceful coexistence?

With respect to the objectives of governance (goals of political power) constitutional liberalism means the defence of individual autonomy and dignity against arbitrary coercion (e.g. social, public or ecclesiastical). It is therefore related to a limitation of political power. 'For to us 'constitution' means – as Sartori writes – a frame of political society, organised *through and by the law*, for the purpose of restraining arbitrary power'[13]. In Zakaria's interpretation, 'liberal constitutionalism' is liberal because it affirms the value of individual freedom, it is constitutional, as it 'places the rule of law in the centre of policy'[14]. In liberal constitutionalism, the division of powers, equal justice under law, independent judiciary, the separation of state and church are to serve the protection of fundamental freedoms of individuals (freedom of speech, assembly, religion, property rights...) which are treated as 'inborn and inalienable'. Contemporary western democracies are not 'pure democracies', but are rather an example of a 'mixed system' where non-elected institutions operate alongside democratic institutions. This results from the conviction that 'more democracy' does not automatically lead to 'more

[13] G. Sartori, *Constitutionalism: A Preliminary Discussion*, The American Political Science Review, Vol. 56, No. 4, 1962, p. 860.
[14] F. Zakaria, *The Future of Freedom*, p. 19.

freedom'[15]. Modern liberal democracy, in addition to the mechanisms and institutions that enable the implementation of the principle of self-government (or self-determination), introduces mechanisms and institutions that implement the principle of self-control, which has an inhibitory effect on the political power and secures the rights of individuals against their violation, as well as stabilising the political system by making its functioning independent of variable 'social moods', fluctuations of public opinion, or self-proclaimed 'spokesmen of the people'[16]. Institutions resulting from the rule of law (e.g. independent courts, public services, supervisory institutions) are to have positive effects, not only on the stability, but also on the effectiveness of the political system, the quality of governance, and are to ensure protection against excessive informal influences of interest groups on the functioning of public institutions[17].

The question arises whether the principle of self-control is not too restrictive for the democratic ideal of self-determination? 'The ideal of self-determination – as H. Kelsen puts it – requires that the social order shall be created by the unanimous decision of all its subjects'[18]. In the original form the idea of self-determination does not permit diversity and conflict of opinion, and a lack of agreement

[15] Cf. Ibid., p. 26.
[16] Cf. J.-W. Müller, *Contesting Democracy*…, pp. 146 et seq.
[17] Cf. F. Fukuyama, *Political Order and Political Decay. From the Industrial Revolution to the Globalization of Democracy*, New York 2014, chapters 1, 13, 27, 36.
[18] H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg, Cambridge 1949, p. 285. On the transformation of the idea of self-determination into the idea of a representative government, cf. also A. Przeworski, *Democracy*..., pp. 17 et seq.

with a ‘unanimous decision’ would mean an exclusion from society. The principle of *a priori* unanimity excludes the possibility of disagreement. Any change of a unanimously established order would be impossible as the groups or individuals that defy a particular shape of social order would actually resign from being part of it. In practice this kind of idea is virtually unworkable if we take into account the many forms of social diversification. Attempts at its implementation may take a distorted form of obtaining unanimity with the use of insistent propaganda and coercion. However, this would be a ghastly caricature of unanimity as an expression of self-determination. In practice unanimity is unattainable. This does not mean that the principle of self-determination is impossible to implement. The possibility of its fulfilment involves a limitation of its applicability: not ‘everyone’, but the ‘majority’ should define the content of the legal order. The principle underlying majority rule is that ‘social order shall be in concordance with as many subjects as possible, and in discordance with as few as possible’[19]. Thus, the majority rule ensures political freedom to the maximum extent possible, i.e. self-determination, as the compliance of the will of the individual with the common will. ‘Theoretically, democracy is a political or social form in which the will of society or – less figuratively – the social order is generated by its subjects, the People. Democracy means that the leader and those who are led, that the Subject and Object of rule, are identical. It means the rule of the People over itself’.[20].

[19] H. Kelsen, *General Theory...*, p. 286.
[20] H. Kelsen, *The Essence and Value of Democracy*, trans. B. Graf, Lanham-Boulder-New York-Toronto-Plymouth 2013, p. 35.

However, the complexity of modern societies as well as their greatness causes that direct participation of citizens in law-making is practically impossible. Just as the division of labour has become indispensable in the economic reality, it has also proved necessary in the political sphere. Democratic self-determination is in fact implemented in the form of participation in the procedure of nominating individuals to legislative bodies, i.e. mainly through the participation in the elections. 'The organ authorised to create or execute the legal norms is elected by those subjects whose behaviour is regulated by these norms'[21]. Contemporary democracy assumes the form of an indirect, representative democracy, where individuals selected for a particular assembly are treated as representatives of the voters[22].

3. Constitutionalism versus strong democracy

The constitution of any institution, as E.-J. Sieyès claims, endows it with an organisational framework, forms, and laws allowing it to fulfil the functions it was established to perform. A representative institution cannot exist without a constitution, i.e. an establishment of a representative institution is possible only by its appointment in the constitution. 'Thus the body of representatives entrusted with the legislative power, or the exercise of the common will, exists only by way of the mode of being which the

[21] H. Kelsen, *General Theory...*, p. 289.

[22] R. Dahl notes that the transformation of democracy from direct to representative has enabled the implementation of the idea of democracy in large and complex societies. Cf. R. Dahl, *Democracy and its Critics*, New Haven 1989, chapter 15. G. Sartori defines the principle of representation as an 'intermediate principle' between the political ideal and reality, G. Sartori, *Theory of Democracy Revisited*, Chatham 1987, chapter 4.5.

nation decided to give it. It is nothing without its constitutive forms; it acts, proceeds, or commands only by way of those forms'[23]. The said 'constitutive forms' establish a representative institution, define its functions and the manner of conduct and scope of its activities. Without the above constitution, the institution has neither authority nor competence, and therefore no basis for being both a representative and a legislative institution. The 'constitutive forms' are to ensure protection against an arbitrary attribution of power and any exceeding of the entrusted competences. This way, the nation protects its 'common will' against an abuse of 'common representative will'. The nation is a 'constituent power' (*pouvoir constituant*) that defines the fundamental norms for the functioning of political institutions. The norms defining the organisations and functioning of the political institutions within a representative system (legislative and executive power) constitute positive constitutional law, which is fundamental with regard to 'constituted power' (*pouvoir constitué*) and is completely dependent on constituent power. 'The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself'[24]. Constituted power (representative system) is in fact an authority delegated by constituent power (nation). A delegated authority cannot change the terms of its delegation. The will of constituent power is unlimited, whereas constituted power is limited by the 'terms of delegation'. From the perspective of Sieyès' theory, the role

[23] E.-J. Sieyès, *What Is the Third Estate?* in E.-J. Sieyès, *Political Writings. Including the Debatte between Sieyès and Tom Paine in 1791*, trans. M. Sonenscher, Indianapolis-Cambridge 2003, p. 135.
[24] Ibid., p. 136.

of the constitution consists in defining the principles and rules of functioning of legislative and executive power. The nation itself is not subject to the constitution, as it is a natural being and a source of positive law, whilst the existence of political institutions depends on the fundamental positive law (norms of the constitutional law).

Sieyès' concept may constitute a kind of a model for the theory of the unlimited sovereignty of a nation: a nation (constituent power) ontologically precedes constituted political institutions and in that sense is independent of positive law. Positive law cannot constitute a nation, yet without a nation there is no positive law. Similarly, positive law cannot bestow on the nation rights that it no longer possesses (we may say that it may only declare them). Delegated power is fully dependent on the nation, and therefore it cannot award it with anything that it no longer possesses. Constituted power is subject to the constitution established by unlimited constituent power. The constituent power itself is not subject to the constitution, for it would thus cease to be unlimited and ontologically primary. Any limitation of constituent power would lead to contradictions, as by the imposition of such limitations it would no longer be a constituent power. The nation is in a way permanently embedded in the state of nature, for its will as a constituent power cannot be regulated and limited. In this sense, the will of the nation has an absolute primacy over the positive law, for it is its will that 'is the source and supreme master of all positive law'[25]. Taking Sieyès' radical view, the limitation of constituent power of the nation would mean a loss of freedom by the nation and would open the way to

[25] Ibid., p. 138.

establishing a dictatorship. From the thus outlined perspective the principles of liberal democracy appear as a limitation of 'true democracy,' as they not only introduce the inviolable rights of individuals, but also define the constitutional principles and rules governing the functioning of the political system (e.g. principles of the rule of law, lawmaking and amendment of the constitution[26]) which limit the freedom of the nation as a constituent power.

The limitations introduced by constitutionalism are evident in the example of 'the Federalist Papers', where the possibility of direct rule by the people is rejected thus differentiating the republican system (today's representative democracy) from direct democracy. 'We may define – J. Madison writes – a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour'[27]. A republic differs from direct democracy particularly in two respects: 'first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended'[28]. A representative system is to provide both political

[26] Liberal constitutionalism distinguishes 'higher lawmaking', i.e. the law established in a particular form whose change also requires maintenance of a specific mode of procedure, that is different and more demanding than 'normal lawmaking'. Cf. B. Ackerman, *Constitutional Politics/Constitutional Law*, The Yale Law Journal, Vol. 99, No. 3, 1989, pp. 461 et seq., B. Ackerman, *We the People. Foundations*, Cambridge–London 1995, pp. 6 et seq. Cf. also J. Rawls, *Political Liberalism*, New York 1993, pp. 231-233.

[27] Alexander Hamilton, James Madison, John Jay, *The Federalist* with *The Letters of* „*Brutus*", ed. T. Ball, Cambridge 2003, p. 182.

[28] Ibid., p. 44.

legitimacy of the political authorities of choice, as well as a means of resolving conflicts between competing interests and views functioning in a complex society. Therefore it assumes pluralism as a fundamental characteristic of a society. 'As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves'[29]. The formation of the so-called factions[30] is to a certain extent natural, with manifold causes behind it and the main one being the uneven distribution of property. Economic inequalities and the related conflicts of interest are one of the major sources of their emergence. 'The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government'[31]. Legislation and the system of representation would constitute forms of conflict resolution, and thus a specific form of mediation between contradictory interests and the pursuit of possibly consensual legislative resolutions. In this context, a particularly important issue is connected with safeguarding against the dominance of a

[29] Ibid., p. 41. Cf. the so-called 'burdens of judgement', which cause a discord and diversity of opinions to be a cardinal property of a free democratic society, J. Rawls, *Political Liberalism*, pp. 54-58.

[30] 'By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community', Alexander Hamilton, James Madison, John Jay, *The Federalist*..., p. 41.

[31] Ibid., p. 42.

single majority faction that could pursue its interests without greater restrictions. According to Madison, in a direct democracy it is practically impossible to safeguard the rights of the minority against the majority. The limitation of factional claims, on the other hand, may take place in a republican, i.e. a representative system. It is therefore necessary to protect both the rights of citizens as well as republican institutions and principles. 'It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure'[32]. The mechanisms of dividing and balancing the powers as well as the system of guarantee and protection of the rights of an individual, both resulting from assigning a special role and legal importance to the constitution, in a sense restrict the freedom of a democratic formation of political will, since it cannot violate constitutional principles and rights. Thus, the constitution forms a specific kind of a 'higher law', which can only be modified in a special mode[33]. Assuming that the democratic 'will of the nation' is diverse, meeting of the legal requirements for an amendment or establishment of a new constitution is not simple. As a result, forms, procedures, and restrictions on the democratic decision-making process are more or less 'rigidly' normalised in the constitution as a 'higher law'. A question arises as to whether such a 'limitation' should be interpreted as the dominance of a

[32] Ibid., p. 254.
[33] Cf. footnote 26.

liberal element over a democratic one[34], or whether the relation between them may be perceived through the category of interdependence?[35]

From the perspective of the theory that democracy 'simply' means participation and self-determination, any regulation of their expression in the form of representative institutions will be associated with their 'limitation'. Such an interpretation entails an irremovable conflict between democracy and liberalism (constitutionalism), as when the will of the nation is not absolute (unconditioned), it is impossible to speak of democracy. Constituent power, as A. Negri points out, is closely linked to democracy. 'Constituent power has been considered not only as an all-powerful and expansive principle capable of producing the constitutional norms of any juridical system, but also as the subject of this production – an activity equally all-powerful and expansive'[36]. Constituent power is not only a principle of political power adopted in the form of the principle of sovereignty of the nation, but also an actual entity – constituent power is a political entity that in a certain way, intrinsically and without intermediaries, 'produces' the democratic politics. Hence, it constitutes not only an entity that establishes a democratic constitution, but a democratic policy in general while itself it 'resists being

[34] C. Schmitt points out that 'a threefold division of powers, a substantial distinction between the legislative and the executive, the rejection of the idea that the plenitude of state power should be allowed to gather at any one point – all of this is in fact the antithesis of a democratic concept of identity. The two postulates are thus not simple equivalents', C. Schmitt, *The Crisis of Parliamentary Democracy*, trans. E. Kennedy, Cambridge-London 2000, p. 36.
[35] Cf. J. Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, Political Theory, Vol. 29, No. 6, 2001, pp. 766-768.
[36] A. Negri, *Insurgencies. Constituent Power and the Modern State*, trans. M. Boscagli, Minneapolis-London 1999, p. 1.

constitutionalised'. Democratic constitutions may only declare the existence of such an entity in their content. Similarly – as Negri further argues – democracy as the 'theory of an absolute government' (the sovereign will of the people) 'resists being constitutionalised', since 'constitutionalism is a theory of limited government and therefore a practice that limits democracy'[37]. There is a conflict between constitutionalism and democracy (constituent power): 'constitutionalism poses itself as the theory and practice of limited government: limited by the jurisdictional control of administrative acts and, above all, limited through the organisation of constituent power by the law'[38]. Liberal constitutionalism forms a limitation of a radically democratic will and in this sense is undemocratic. Constitutionalism is in a way oriented on the past and preserves the already established system, whereas democracy (constituent power) is a creative and forward-looking force, thus the conflict between them can be interpreted as a conflict between an unlimited creative power and a tendency to regulate and stabilise. '*Democracy* means the omnilateral expression of the multitude, the radical immanence of strength, and the exclusion of any sign of external definition, either transcendent or transcendental and in any case external to this radical, absolute terrain of immanence. This democracy is the opposite of constitutionalism. Or better, it is the negation itself of constitutionalism as constituted power – a power made impermeable to singular modalities of space and time, and a machine predisposed not so much to exercising strength but,

[37] Ibid., p. 2.
[38] Ibid., p. 10.

rather, to controlling its dynamics, its unchangeable dispositions of force. Constitutionalism is transcendence, but above all constitutionalism is the police that transcendence establishes over the wholeness of bodies in order to impose on them order and hierarchy. Constitutionalism is an apparatus that denies constituent power and democracy'[39]. Assuming the above understanding of democracy, all forms of indirect democracy, the rule of law, and the guarantee of individual rights are merely a form of wielding control over the 'democratic dynamics'. Where does this particular preoccupation of liberal constitutionalism with the limitations of political power and stability of the political system come from? According to B. Barber, liberal democracy is a theory that focuses on a conflict within the society, which is the main problem of the policy[40], thus the fundamental postulates of liberalism stem from the attempts to deal with social and political discord. However, according to critics, because of it the hidden constructive forces of a society are underestimated, hence liberal democracy should be confronted with a different concept of democracy. 'Strong democracy is a distinctively modern form of participatory democracy. It rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature'[41]. One could

[39] Ibid., p. 322.
[40] B. R. Barber, *Strong Democracy. Participatory Politics for a New Age*, Berkeley-Los Angeles-London 2003, p. 5.
[41] Ibid., p. 117.

ask here whether the ‘productive forces of democracy’ operating within ‘participatory democracy’ without stabilising and limiting institutions are not in fact going to turn into a permanent conflict? Will the perpetual revolution, that the constituent power indeed is to follow Negri's interpretation, lead to the dominance over that part of society which is best organised as a ‘productive movement’? Will a completely unrestricted democratic participation not lead to the hegemony of the majority, and thus (similarly as the principle of unanimity) deprive the minority of the right of participation and consequently eliminate pluralism?

4. Liberal ‘constitutional essentials’ of democratic constitution

The answer to these questions does not have to be affirmative to demonstrate that liberalism constitutes an indispensable element of modern democracy. Indeed, the aim of political liberalism is to establish the basic principles of a democratic system that would provide all citizens with equal political subjectivity and enable the maintenance of democratic disputes on equal terms. It aims towards the formulation of basic principles underlying the system of constitutional democracy that would be adequate for a

society characterised by (reasonable[42]) pluralism[43]. Ch. Larmore defines the problems faced by the theory of liberalism as follows: (a) formulation of moral conditions for limiting political power (defined by the idea of a common good); (b) formulation of conditions under which people with different concepts of good would be able to live together in a political association[44]. The solution would consist in the formulation of a 'minimal moral conception' that expresses the idea of a common good that could be supported by a broad spectrum of doctrines and conceptions of a good life. Such an idea would be neutral in relation to various worldviews, which does not mean that it would be neutral in moral terms[45].

Therefore, what kind of an idea does liberalism propose as a 'minimal moral conception' for the democratic

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[42] 'The diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy', J. Rawls, *Political Liberalism*, p. 36. Reasonable pluralism does not only mean that people accept various holistic doctrines within the democratic system but that such doctrines are also reasonable, although individuals may perceive only their own 'doctrines' as 'true or right', cf. J. Cohen, *Moral Pluralism and Political Consensus*, [in:] J. Cohen, *Philosophy, Politics, Democracy: Selected Essays*, Cambridge Massachusetts 2009, p. 53.

[43] 'Liberalism assumes that in a constitutional democratic state under modern conditions there are bound to exist conflicting and incommensurable conceptions of the good'. J. Rawls, *Justice as Fairness: Political not Metaphysical*, Philosophy and Public Affairs, Vol. 14, No. 3, 1985, p. 245. 'Liberalism as a political doctrine supposes that there are many conflicting and incommensurable conceptions of the good, each compatible with the full rationality of human persons, so far as we can ascertain within a workable political conception of justice. As a consequence of this supposition, liberalism assumes that it is a characteristic feature of a free democratic culture that a plurality of conflicting and incommensurable conceptions of the good are affirmed by its citizens'. Ibid., p. 248.

[44] Ch. Larmore, *Political Liberalism*, Political Theory, Vol. 18, No. 3, 1990, p. 340–341.

[45] Cf. Ibid., p. 341.

system? As claimed by R. Dworkin, every coherent political programme contains two elements: 'constitutive political positions that are valued for their own sake, and derivative positions that are valued as strategies, as means of achieving the constitutive positions'[46]. It is possible to speak of a continuity of a political doctrine, if the transformations that it is undergoes affect the derivative positions and not the constitutive ones. In other words, constitutive positions remain the same, whereas the means towards their achievement change along with social, economic or other changes. Liberalism shares numerous constitutive principles with other doctrines (such as the principle of freedom which is shared with conservatism), however it assigns them a different rank. The constitutive position of liberalism consists in the defined concept of equality[47]. It is possible to distinguish between the principle of treating the citizens 'as equals' (in terms of being entitled to the same care and respect) and treating them 'equally' (in the same way), however 'equally' does not always mean the same as the expression 'as equals' (for instance, a tax can be imposed equally on all citizens, but it does not mean that they are treated as equals, as the cost incurred by citizens with the lowest income is relatively higher than the burden placed on high-income citizens), therefore the first meaning is constitutive whilst the other derivative[48]. What really distinguishes liberalism from other political doctrines is the thesis that individuals should be treated 'as equals' (neutrally), and thus regardless of their understanding of

[46] R. Dworkin, *Liberalism*, [in:] R. Dworkin, *A Matter of Principle*, New York 1985, p. 184.
[47] Cf. Ibid., p. 188.
[48] Cf. Ibid., p. 190.

good (or life goals, what a good life is to them)[49]. In order to ensure equal treatment of individuals with different concepts of the good, preferences, or aspirations, it is necessary to establish institutions ensuring the stable functioning of a diverse society (e.g. representative democratic institutions, free market, redistribution mechanisms), which on the one hand recognise the inequalities arising from the diversity of goals and concepts of the good, whilst on the other hand eliminate arbitrary and unjustified inequalities, thus treating citizens ‘as equals’.

A liberal protection of citizens' treatment ‘as equals’ by social and political institutions consists of a system of guaranteed rights and freedoms. From such a perspective, liberalism is associated with the recognition of diversity resulting from an equal treatment of persons pursuing different concepts of the good, different goals, and having varying interests. The existence of a universal system of rights and freedoms would guarantee the treatment of such persons as equals. Thus it is the equality that constitutes the ‘minimal moral concept’, which is the basic principle of a political system that affirms pluralism. B. Ackerman lists six elements of response of political liberalism to the fact of pluralism: (a) political principles should not be ‘hostage’ to one of the many ideas of a good life operating in a society; (b) political liberalism adopts such a strategy of justification of political principles as could be adopted by representatives of various comprehensive doctrines; (c) political liberalism strives to remain independent of holistic philosophical

[49] Cf. Ibid., pp. 191–192. This would distinguish liberalism from conservatism, which connects equal treatment with a specific concept of the good, similarly to socialism.

doctrines and base itself on its own principles and ideas; (d) emphasises the primary commitment of maintaining public dialogue between the different parties; (e) introduces the principle of conversational constraint – until a citizen makes a specific argument publicly, it cannot be deemed convincing; (f) before particular institutions of the basic structure become legitimate, they must undergo a rigorous test of a public dialogue of free and equal citizens[50]. From the thus outlined perspective, the basic principles of constitutional democracy and its basic institutions are not treated as 'granted', but as the subject of a consensus of free and equal citizens, reached as a result of a public deliberation of arguments in favour of them (an ideal representation of such a public debate is the idea of an initial situation). 'Problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime?'[51].

According to J. Raz, the essence of political liberalism, in relation to the fact of pluralism, is a specific 'epistemic abstinence': it should not refer to the question of the truth or falsehood of comprehensive doctrines professed by citizens[52]. If it were to be a true theory, it would have to

[50] B. Ackerman, *Political Liberalisms*, The Journal of Philosophy, Vol. 91, No. 7, 1994, pp. 365-368.
[51] J. Rawls, *Political Liberalism*, p. xviii.
[52] Cf. J. Raz, *Facing Diversity: The Case of Epistemic Abstinence*, Philosophy & Public Affairs, Vol. 19, No. 1, 1990, p. 4.

be based on a certain comprehensive doctrine accepting certain fundamental positions as justified, however then it would not be a theory formulating the 'minimal concept of principles', it could not serve as a theory adequate for the democratic system characterized by the fact of pluralism. Therefore, the main problem of political liberalism is seen in the principles which cause that democratic political power to be legitimised by virtue of such principles. 'We ask: when is that power appropriately exercised? That is, in the light of what principles and ideals must we, as free and equal citizens, be able to view ourselves as exercising that power if our exercise of it is to be justifiable to other citizens and to respect their being reasonable and rational?'[53]. In response to this question, J. Rawls formulates the 'liberal principle of legitimacy': 'our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason'[54]. Political liberalism points to the particular importance of a constitution in the democratic system. The legitimisation of political power occurs when it respects the 'constitutional essentials', i.e. the principles expressing the idea of democratic equality, which can be accepted by citizens in the conditions of pluralism. Rawls indicates that from the point of view of political liberalism, a democratic constitution should contain two elements that are understood as 'constitutional essentials':

[53] J. Rawls, *Political Liberalism*, p. 137.
[54] Ibid., p. 137.

a) fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and
b) equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law'[55].

These are not equivalent elements in the sense that their meaning is the same. The second important element of a constitution is contained in the very sense of a constitution of a democratic state, while the first is related to the pragmatism of exercising political power. If the rights and freedoms contained in the second constituent of the constitution are preserved, it can be presumed that the way of organising the power respects the principles of democracy, whereas even the most rational organisation of a system of political power cannot be considered democratic in the absence of political rights of participation and fundamental freedoms of the individual. Without ensuring fundamental subjectivity we cannot speak of free and equal citizens, and when this is the case we cannot speak of democracy either. Equal rights of participating in the democratic process constitute a sort of democratic 'rights of rights'[56]. Liberal democracy defined by the above constitutional essentials would be a system functioning

[55] Ibid., p. 227.
[56] Cf. J. Waldron, *Law and Disagreement*, Oxford-New York 2004, p. 156, cf. also chapter 11.

according to the 'logic of equality'[57]. In other words, with the constitutionalisation of political rights, citizens acquire political subjectivity and are able to establish a real political entity. Regardless of whether the ontological primacy of constituent power is recognised before constituted power, it is only with the constitutionalisation of equal rights of participation in the democratic process that the civic subjectivity assumes a real and normative meaning. In such an interpretation the principle of liberalism is linked to democracy, as the liberal rights of political participation may only be realised in a democratic system, whilst democracy itself is based on these very rights[58].

[57] Cf. R. A. Dahl, *On Democracy*. p. 10. Rosanvallon points to equality as a constitutive idea for a democratic society: 'I therefore propose to begin by reexamining the spirit of equality as it was forged in the American and French Revolutions. Equality was then understood primarily as a relation, as a way of making a society, of producing and living in common. It was seen as a democratic quality and not merely as a measure of the distribution of wealth. This relational idea of equality was articulated in connection with three other notions: similarity, independence, and citizenship. Similarity comes under the head of *equality as equivalence:* to be 'alike' is to have the same essential properties, such that remaining differences do not affect the character of the relationship. In dependence is *equality as autonomy;* it is defined negatively as the absence of subordination and positively as equilibrium in exchange. Citizenship involves *equality as participation*, which is constituted by community membership and civic activity. Consequently, the project of equality as relationship was interpreted in terms of a *world* of like human beings (or *semblables*, as Alexis de Tocqueville would say), a *society* of autonomous individuals, and a *community* of citizens', P. Rosanvallon, *The Society of Equals*, p. 10.

[58] If we assumed the above stance 'illiberal democracy' would be internally contradictory, cf. also J. W. Müller, *What is Populism?*, Philadelphia 2016, chapter 2. Cf. Habermas's attempt to combine democracy and liberalism, i.e. presentation of their relationship as 'non-paradoxical', J. Habermas, *Constitutional Democracy...*, pp. 776-778. 'The sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized', J. Habermas, *Between Facts and Norms. Contributions to a*

The close relationship between fundamental freedoms and the democratic political procedure causes fundamental rights and freedoms to be interpreted by Rawls as an expression of the principle of equal participation. It is to express the idea of civic equality with the condition for its realisation consisting in ensuring equal rights and freedoms to citizens. 'Since the constitution is the foundation of the social structure, the highest-order system of rules that regulates and controls other institutions, everyone has the same access to the political procedure that it sets up. When the principle of participation is satisfied, all have the common status of equal citizen'[59]. An ideal form of demonstrating such an inclusive procedure of establishing the constitution is the social agreement: each party has an equal voice in the procedure for the establishment of the system. On the lower level of deliberation, i.e. the level of participation in a 'regular' political process, the principle of participation 'requires that all citizens have equal rights to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply with'[60]. Of course, within the context of a modern democratic system this occurs in the form of representative democracy, which guarantees the citizens the right to participate in the form of specific electoral rights, parliamentary law, party system, expression of opinions, etc.

By emphasising the importance of constitutional rights of participation in the political process, political

Discourse Theory of Law and Democracy, trans. W. Rehg, Cambridge 1996, p. 104, cf. pp. 118-131.

[59] J. Rawls, *A Theory of Justice*, Cambridge 1999, p. 200.

[60] Ibid., p. 194.

liberalism in a way refers to the republican affirmation of politics as an area in which the specific human nature is fulfilled[61]. H. Arendt divides fundamental human activities into labour, work, and action. In general, labour is linked to the biological side of humanity, work is an expression of the creative side (production of the 'artificial' world of things), action is a form of activity, which occurs exclusively 'between people' and therefore has a specifically social character (intersubjective)[62]. 'Human plurality, the basic condition of both action and speech, has the twofold character of equality and distinction. If men were not equal, they could neither understand each other and those who came before them, nor plan for the future and foresee the needs of those who will come after them. If men were not distinct, each human being distinguished from any other who is, was, or will ever be, they would need neither speech nor action to make themselves understood'[63]. The area of specifically human matters is situated in the 'interpersonal' sphere, where action constitutes the proper form of activity. It occurs in the public sphere and is concerned with public affairs. The rights of political participation allow for an occurrence of a specifically human form of activity, and the value of the constitution is that it organises a space in which various forms of human activity may be manifested. Thus, it allows fulfilment of this element of human nature that is specific for it (i.e. distinguishes humans from other beings),

[61] Of course, it does not issue strong ethical claims concerning citizens' preferences of the public good, cf. Habermas's criticism of republicanism and narrowly understood liberalism (limited to private rights) in *Three Normative Models of Democracy*, [in:] *Democracy and Difference. Contesting the Boundaries of the Political*, ed. S. Benhabib, Prncteon 1996, pp. 21-23, 26, 29.
[62] Cf. H. Arendt, *The Human Condition*, Chicago-London 1998, pp. 7 et seq.
[63] Ibid., pp. 175-176.

namely acting in a public forum and for public purposes. In such an interpretation liberal constitutionalism provides the principles by which a specific form of human activity may take place according to the principles of democratic citizenship and social co-operation.

5. Conclusion

According to Mouffe, a specific value of liberal democracy is that 'it creates a space in which this confrontation is kept open, power relations are always being put into question and no victory can be final'[64]. For modern liberal democracy, the acceptance of pluralism is of a constitutive meaning. It relates not only to the very fact of diversity, but to the recognition of diversity as a desirable state and awarding equal rights to all persons. Properly understood political liberalism[65] should 'cherish' such pluralism, thus allowing for the widest possible discussion and public debate and questioning of both current affairs (e.g. ordinary legislation or government decisions) and the very bases of the political system[66]. This means that liberalism indeed enters into a conflict with democracy when it limits pluralism by

[64] Ch. Mouffe, *The Democratic Paradox*, p. 15.

[65] This article is concerned with the theory of liberal constitutionalism and not with political practice, therefore this theory can also serve as a criticism of a practice that is called 'liberal' yet does not pursue fundamental liberal ideas.

[66] 'Within our tradition there has been a consensus that the discussion of general political, religious, and philosophical doctrines can never be censored. Thus the leading problem of the freedom of political speech has focused on the question of subversive advocacy, that is, on advocacy of political doctrines an essential part of which is the necessity of revolution, or the use of unlawful force, and the incitement thereto as a means of political change', J. Rawls, *Political Liberalism*, p. 343. 'To repress subversive advocacy is to suppress the discussion of these reasons, and to do this is to restrict the free and informed public use of our reason in judging the justice of the basic structure and its social policies. And thus the basic liberty of freedom of thought is violated', Ibid., p. 346.

formal restrictions in the possibility of participating in public discourse[67]. 'In a democratic policy, conflicts and confrontations, far from being a sign of imperfection, indicate that democracy is alive and inhabited by pluralism'[68]. Rawls's 'constitutional essentials' should therefore allow citizens to participate equally in public discourse regardless of their political power. In other words, they should make the democratic system open to change and re-interpretation both in terms of common legislation as well as with regard to basic principles. However, such changes should take place while being embedded within the framework of democratic principles and not violating them, therefore an actual (and not only declared) refusal to recognise the civic equality of certain classes of citizens would breach both liberalism and democracy. Taking into account the pluralism of a democratic society, awarding all citizens with equal rights of political participation makes the content of democratic legislation variable or open to change. C. Lefort argues that democracy is connected with a process of calling things into question, which is endless and is a presumed part of social practice[69]. If various aspirations and conflicts cannot be resolved within the framework of a symbolic practice of questioning things, movements seeking to 'define society', making it 'one' may occur, which on the

[67] In the above interpretation liberalism is not far from Mouffe's radical and pluralist democracy, i.e. the political project assuming the existence of conflict and violence, calling for the establishment of a group of institutions that would 'limit and contest' dominance and violence, yet would not eliminate conflict and diversity, Ch. Mouffe, *The Democratic Paradox*, p. 22. Cf. Ch. Mouffe, *Agonistics. Thinking the World Politically*, London-New York 2013, chapter 1.
[68] Ch. Mouffe, *The Democratic Paradox*, p. 34.
[69] C. Lefort, *Democracy and Political Theory*, trans. D. Macey, Cambridge 1988, p. 19.

other hand leads to totalitarianism. The functioning of a democracy depends on allowing an open 'practice of questioning' within the context of 'an institutionalised conflict'. 'The exercise of power is subject to the procedures of periodical redistributions. It represents the outcome of a controlled contest with permanent rules. This phenomenon implies an institutionalization of conflict. The locus of power is an empty place, it cannot be occupied - it is such that no individual and no group can be consubstantial with it – and it cannot be represented'[70]. A democratic-liberal constitution does not fill the said 'empty place of power,' but maintains an 'institutionalisation of conflict', thus ensuring an open and inclusive way of operating of the system, i.e. giving citizens an opportunity to participate in the 'practice of questioning' of the existing *status quo* 'as equals'. If the above interpretation is correct, the democratic paradox is that democracy indeed needs liberal constitutionalism in order to function as an open and pluralistic system.

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[70] Ibid., p. 17.

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Liberal democracy's rocky path – the cases of Kenya and Tanzania

1. Introduction

The present paper's objective is to shed light on the extent, to which the idea of a liberal democracy has taken root in Kenya and Tanzania. The paper very briefly outlines some distinctive features and assumptions of liberalism and how the same relates to the idea of democracy, before putting both concepts – the liberalism and the democracy – into Kenyan and Tanzanian contexts. In so doing, it focuses on the historical development, in particular the views of the leading independence figures: Jomo Kenyatta of Kenya and Julius Nyerere of Tanzania; these leaders had decisive impact on the development path, which the both states chose after securing independence in the 1960's. The paper closes with some recent examples of legal practice from Kenya and Tanzania, discussed in the light of the respective constitutional framework. Given the attempts to conceptualise some forms of democracy that are not liberal,

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e.g. in Poland and Hungary, the East African experience can prove valuable for comparative studies.

2. Liberalism

Individualism or primacy of the individual over collective interests is the core value to which liberalism subscribes. Accordingly, the individual has a dignity; she cannot be treated as an instrument to other policy aims; rather, she is an end 'in itself'. Liberalism further assumes that individuals are equal and may have different conceptions of what a good life is; identifying, selecting and pursuing a conception of good is left to individuals, whose interest may conflict and who may disagree on values.[1] For this reason, in the liberal view, there cannot be an 'official conception of good'. A liberal view suggests that such a conception, once established and enforced by the state, leads to injustice and oppression.[2]

Societies are regarded as voluntary associations of individuals and appraised as good, only if they are good for individuals. In the classical liberal view, the state actions are based on the harm principle**:** As John Stuart Mill puts it, preventing harm to others is the only purpose for which the power can be exercised in a civilised community.[3] Mill emphasises that 'over himself, over his own body and mind,

[1] It was Immanuel Kant, who gave this shape to the idea of human dignity. See generally George Fletcher, 'Loyalty' in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson, 2nd ed. (Chichester: Blackwell Publishing Ltd, 2010), p. 516; Robert Talisse, *Democracy after Liberalism. Pragmatism and Deliberative Politics* (New York: Routledge, 2005), pp. 80-81; John Rawls, 'Justice as Fairness: Political Not Metaphysical' *Philosophy & Public Affairs* 14 (1985): pp. 223–251, p. 245.

[2] Rawls, (supra note 1), p. 247.

[3] John Stuart Mill, *On Liberty* (New York and Melbourne: The Walter Scott Publishing, 1901), 17.

the individual is sovereign'[4], an assumption which places protection of individual rights at the core of the liberal concept.

As the most important attribute of this individual sovereignty, John Stuart Mill regards the freedom of conscience or freedom of thought and by extension also the freedom of expression. Although the latter – as Mill claims – belongs to the sphere of individual conduct affecting other people, it is of the same importance as the freedom of thought and it rests on the same reasons.[5] Silencing opinions is 'robbing of the human race', since 'If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[6] For Mill, lack of debate is harmful, as it supresses the 'high scale of mental activity which has made some periods of history so remarkable'.[7] The freedom of opinion is thus necessary for the 'mental well-being of the mankind'.[8] It is also necessary for the pursuit of truth, for even erroneous opinions may contain a portion of it, and the prevailing opinion is never the whole truth. Moreover, the prevailing opinions, if not vigorously contested and discussed, may degenerate into mere prejudice, formal dogmas, deprived of vital effects inefficacious for good, but cumbering the ground, and

[4] Ibid.
[5] Ibid., 22.
[6] Ibid., 31.
[7] Ibid., 63.
[8] Ibid., 97.

preventing the growth of any real and heartfelt conviction, from reason or personal experience'.[9]

3. Liberalism and Democracy

The relationship between liberalism and democracy is an ambivalent one. On one hand, democracy and liberalism converge on the level of values. 'One man, one vote' – one of the most basic democratic principles – and the inclusion of those affected by collective decisions and actions into the decision making processes exemplify the liberal idea of equality of individuals and their equal moral worth.[10] The freedom of expression becomes particularly important, since otherwise the free and equal individuals cannot voice their individual preferences and autonomous choices, which can be aggregated fairly in the society, or – according to deliberative democratic theorists – the individuals cannot contribute to collective judgements, which should be reached by argument and persuasion rather than be imposed by elites.[11] Moreover, as a matter of empirical observation, democracies seem to have better record when it comes to protection of individual rights – cherished by liberals – than other, especially authoritarian forms of government.[12]

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[9] Ibid., 98.

[10] See Mark E. Warren, 'Democracy and the State' in *The Oxford Handbook of Political Theory*, ed. John S. Dryzek, Bonnie Honig, and Anne Phillips (Oxford: Oxford University Press, 2006), 382–399, 383-394; Talisse (supra note 1), 24; The fact that in a democracy, the 'free and equal citizens' are the source of political power is emphasised by John Rawls, *Political Liberalism*, Expanded Edition (New York: Columbia University Press, 2005), 137 and 217. Democracy and Liberalism are however juxtaposed by John Skorupski, 'Rawls, Liberalism, and Democracy' *Ethics* 128 (2017): 173–98, 178.

[11] See Talisse, (supra note1), 23 and 81; Warren, (supra note 10), 391.

[12] See Ian Shapiro, *Politics against Domination* (Campridge MA & London: The Belknap Press, 2016), 68 et seq. arguing that democratic government is the best protector against domination.

But on the other hand, when it comes into translating basic values into political arrangements, the decision-making by a majority entails risks for the outvoted minority; democracy understood as a rule of the majority may turn to a tyranny of majority, in which the rights of individuals are not respected.[13] Therefore, in liberal democracies the individual and the state are juxtaposed: A government in a liberal democracy is a limited government respecting individual rights – an idea traceable to John Locke.[14] The latter are safeguarded by multiplication of veto points designed to counter the political action of the majority. This is also where the separation of powers comes in and the role of courts and judicial review becomes important.

In this sense, the liberal democracy as a political arrangement does not reflect a comprehensive political philosophy,[15] but is rather a result of an on-going struggle between the liberal tradition on one hand and the democratic tradition on the other: Whereas the former in classical form emphasises the individual freedom and personal self-determination as a source of a normative order, the radical democrats point to the supremacy of the general will, through which the individuals become citizens of a

[13] See most notably Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition of De La Démocratie En Amérique*, ed. Eduardo Nolla, trans. James T. Schleifer, vol. 2 (Indianapolis: Liberty Fund, 2010), 412 ('I believe liberty is in danger when this power encounters no obstacle that can check its courser and give it time to moderate itself'). But see also the critical analysis in Shapiro, Politics (supra note 12), 68 and 78-79.

[14] John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Hanckett Publishing Company, 1980), paras. 139 and 149, see also the editor's introduction p. vii et seq.

[15] As a matter of political theory, it was John Rawls, who attempted the most notable fusion of the democratic and the liberal tradition, in which free and equal citizens, whose political power is rooted in a public reason, engage in a social cooperation on fair terms. See in particular Rawls, (supra note 10), 290-301.

democratic republic and acquire rights which they did not have before.[16] Keeping this tension alive and accommodating the liberal standpoint in constitutional arrangements aims at assuring that the democracy does not degenerate into a populist autocracy.

4. Liberalism, Democracy and East Africa

In East Africa, the liberal concept of democracy, as outlined above has been facing two types of challenge; the first type of challenge may be dubbed 'philosophical' while the other one is of a socio-economical nature.

4.1. The philosophical challenge

It was Jomo Kenyatta – and the country's first president –, whose views appear to be on the opposite to what the liberals hail as primacy of the individual. Kenyatta's political stance, which eventually calls into question this very fundamental liberal assumption, is informed by his anthropological views. According to the first Kenyan president the 'African society traditionally revolves around the family tree, the wider pattern of blood and brotherhood, and the wider network of clans and tribes'.[17] To an African 'The traditional tribal council was at once a Government and an expression of the very personality if each and every citizen'[18]. Kenyatta goes on to explain, that 'by obeying the Tribal Councils the people maintained that they obeyed themselves and their true will'.[19] He further seems to reject

[16] See Skorupski, (supra note 10), 175 and 177.
[17] Jomo Kenyatta, *Suffering without Bitterness: The Founding of the Kenya Nation* (Nairobi: East Africa Publishing House, 1968), 229.
[18] Ibid.
[19] Ibid.

the idea of limited government claiming that 'We do not subscribe to the motion of the Government and the governed being in opposition to one another, the one clamouring for duties and the other crying out for rights'.[20]

Julius Nyerere of Tanzania takes a similar position. According to him '[the] African has always been a free individual, but seeing no conflict between his own interests and those of his community. This is because the structure of his society was, in fact, a direct extension of his family. First you had a small unit; this merged into a larger 'blood' family, which in its turn merged into a tribe'.[21] Clearly, the authors of these words do not look at societies as at voluntary associations of individuals. Quite on the contrary, it is the embeddedness of the individual in the society and the obedience to its traditional authorities, which helps the individual to her true self. However, Nyerere also points out that the affairs of the community were traditionally conducted in 'free and equal discussion'.[22] Hence, he does not seem to regard his model of an 'African community' as being completely at odds with liberal ideals.

Most obviously, liberalism is not the only school of thought shaping today's democracies. Originating from the mid 1960's, the quotations of Jomo Kenyatta to some extent coincide with the ideas underlying the communitarian concept of democracy, still very much alive in the contemporary political thought. According to scholars in the communitarian tradition, the liberalism misreads the social

[20] Ibid., 227.

[21] Julius Nyerere, *Freedom and Unity - Uhuru Na Umoja. A Selection from Writings and Speeches 1952-65* (Dar es Salaam: Oxford University Press, 1966), 105 and 170.

[22] Ibid., 105.

nature of individuals.[23] What constitutes individuals, as beings are collective norms and practices and characters; those norms are the true 'sources of the self'; they supply the life with *telos*, meaning, and value.[24] Consequently, individual rights are subordinated to collective conceptions of good, of which the sense of belonging is the most basic.[25] The role of the state is not just harm avoidance, but empowerment of its citizens.[26] Thus, in a nutshell, while individuals make societies according to the liberal view, the communitarian view holds that it is the other way round: it is the societies which 'make' individuals. As Michael Sandel emphasises, justice is not about maximising utility or respecting freedom of choice, as the liberals would want to; rather, it requires 'to reason together about the meaning

[23] On the communitarian tradition see generally, Talisse, (supra note1), 21 et seq. and Ian Shapiro, *The Moral Foundations of Politics* (New Haven: Yale University Press, 2003), 151 et seq.

[24] This element of communitarian tradition is emphasised by Shapiro (supra note 23), 170; see also most notably Alasdair MacIntyre, *After Virtue. A Study in Moral Theory*, 3rd ed. (Notre Dame, Indiana: University of Notre Dame Press, 2007), in particular 33-34, 112, 135, 258. According to MacIntyre, there is an objective conception of good forming a basis for the authority of virtues and law; it is entrenched in the relationships within a given community as 'fragmented survivals from the past'. And it is a membership in the community, which provides the individuals with the understanding of such a conception. The individual occupies a certain space within a set of social relationships. According to MacIntyre 'to know oneself as such a social person is however not to occupy a static and fixed position. It is to find oneself placed at a certain point on a journey with set goals; to move through life is to make progress – or to fail to make progress – toward a given end' (at 34).

[25] See Shapiro (supra note 23), 153, 177 with further references and 183 ('We might say that ''I belong, therefore I am'' is the communitarian alternative to the Cartesian cogito'), see also Talisse, (supra note 1), 24 and 93.

[26] See generally Talisse, (supra note1), 24 and 93. As stressed by Michael Sandel, a leading communitarian tradition scholar, 'If a just society requires a strong sense of community, it must find a way to cultivate in citizens a concern for the whole, a dedication to the common good' Michael J. Sandel, *Justice. What Is the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2010), 485.

of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise'.[27]

Siding with what one would call today a communitarian view in terms of political morality, Jomo Kenyatta – as opposed to Nyerere – does not advance radical economic solutions. In particular, he does not deny to the individual the property rights. For him, the need for protection of property rights does not originate from the human nature, but is rather a question of necessity; acknowledging that private property is an element of pride and hard-won freedom, Jomo Kenyatta warns that lack of respect for it would lead to 'utter chaos, total injustice, destruction of the state'.[28] And even if Kenya did not eventually embark on communist experiments, Kenyatta's take had to face the challenge from his influential former independence struggle comrade Jaramogi Oginga Odinga, who put forward a much more radical programme, including nationalisations. Following a split with Kenyatta, Odinga established his own party – the Kenya People's Union (KPU), which was eventually abolished by the government in 1969.[29]

In the course of history, the Kenyan reality exposed some risks of the communitarian view.[30] The emphasis on respect

[27] Sandel, (supra note 26), 480-481.

[28] Kenyatta, (supra note 17), 310.

[29] See William Ochieng, 'The Kenyatta, Odinga and Mboya Wars: 1963-1969' in *A History of Independent Kenya. A Celebration of Kenya's Fieftieth Aniversary*, ed. William Ochieng (Kusumu: Lake Publishers and Stationers, 2013), 55-57.

[30] Ian Shapiro points out that '[…] claims of the form ''the American people believe'' or ''the Jewish people must stand together'' may be attempts to mobilize group support vis-à-vis an out group, but they can also operate to suppress internal dissent and opposition' and further '[i]n practice, ''respecting traditional communal practice'' may amount to validating a system of internal oppression that would be difficult to justify on any grounds other than blunt appeal to existing practice'. See Shapiro (supra note 23), 183. The developments

of communal norms, practices and authorities was translated into a authoritarian and later even dictatorial rule, which – as it will be explained – came to an end only in 2002. Another Kenyan characteristic, which the communitarian perspective does not adequately address, is the lack of *the* only one single collective national identity, the one sense of belonging, which supplies the life with meaning. Being a multi-ethnic society,[31] the national 'Kenyan' collective identity has always coexisted, even if not necessarily competed, with the 'ethnic' one. Jomo Kenyatta and his successor in office Daniel arap Moi addressed the plurality of identities emphasising the need of the nation-building project and its prevalence over tribal divisions.[32] Yet, the political practice was to a large extent at odds with this approach.[33] The ethnicity-based inclusion of some individuals into the circles of power has led to exclusion of others; and ethnic mobilisation of communities not once ended up in a dramatic political unrest.[34]

in Kenya and Tanzania support Shapiro's point; the hospitability to disagreements postulated by Sandel kept dwindling with time.

[31] In Kenya, the five largest ethnic groups constitute 70% of population, whereas in Tanzania the largest ethnic group accounts for 13% and this is the only group, whose share in the Tanzanian population exceeds 5% - see East Africa Living Encyclopaedia available africa.upenn.edu. The multitude of smaller ethnic groups could be one of the reasons, why ethnic identity in Tanzania has not competed with the national identity to such a large extend as it did in Kenya.

[32] See Kenyatta, (supra note 17), 310; Daniel arap Moi, *Kenya African Nationalism: Nyayo Philosophy and Principles* (Nairobi: MacMillan, 1986), 21.

[33] See Pius O. Cokumu, 'Jomo Kenyatta and the Politics of Transition, 1866-80' in *A History of Independent Kenya. A Celebration of Kenya's Fieftieth Aniversary*, ed. William Ochieng (Kusumu: Lake Publishers and Stationers, 2013), 87. On the practices of the Moi regime see further below.

[34] The 2007/2008 Post-Electoral Violence, which left around 1,100 people killed and thousands displaced is perhaps the best-known example.

4.2. The socio-economic challenge

Going through the thoughts of Kenyatta and Nyerere, one is inclined to conclude that according to both statesmen, the liberal ideology is simply at odds with social and economic necessities in the region, especially with those, which prevailed on independence in the early sixties. As Kenyatta claimed, 'the evils of colonialism and imperialism left mass poverty, illiteracy, disease and ignorance in our midst'.[35] Nyerere's diagnosis of Tanganyika is not different.[36] However, Nyerere seems to be more explicit on what he regards as gross economic inequalities. In his account on the early years of independence, Nyerere observes that the economy was based on subsistence agriculture, in which the masses of people were living 'a life of poverty and insecurity […], while a small number of farmers from Europe were obtaining a comfortable life – often at expense of their exploited workers'.[37] This is attributed to the policies during the colonial era, when the society 'was organised so as to separate people form different races, give privilege to those of European origin, and make the African people feel that they were inferior'.[38]

Those socio-economic conditions prevailing in the first decades after independence were invoked to cast doubt on

[35] Kenyatta, (supra note 17), 310.
[36] Julius Nyerere, *Freedom and Development - Uhuru Na Maendeleo* (Dar es Salaam: Oxford University Press, 1973), 296 ('[W]e inherited a society which was basically illiterate, and where the number of people with even secondary school education was very small indeed. Thus, for example, in 1961 there was a total of only 11,832 children in the secondary schools in Tanganyika and only 176 of them were in the Sixth form!'.
[37] Ibid., 264.
[38] Ibid., 266.

the relevance of political rights in African context.[39] Instead, the imperative of development carried the day. According to the underlying ideology of developmentalism, the economic development was to take precedence over everything; the politics – and one must also add individual political freedoms – were regarded as at best secondary in relation to economic development; politics was to be replaced by government.[40] In a situation of little control of capital and skills, the government was seen as an economic resource, perhaps even as the most important one. According to Kenyatta 'Through this Government the African controls and directs land use, commerce and industry, power and communication, finance and employment. If we weaken the Government, we weaken the only major force for African advancement'. The party was regarded as another important resource; praising the idea of a 'one-party democracy', Nyerere observes that allowing for competition of different political organisations 'the nation was wasting one of the few resources it had – a mass organisation which the people trusted and through which they could both express their views and co-operate with the projects being executed through the state machinery'.[41] Kenyatta also supports the idea of a one-party state, claiming, however, that such a state does not have to be authoritarian; he does not oppose multi-

[39] Claude Ake juxtaposes human rights in 'procedural liberal sense' with those in 'concrete socialist sense', Claude Ake, 'The African Context of Human Rights' *Africa Today* 34 (1987): 5–12, 7; see also Reginald Herbold Green, 'Vision of Human-Centred Development: A Study in Moral Economy' in *Mwalimu. The Influence of Nyerere*, ed. Colin Legum and Geoffrey Mmari (London: James Currey, 1995), 80.
[40] Gamaliel Mgongo Fimbo, *Multipartyism, Constitutions & Law in Africa* (Dar es Salaam: lawAfrica, 2013), 21.
[41] Nyerere, (supra note 36), 275.

partism in principle, but does not regard it as fitting into Kenyan conditions at independence.[42]

Nyerere is generally more radical than Kenyatta. Whereas Kenyatta declares respect for private property,[43] Nyerere makes very far-reaching claims obviously inspired by the communist ideology. Even if he asserts that the term development in its proper sense means 'a growth for a people in freedom, and a growth of a society, which upholds and protects that freedom',[44] he does not equate the 'freedom' with primacy of individual in the liberal sense. He means 'development of justice' among the people and links it with socialism, rather than with a democracy; he also regards socialism and freedom as 'indivisible'.[45] A political democracy under conditions of gross economic inequalities, which according to Nyerere were prevailing in the early independence years, is 'at best imperfect and at worst a hollow sham'. Freedom for Nyerere seems to be in first instance freedom from economic exploitation.[46] Nyerere's political imperative was therefore to 'prevent the growth of a class structure in our society'.[47] Accordingly, Nyerere wants to embark on a state-led formative project of 'building socialism' which does not only entail a complete transformation of the economy, but also – and here the contrast to the liberal approach cannot be more striking – some sort of a mind-set transformation; for Nyerere it is not

[42] Kenyatta, (supra note 17), 227 and 231.
[43] Kenyatta, (supra note 17), 310.
[44] Nyerere, (supra note 36), 259.
[45] Ibid.
[46] James S. Read, 'Human Rights in Tanzania' in *Mwalimu. The Influence of Nyerere*, ed. Colin Legum and Geoffrey Mmari (London: James Currey, 1995), 132.
[47] Nyerere, (supra note 21), 210

only about 'building socialism' but also ensuring that the people 'act like socialists'.[48] In his view, due to the fact that the 'productive forces' are developed only to a little extent 'a revolutionary consciousness is not developing in a spontaneous manner. It has to be induced from above by a political leadership that is willing and anxious to overthrow remnants of the past'.[49]

The entire developmentalist ideology – as implemented both in Kenya and even more in Tanzania - seems to rely on an unwritten assumption that liberal democracy entails economic costs, thus putting development at risk. From today's perspective, the empirical evidence suggests that rather the opposite is true.[50] Back then however, the liberal idea of limiting the government or countering the government action through various veto players for the sake of individual rights was at odds with the prevailing paradigm of a government-led development.

4.3. Political consequences

The idea of government and party based development ushered in a concentration of power in the executive, which was controlled by a monopolist party.[51] The 'executive presidency' became soon an 'imperial presidency'. In addition, according to what the leaders declared, achieving

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[48] Nyerere, (supra note 36), 284-285

[49] Cited after John J. Okumu, *Politics and Public Policy in Kenya and Tanzania* (New York: Praeger Publishers, 1979), 107.

[50] Shapiro (supra note 23), 165 with further references.

[51] In Tanzania the one-party system was officially introduced in 1965. In Kenya the KANU established itself as a *de facto* one party regime in 1969. It was sanctioned by a constitutional amendment in 1982. See William Tordorff, *Government and Politics in Africa*, 4th ed. (Houndmills and New York: palgrave macmillan, 2002), 110.

some sort of national unity appeared more important than promotion of individual freedom, as a core postulate of liberalism. In Kenya, the national coherence and unity was meant to overcome tribal divisions; in Tanzania it was more about avoidance or eradication of class cleavages. The practical result was a dictatorship, of which both states were held in grip for a long time. There were no serious veto players. Also the judiciary, whose independence guarantees were systematically eroded, abdicated as a protector of individual rights against the ruling party elite.[52] The independence constitution, being a product of negotiations between a part of Kenyan elites with the colonisers lacked the necessary authority and its guarantees were soon watered down or abolished through a series of constitutional amendments.[53] The imperial presidency was fully established under Kenyatta's authoritarian rule before he died in 1978.[54]

But the most difficult days for Kenya's democracy were yet to come. Jomo Kenyatta's successor, president Daniel arap

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[52] See Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' *Human Rights Quarterly* 23 (2001): 96–118, 101; Joe Oloka-Onyango, 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View' *The George Washington International Law Review* 47 (2015): 763–823, 774-775. Both authors emphasise that the tradition of a subdued judiciary has its roots in the colonial era. According to Oloka-Onyango 'the judiciary viewed itself much more as an appendage to the goals of achieving colonial (in)justice than as a bastion for the protection of the indigenous population', ibid., 774. See further Gordon Obote-Magaga, 'The Nyayo Era & Single Party: 1978-2002' in *A History of Independent Kenya. A Celebration of Kenya's Fieftieth Aniversary*, ed. William Ochieng (Kusumu: Lake Publishers and Stationers, 2013), 131 et seq. with further references. For 'many particularly shocking instances of judicial timidity and complicity with the executive' during the Moi regime era, see Mutua, ibid., 114 et seq.

[53] See PLO Lumumba and Luis G Franceschi, *The Constitution of Kenya, 2010. An Introductory Commentary* (Nairobi: Strathmore University Press, 2014), 30 et seq.

[54] See Cokumu (supra note 33), 87 et seq.

Moi installed in Kenya a quite harsh dictatorship, especially in the period following the attempted military coup in 1982. Political criticism was supressed, the security of tenure of judges and civil servants removed and Moi's political opponents oppressed, detained – often without trial – and terrorised.[55] Ironically, Moi championed an official state ideology of 'peace, love and unity' called Nyayo – a Kiswahili word for 'footsteps'. It was the footsteps of Jomo Kenyatta which were to be followed.

Officially, the Nyayoism aimed at 'continuous process of the consolidation of the elements which integrate people into a common wholeness'. This was according to Moi an important task to fulfil, since, as Moi pointed out, 'throughout the colonial period Kenya was never a nation'. The state was to be engaged in 'continual upgrading and achieving of the sense of commitment to a common goal'; Kenyans had to share 'a cause for togetherness', 'identify common principles' and develop 'a common philosophy of life'. Needless to say, this is not liberal, but also not for what the scholars in communitarian tradition advocate: the civic virtues should be forged through public engagement with moral disagreements,[56] and not through imposition of one particular state-sponsored philosophy of life. Moi's profoundly anti-liberal programme emphasised integrative, trans-tribal forces. Yet in practice, especially after return to a multi-party system in 1991, in order to stay in power, Moi incited violent clashes between ethnic communities which

[55] Obote-Magaga, (supra note 52), 127-130.

[56] See Sandel, (supra note 26), 495. The difference to the liberal approach lies in the fact that latter leaves moral convictions to the citizens, and, as a matter of the constitutional set-up, looks only for an overlapping consensus among those convictions.

left – according to different estimations – between 1000[57] and 3000[58] people dead; the Nyayo ideology actually became what John Stuart Mill thought that would happen to uncontested opinions: a mere prejudice without vital effects. The so-called 'negative ethnicity' mobilised by politicians led to the post-electoral violence of 2007/2008.[59] Also today, the Kenyan politics is organised along ethnic cleavages and the dominant ethno-centric narrative competes with the liberal idea of the primacy of the individual. Regarding the development paradigm under Moi, it is best summarised by the words of one of his ministers and close confidents: 'So much time is wasted for elections, while people should be engaging in development'.[60]

While Kenya remained a market economy, Tanzania underwent an attempt of a Marxist or even Maoist redesign of the society. The agenda for it was set in a so-called Arusha declaration of 1967 made by the central committee of the ruling party. It included nationalisation of economy.[61] The state was to become the major supplier, as – according to Nyerere – private sector cannot provide services affordable to poor people. The vocabulary became militarised and could not have been further from Mill's harm principle justifying state action. The state embarked

[57] According to Obote-Magaga, (supra note 52), 129.
[58] According to Kibe Mungai, 'The Law and Ledership - The Post-Colonial Experience in Kenya' in *Governance and Development. Towards Quality Leadership in Kenya*, ed. Kimani Njogu (Nairobi: Twaweza Communications, 2007), 84.
[59] See supra note 34.
[60] Cited after Mungai, (supra note 58), 77.
[61] On nationalisations in Tanzania see generally Chris Maina Peter, *Foreign Private Investments in Tanzania. A Study of the Legal Framework* (Konstanz: Hartung-Gorre Verlag, 1989), 20 et seq.

on a 'war against poverty'[62], the economic policies were designed as 'frontal attacks' and 'operations' and raising agricultural production became a 'matter of life and death'.[63] The redesign of the society did not go without human rights violations. An example is the villigisation programme aiming at establishment of so-called ujamaa villages where people were supposed to live and work on state-owned farms. Between 1973 and 1976, around 10 million people had to leave their homes and were forcefully moved to work on the ujamaa farms,[64] whose economic efficiency turned out to be very low and environmental impact (land degradation) precarious.[65] On the political plane, the ruling party's control was omnipresent; the local boards of the party were overseeing judiciary and the party also installed a parallel system of arbitrage. In 1983, the National Anti-Economic Sabotage Tribunal was established. It could impose harsh penalties for certain economic 'crimes', such as 'hoarding of commodities' under very weak procedural safeguards for the defendant.[66] The political opponents were oppressed using a Preventive Detention Act and according to the Tanzanian Penal Code 'intimidation of the Executive, Legislative or Judiciary of the United Republic' amounted to high treason and was

[62] Nyerere, (supra note 36), 286.
[63] See Okumu, (supra note 49), 107.
[64] Read, (supra note 46), 133. According to Donatus Komba, 'Contribution to Rural Development: Ujamaa & Villagisation' in *Mwalimu. The Influence of Nyerere*, ed. Colin Legum and Geoffrey Mmari (London: James Currey, 1995), 40; by mid 1976 nearly ninety per cent (!) of the Tanzanian population was settled in the ujamaa villages.
[65] Komba, ibid.; see also Idris S. Kikula, *Policy Implications on Environment. The Case of Villagisation in Tanzania* (Dar es Salaam: Dar es Salaam University Press, 1996), 211-213.
[66] Read, (supra note 46), 134-135.

punishable by death.[67] Clearly and ironically, 'soon after independence, African governments talked of the threats to the integrity of their states as well as their plans for development as justification for authoritarianism, when not long previously they had demanded independence and human rights for the people from the colonies'.[68]

4.4. Back to liberal democracy?

4.4.1. Political change

In the early nineties, Kenya and Tanzania were engulfed by the 'democratisation wave sweeping across Africa'.[69] The wave was triggered by a combination of internal and external factors: The fall of communism in Central and Eastern Europe and the Western donors conditionality approach linking financial assistance to the respect of human rights and democratic principles added to the frustration of African citizens with oppressive and corrupt regimes, delegitimised by economic decline and appalling human rights record.[70]

As Obote-Magaga puts it, 'despite the [Moi] regime's authoritarianism, the call for change never died amongst Kenyans'.[71] The national pressure groups were already formed in the eighties and the society's clamour for democratisation supported pressure of donors culminated in

[67] Fimbo, (supra note 40), 64.
[68] Yash Ghai, 'Constitutionalism: African Perspectives' in *The Gallant Academic. Essays in Honour of H.W.O. Okoth Ogendo*, ed. Patricia Kameri-Mbote and Collins Odote (Nairobi: University of Nairobi, 2017), 153.
[69] Tordorff, (supra note 51), 197.
[70] Tordorff, (supra note 51), 198 and Mungai, (supra note 58), 78.
[71] Obote-Magaga, (supra note 52), 128.

1991 the repeal of section 2(a) of the constitution;[72] a provision enacted in 1982 turning Kenya to a *de jur*e one party state. Yet, the 1991 events dubbed 'second liberation' did not lead to the change of the regime. The latter responded 'adopting forms and not substance of democracy'.[73] Moi remained in power until 2002 and it was only in 2010 that after a long and cumbersome process, full of dramatic twists,[74] that Kenyans passed a new constitution, which according its preamble recognises 'the aspiration of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice, and the rule of law'.

In Tanzania, the post-Arusha declaration policies led to an economic disaster and were abandoned in mid-eighties.[75] The introduction of a multi-party system came not without resistance in 1992; it was – differently than in Kenya – driven more by the ruling elite than by the general clamour for democracy, and one of the substantial reasons for abandoning a one-party system was pressure by foreign donors.[76] The Tanzanian President appointed a commission under the chairmanship of Chief Justice Francis Nyali (the so called Nyali-Commission), which was tasked to

[72] Peter O. Ndege, 'Multi-Partyism and the Struggle for Constitutional Change, 1991-2002' in *A History of Independent Kenya. A Celebration of Kenya's Fieftieth Aniversary*, ed. William Ochieng (Kisumu: Lake Publishers and Stationers, 2013), 141.
[73] Mungai, (supra note 58), 81.
[74] See PLO Lumumba and Luis G Franceschi (supra note 53), 41-49.
[75] In mid-eighties the salaries in public sector stood at only 20% of what they had been in the seventies and the inflation stood at 30%; the standards of living in general fell by 40-50% and the country's foreign reserves by 70%. See Kivutha Kibwana, Chris Maina Peter, and Joe Oloka-Onyango, eds., *In Search of Freedom and Prosperity. Constitutional Reform in East Africa* (Nairobi: Claripress, 1996). 36-37.
[76] Ibid., 37.

deliberate on the question of 'one or many parties'; the commission recommended the introduction of a multi-party system although, according to its records, 80% of Tanzanians preferred a one party system advocated by Nyerere.[77] Nyerere himself stepped down as a president in 1985 and as party chairman only in 1990. By 1992, opposition parties were of no political significance. Although Tanzania's presidents always observed the two-terms rule, the country's 'cautious democracy moves'[78] have up to now not produced any change of regime in sense of replacing the ruling party by an opposition party, even though the opposition parties are currently firmly established. Also, the constitution in force is still an amended document from 1977. An elite-driven, but at least initially inclusive constitution-making process was set in motion in 2011, but collapsed under allegations of being hijacked by the top-ranks of the ruling party in 2015.[79]

4.4.2. Constitutional setting

Both constitutions – the Kenyan and the Tanzanian – as they stand now, may be regarded as embracing the liberal principles; the former, however, to a much greater extent as the latter.

The Kenyan constitution of 2010 contains an extensive bill of rights combined with robust judicial review, which incorporates the idea of public interest litigation; accordingly, the access to the court is not dependent on a

[77] Ibid., 38.
[78] Ibid., 39.
[79] See Edwin Babeyia, 'New Constitution-Making in Tanzania: An Examination of Actors' Roles and Influence' *African Journal of Political Science and International Relations* 10 (2016): 74–88, 86.

personal grievance.[80] In applying the Bill of Rights the courts should also 'develop the law' when it does not give effect to individual rights and adopt interpretation that most favours the enforcement of fundamental rights and freedoms (Article 20 (3)(a) and (b)); Article (20)(4) directs the courts to promote the 'values that underlie an open and democratic society based on human rights, dignity, equality, equity and freedom' as well as 'the spirit, purport and objects of the Bill of Rights'; according to the directive of Article 259 (1)(b), the entire constitution shall be interpreted in a manner that 'advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights'. Further, the 2010 Constitution associates itself with the liberal idea of individual rights preceding statehood, proclaiming (Article 19 (3)(a)) that the rights and fundamental freedoms in the Bill of Rights 'belong to each individual and are not granted by the State'. Although the Constitution adopts a presidential model of government, it does not leave the executive branch unchecked. One may even claim that the numerous safeguards against tyranny, independent offices and commissions are a striking feature of Kenyan constitutionalism.

Yet, the emphasis on the individual rights has its limits. In a bid to strike some balance between individualism and communitarian commitment to tradition, at least in two instances the constitution looks at individuals not through the prism of their primacy, but as members of certain rural communities. Firstly, it gives a lot of space to traditional dispute resolution mechanisms; the promotion of such mechanisms is declared as one of the principles for

[80] See in particular Article 22 (2)(c) of the Kenya 2010 Constitution.

exercising of judicial authority.[81] And even if the constitution restricts the use of such mechanisms, so that might not be used in a way that contradicts the Bill of Rights, is repugnant to justice an morality or is inconsistent with the Constitution or any written law,[82] there is no legislation in place, which would operationalize this caveat. Secondly, the constitution acknowledges community land ownership, which involves jurisdiction over community land to be exercised according to long standing customs.[83]

Due to failure to adopt a new constitution in Tanzania, a declaration of core liberal values, which would be as powerful as Kenya's 2010 constitution, is not in place; a clear signal that the illiberal practices belong to the past has not been sent. The current constitutional framework in Tanzania is based on the amended 1977 constitution, which has some built-in tensions: On the one hand it embraces some liberal ideas, defining in Article 9 Tanzania as a nation of 'equal and free individuals'. On the other hand, the very same provision places the enjoyment of 'freedom, justice, fraternity and concord' under the caveat of a state ideology, namely the pursuit of the policy of 'Socialism (Ujamaa) and Self-Reliance' and 'application of socialist principles'.[84] On the one hand, Article 9 obligates the state to ensure that 'human dignity and other human rights are respected and cherished' and 'preserved and upheld in accordance with the

[81] See Article 159 (2)(c) of the Kenya 2010 Constitution.
[82] Article 159 (3) of the Kenya 2010 Constitution.
[83] Article 63 of the Kenya 2010 Constitution.
[84] The definition of Socialism or Ujamaa (the equivalent Kiswahili term) is in itself quite ambiguous. According to Article 151 of the Tanzanian Constitution, socialism stands for 'the society's life principles for building a Nation that observes democracy, self reliance, freedom, equality, fraternity and unity of the peoples of the United Republic'.

spirit of the Universal Declaration of Human Rights', but on the other hand Article 30 suggests that the human rights are subordinated to the 'public interest'. The latter provision seems to work as a limitation clause, but its wording is unusual. Rather than authorising the government – acting in public interest - to limit the rights and freedoms of individuals under certain conditions (e.g. proportionality), it prohibits 'a person' from exercising those rights and freedoms 'in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest'. This may be read as imposing on an individual a burden of proof that she exercises her rights and freedoms in line with the public interest. The balance between the individual rights and freedoms and the public interest is thus struck quite differently than in the case of the Kenyan constitution. Also, the Public Interest Litigation is not explicitly embraced in the Tanzanian legal order. Although Article 26 (2) generally stipulates that 'every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land', article 30 (3) provides for a right to institute proceedings in the High Court only 'concerning his right or duty owed to him'.[85] Yet, as explained in the following section, the Tanzanian, judiciary did adopt a restrictive stance, which the wording of the cited provisions seems to imply.

[85] Similarly, the Basic Rights and Duties Enforcement Act – BRADEA (Act 33 of 1994) provides for a legal action only when a provision of the Bill of Rights 'is being or is likely to be contravened in relation' to the petitioner.

4.4.3. Examples from the judicial practice

Both Kenyan and Tanzanian courts adopted quite resolute stance acting as veto players on many occasions, the Kenyan Supreme Court decision of the 1st of September 2017 annulling presidential election being perhaps the most striking example. But also apart from this judgement there are numerous cases, in which the judiciary lived up to its task as a protector of individual freedoms; the following section will depict some examples, in which the reasoning of judicial decisions advance liberal positions. These examples do not purport to paint a full picture, for which a comprehensive study, going beyond the scope of the present paper, would be necessary. Obviously, there are decisions, which clearly do not regard the individual as an 'end in itself'.[86] The point here is rather to demonstrate that the Kenyan and Tanzanian judiciary are capable of playing a role of a credible protector of individual liberty and a free public debate as envisaged by the liberal concept of democracy.

Looking at those examples one must be aware of difficult conditions under which the Kenyan and Tanzanian courts

[86] In the case COL & GMN v. Resident Magistrate Kwale Court & 3 others [2015] eKLR, the High Court of Kenya had *inter alia* to determine, if a court order of forced anal examination to find out whether the accused committed an offence of having carnal knowledge against the order of nature – this is the term the Kenyan Penal Code uses for homosexual contacts between males (see below) – amounts to a degrading treatment, prohibited by Article 25 of the Kenyan Constitution. The High Court denied this. For the judge, a forced anal examination is an examination as any other. The judge points out that in case of sexual act an examination of the vagina and in case of sodomy (this is the term the judge actually uses) – of the anus is the only way to find out, if the acts were committed. In this ruling, the autonomy of individual is a non-issue. The court does not look at the individual rights of the accused and the reasons to restrict those rights; it does not even identify any rationale of penalising homosexual acts and consequently, it does not balance it against the need to preserve human dignity.

embark on the role of freedom guardians. The difficulty starts with judiciary's colonial heritage and it is one of a subdued judiciary, of an institution designed to enforce the interests of colonial powers, rather than protecting Africans from power abuse, and whose shape did not change much at independence.[87] As the present account suggests, the years of one party rule in Kenya and in Tanzania did not contribute to its assertiveness; the trend was rather to strengthen the executive power than confront it with veto players. Also today, the judiciary faces a style of governance, which is sometimes still at variance with the concept of a liberal democracy. This is particularly true for the attitude of the current Tanzanian government of President John Pombe Magufuli to the freedom of speech and freedom of assembly: the broadcasting of parliamentary proceedings was stopped, political rallies were banned, numerous magazines were shut down, the journalists are harassed by the police, over 400 members of the main opposition party were arrested within the past two years and one prominent critic of the president was subject to an assassination attempt.[88] John Stuart Mill would now perhaps

[87] The courts kept being partly manned by the so-called 'expatriate judges' for years. See Oloka-Onyango, (supra note 52) p. 774.

[88] See the report of the regional weekly 'The EastAfrican' (No. 1196, 2017 September, 30 – October, 6) titled 'Governance crisis: State of democracy'). See also the statement of International Press Institute of 2017 May, 9th ('Tanzanian President John Magufuli's aside on 'limits' of press freedom raises fears'), available at http://ipi.freemedia.at. One of the recent examples of a newspaper ban concerns the newspaper Mwanahalisi suspended for 2 years for publishing a letter saying that Magufuli 'claims to be a patriot but questions the patriotism of anyone who opposes him. This is hypocritical' (see Daily Nation (Nairobi), 2017 September, 17th). On Magufuli's crackdown on LGBT persons accompanied by harassment of NGO's and advocacy groups. See the 'Washington Post' report 'Tanzania suspends U.S.-funded AIDS programs in a new crackdown on gays', 2016, November, 23rd.

ask how Tanzanian history could be made remarkable, if so much of mental activity is supressed?

But also the state of liberal democracy in Kenya is a cause for concern. Only recent media reports quote excessive police violence, verbal attacks on independent institutions set up by the 2010 constitution, especially on the Supreme Court following the latter's decisions on annulment of August 2017 presidential polls, unconstitutional ban on foreign travels for all public servants including university lecturers and attempts to change electoral laws four weeks before the polling day.[89]

Yet, the picture becomes less distressing, if one takes a look at the judiciary.

Generally speaking, there is not much case law available related to the recent attempts to suppress the freedom of expression in Tanzania. One example of a court decision opposing such attempts is the ruling of Resident Magistrate's Court in Arusha in the case *Republic v. Allan Harold Mbando*.[90] The defendant was accused on the basis of a section 16 of the 2015 Cybercrimes Act, a draconian provision designed to curb any opinion, which displeases the government. It reads as follows:

> 'Any person who publishes information, data or facts presented in a picture, text, symbol or any other form in a computer system where such information, data or fact is false, deceptive, misleading or inaccurate commits an offence, and shall on conviction be liable to a fine not less than three million shillings or to imprisonment for a term not less than six months or to both'.

[89] See 'The EastAfrican'(supra note 88). See also the Nairobian 'Sunday Nation' of 2017 October, 1st.

[90] *Republic v. Allan Harold Mbando,* Criminal Case No. 141 of 2016.

The defendant was charged for publishing 'misleading information relating to political affairs of the United Republic of Tanzania' on a social media portal. He wrote: 'The son of Munyage should overthrow the government, for it cannot be that people are left out of power'.[91] Even though the High Court dismissed the charge, it did not purport to be a defender of the freedom of expression. It merely stated that the law does not refer to such 'trivial issues' and 'no court, worth a name, can hold the evidence available to have made a *prima facie* case against the accused person'. In another case, [92] the High Court of Tanzania quashed a provision of the very same Cybercrimes Act, which authorised the Director of Public Prosecutions (DPP) to impose fines for a violation of the Act's provision in case of 'a voluntary admission of the commission of offence under this Act', however, excluding the right to appeal against the DPP's decision. The High Court established a violation of the right to be heard. The section 16 of the Cybercrimes Act cited earlier was not challenged in this case and it still remains on the statutes book.

And it was the Tanzanian courts, which in much quoted jurisprudence paved a way for application of East African constitutions in the spirit of liberalism. In 2001, in the case *Julius Ishengoma Francis Ndyanabo v. The Attorney General*[93] for example, the Court of Appeal of Tanzania

[91] The Kiswahili word 'Munyage' could be a designation of a person or a place. The court itself held that it is not clear, to whom exactly this message relates. In the original Kiswahili version, the message reads as follows 'Mwamunyage Pindua nchi, haiwezekani wote wawe nje halafu hakuna aliyepewa mamlaka kukalia kile kiti'.

[92] *Jebra Kambole v. The Attorney General*, Misc. Civ. Cause No. 32 of 2015.

[93] *Julius Ishengoma Francis Ndyanabo v. The Attorney General*, Civ. Appeal No. 64 of 2001.

quashed a provision that made an electoral petition dependent on a security for costs of 5 Million Tanzanian Shillings, as sum, for which, as the Court noted, a civil servant working on a minimum wage would have to work for eight years. Ruling that there was an infringement of the right to access to justice, the Court held that fundamental rights 'have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail'.

Tanzanian judiciary relied on this judgement in the case *Christopher Mtikila v. The Attorney General* of 2005 (Mtikila II),[94] in which the High Court of Tanzania invalidated a constitutional amendment seeking to bar independent candidates from running for the office of the president of Tanzania, holding that such an amendment would alter the basic structure or essential features of the Constitution and in so doing impose disproportionate limits on the representative democracy.[95] The main argument was that the amendment would contravene the provisions of the Bill of Rights introduced in 1984 into the Tanzania constitution, in particular the provisions safeguarding the freedom of association and the freedom to participate in public affairs – articles 19 and 21 of the Tanzanian

[94] *Rev. Christopher Mtikila v. Attorney General*, Misc. Civ. Cause 10 of 2005.

[95] This amendment was a response to a judgement of a High Court from 1994 (*Rev. Christopher Mtikila v. the Attorney General*, Civil Cause No. 5 of 1993 – Mtikila I), in which the Court invalidated a statutory provision with the same content. The legislator sought to thwart the Court ruling by amending the constitution.

Constitution respectively. The court qualified those provisions as elements of constitution's basic structure and its essential features, for in a quest to move away from the one-party rule, they 'expand the arena of democracy and the right to participate in the government of the state'. In both rulings the judiciary embraced the liberal idea of individual rights as a fundament for democracy. The liberal pronouncements of the Court of Appeal of Tanzania attracted also very much attention in the Kenyan case law.[96] The Tanzanian courts are well positioned to withstand the current political pressure and keep up this tradition, which is rooted in the 1990's democracy wave.

In Kenya, there have been many High Court judgements, especially following the adoption of the 2010 constitution which may even sound like a liberal manifesto. In the case *L.N.W v Attorney General & 3 others*,[97] the High Court declared unconstitutional a provision of the Registration of Births and Deaths Act concerning the registration of the name of a child born out of wedlock. The Act, which dates back to 1928, provided in section 12 that the child's father's name can be entered in the register only upon the joint request of mother and father or if there is evidence that the mother and father were married. If those requirements were not met, 'XXXX' marks would be entered into the birth certificate as father's name. The government claimed that the provision would still be having some rationale, namely

[96] The High Court of Kenya describes the Court of Appeal of Tanzania ruling as a 'celebrated case', see *Brenda Achieng Okwach & 2 others v Charles Rotich SP, OCPD, Nyeri Central & 3 others* [2015] eKLR. It is also quoted as the leading case for the application of the Kenyan Constitution's Bill of Rights by PLO Lumumba and Luis G Franceschi (supra note 53),131.

[97] *L.N.W v Attorney General & 3 others* [2014] eKLR.

preventing 'unscrupulous mothers from vindicating any man of their choice for personal reasons' and also keeping proper birth records. The High Court ruled that the provision violates the constitutional prohibition of discrimination, invoking the liberal idea of equal worth of every person:

> 'What I read from these provisions is a desire to transform society, to recognize the inherent dignity and worth of all persons; to protect those who have hitherto been marginalized and to ensure that they enjoy the human rights guaranteed to all on the same basis as others. Further, that the best interests of the child, whatever its status of birth, must be the primary consideration in every matter concerning the child.
>
> In my view, these constitutional aspirations, in so far as they apply to children born outside marriage, far outstrip in importance the need to keep official records, or the desire to 'protect' men from 'unscrupulous' women, assuming that one accepts that this was the purposes that section 12 was intended to serve'.

Furthermore, the court criticised stereotypical thinking about women and emphasised the need to take responsibility for one's actions:

> 'The second alleged purpose, protecting the putative father from the alleged machinations of unscrupulous women is, in my view, based on an unapologetic but unacceptable patriarchal mind-set that wishes to protect men from taking responsibility for their actions, to the detriment of their children. In my view, balancing the two interests, that of the men and the rights of children, I see no contest. I need not add that such a stated purpose, the alleged protection of men from unscrupulous women, is premised on a negative, discriminatory stereotyping of women as dishonest people who will latch onto a man for child support with no basis'.

The commitment to liberal values is even more visible in the case *Eric Gitari v Non- Governmental Organisations Co-*

ordination Board & 4 others,[98] where the High Court of Kenya had to strike a balance between individual freedom on one hand and moral views, to which – according to the Kenyan NGO Co-ordination Board – the majority of Kenyans would subscribe on the other. And of these two, it preferred the former.

The petitioner was trying to register an NGO advocating for rights of Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) persons. He was doing it in a legal environment, which includes criminal provisions against homosexuals. According to section 162 of the Kenyan Penal Code, 'any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years […]'. Needless to say, this long-standing provision does not reflect the liberal approach, as it positions the state as a guardian or a custodian of some official conception of the order of nature – contrary to the Mill's harm principle and sovereignty of mind of every individual. In this vain, the NGO Co-ordination Board refused to register petitioner's NGO claiming that it was 'hell-bent on destroying the cultural values of Kenyans'; the Board was citing moral convictions, which it alleged, the Kenyan society would hold ('Homosexuality is largely considered to be a taboo and repugnant to the religious teachings, cultural values and morality of the Kenyan people'), also suggesting that they should prevail over the freedom of association which was

[98] *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2013] eKLR.

here at stake. It is the very (illiberal) idea of an official conception of morality, which the High Court rejects. According to the judge, 'in a representative democracy, and by the very act of adopting and accepting the Constitution, the State is restricted from determining which convictions and moral judgments are tolerable'. As the judge continues, 'it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups'. Finally, the High Court makes a clear commitment to the liberal idea of the primacy of the individual: 'democratic societies approach the problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom. However in striking the balance certain controls on the individual's freedoms of expressions may in appropriate circumstances be acceptable in order to respect the sensibilities of others'. Very much in the liberal spirit, it also emphasises the importance of a free public debate, pointing out that the 'the constitution is to protect those with unpopular views, minorities and rights that attach to human beings – regardless of majority views'.

5. Conclusions

In Kenya and Tanzania, an ill-liberal democracy or one-party democracy was a short-lived phenomenon, which quickly gave way to autocracy. Democracy without liberalism did not prove to be a sustainable form of government. The one party 'illiberal' democracy was to a large extent based on anthropologic theories put forward by Kenyatta and Nyerere. Those accounts on African psychology were either not quite accurate or underestimated

the latter's dynamic nature. Regarding the economic development, a lot of faith was put in an omnipotent national government; this faith did not prove warranted and paved the way for human rights violations.

Although the constitutions of Kenya and Tanzania in principle embrace the liberal principles, the liberal democracy still has to take roots. In Kenya the liberal ideas seem to be more entrenched, as Kenya has never adopted the Arusha-like communist approaches. It also has a new constitution, which aims at transforming the country in the direction of a liberal democracy.

Like in Eastern and Central Europe, it is difficult to expect that politicians, whose careers started in the one-party state will change their attitude overnight; the establishment of a liberal democracy is a long-term project and an every day struggle that is not free from setbacks. And unlike in Eastern and Central Europe, the former ruling parties – and this is especially true for Tanzania, where the former monopolistic political grouping is still holding power – have not been outright delegitimised. But also unlike in Eastern and Central Europe those parties were not brought on the Soviet army bayonets; they were authentic popular movements against ruthless colonial subjugation.[99] Back then they stood for a clamour for political change, for ideals, which they started supressing once they assumed power. Yet, in the hearts of many Kenyans and Tanzanians, the clamour for change and for freedom remained alive.

[99] On the nature of the latter in Kenya, see only Caroline Elkins, *Imperial Reckoning. The Untold Story of Britain's Gulag* (New York: Henry Holt and Company, 2005), 43 et seq.

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Illiberal constitutionalism in Hungary and Poland: The case of judicialization of politics

1. Introduction

Hungary and Poland share mutual constitutional history, especially after the Second World War. Beyond the having the same king and being bound by the personal union in the Middle Ages,[1] during the Soviet era, these then socialist states, being under the influence zone of the Soviet Union, were forced to adopt a communist constitution that was the basis of the socialist legal system. In the late 1980s, these states followed similar transition processes from socialism to democracy, thereby strengthening the new constitutional

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[1] The personal union between the Kingdom of Hungary and the Kingdom of Poland was achieved twice: in 1370–1382 under Louis I of Hungary and in 1440–1444 under Vladislaus III of Poland.

regime[2] based on the rule of law, democracy and human rights,[3] essentially with the assistance of their constitutional courts. Both the Hungarian Constitutional Court (CC) and the Polish Constitutional Tribunal (CT) embraced an activist approach towards constitutional interpretation, which was required by both the fact and fragility of the transition, and some vague constitutional provisions. Both states joined the European Union in 2004, which meant that they had acknowledged mutual interests and values shared by the Member States, and had adapted their legal systems to the accession.

The first decade of the 21st century brought new changes, the rise of populism and another transformation from liberal

[2] Poland adopted the so-called Small (Interim) Constitution in 1992 and started to work on the new one that was finally approved in 1997. Hungary, mainly due to the features of the transition, decided not to adopt a new constitution but almost entirely changed the socialist one during a series of constitutional amendments. Nowadays, Yaniv Roznai and Stephen Gardbaum name changes which resulted from the regime changing constitution-making and constitution–changing processes as the 'revolutionary constitutionalism' (Y. Roznai paper resented in Copenhagen, ICON S Conference, June 2017 and S. Gardbaum, Revolutionary constitutionalism, 15.1 *I-CON* (2017): 173-200). The first major amendment to the Hungarian (socialist) Constitution was adopted by the still-socialist Parliament in 1989 and created a legal frame which allowed the evolvement of a Western type democratic state and a new Parliament could be elected in a free and democratic election in 1990. In the same year, the new Parliament adopted the second major formal constitutional amendment package which formally finalised the transition at constitutional level. Coming back to the Polish situation, in April 1989, the first transformative change was introduced to the Constitution of 1952, and in December 1989, the entire socialist system was changed by the incorporation of the rule of law into the very same constitution. The first free election in transition period was conducted in 1991. More about the transitionary constitutional changes A. Bień-Kacała, Rewizja czy zmiana konstytucji? (Charakter prawny nowelizacji konstytucji z 1989 r.) [Revision or amendment? Legal character of the constitutional novelizations of 1989],7 *Studia Iuridica Toruniensia* (2010): 90-104.

[3] Both states joined the Council of Europe (Hungary in 1990, Poland in 1991) and ratified the European Convention of Human Rights (Hungary joined in 1992, and the ECHR entered into force in Hungary in 1993, Poland joined in 1993, and the ECHR is entered into force in 1993).

to illiberal democracy.[4] This transformation seems to have been completed in Hungary, whereas in Poland, it may be still considered as an ongoing process. The last 7 years in Hungary and 3 years in Poland are seen as dismantling the former legal system and constitutional arrangements. The newest type of constitutionalism, which we call illiberal constitutionalism,[5] has been rising in our states and can be described by none of the existing classifications. Referring to Bellamy's phenomena, it is not really legal constitutionalism and completely different from political constitutionalism.[6] The new system in Hungary and Poland, even though labelled by us as 'new', obviously does not belong to the states representing new constitutionalism, as characterized by Gardbaum (UK, New Zealand, Canada, etc.)[7] where, according to Lavapuro and his co-authors, also fits Finland.[8]

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[4] For the appearance of illiberal democracy in political communication see Viktor Orbán's speech about the illiberal state in Bálványos, http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp (31.10.2017). See also Kaczyński's slogan: 'there will be Budapest in Warsaw' in in 2011 when PiS lost the parliamentary election, http://www.tvn24.pl/wiadomosci-z-kraju,3/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt,186922.html (31.10.2017). After 2015, when PiS won elections, it was made clear that the slogan was meant to become a philosophy http://pis.org.pl/dokumenty?page=1, p. 7, 12 (31.10.2017).

[5] For a conceptualization of illiberal constitutionalism from a legal perspective see T. Drinóczi, A. Bień-Kacała, Constitutions and constitutionalism captured: shaping illiberal democracies in Hungary and Poland (in publication).

[6] R. Bellamy, *Political constitutionalism: a republican defence of the constitutionality of democracy*, Cambridge University Press (2007): 2-5.

[7] S. Gardbaum, The Case for the New Commonwealth Model of Constitutionalism, 12 *German Law Review* 14(2013): 2230-2248.

[8] J. Lavapuro, T. Ojanen, M. Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review', 2 *ICON* (2011), T. Ojanen, Constitutional amendment in Finland, in X. Contiades, (ed.), *Engineering Constitutional Change*, Routledge (2016): 107-109.

Ran Hirschl,[9] basing on Bellamy's binary code and observing creation of the new constitutionalism located in between its legal and political equivalents, found that juristocracy, as opposed to the more benevolent political processes, endangers efficiency of redistributive politics. In this context, when legal constitutionalism seems to alternate its political counterpart, there is a growing suspicion of the inevitable rise of juristocracy.[10]

Although Carlos Closa criticised Hirschl's book based on excellent reasons,[11] Hirschl's theory on juristocracy and the

[9] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press (2004).

[10] Blokker pictures Hungary and Poland as representing communitarian constitutionalism or even constitutional nationalism completed with populism. He stated that 'in the communitarian perception, the community and its identity are paramount. The constitution itself is less important than the pre-political values and history of the community that the constitution reflects, and the integrative and symbolic function of the constitution is stressed. The emphasis is on safeguarding the political sovereignty of a specific national group'. P. Blokker, *From legal to political constitutionalism?*, *VerfBlog*, 2017/6/04, http://verfassungsblog.de/from-legal-to-political-constitutionalism/, DOI: https://dx.doi.org/10.17176/20170604-190459. Although we can see the strength of this opinion, from our perspective it does not properly grasp the underlying legal problems. It emphasises more the political and societal sentiments which are indeed the very (non-legal) foundation of the new illiberal constitutionalism which is being built. Blokker also relates to L. Morawski's idea of republican tradition. According to Morawski, this tradition gives a deep respect for democracy, human rights and freedoms with strong attention to: patriotism, solidarity, a strong state as a guardian of human rights, the role of the Catholic Church and religion in public life, the traditional family model and rejection the right to abortion, L. Morawski, *A Critical Response*, VerfBlog, 2017/6/03, http://verfassungsblog.de/acritical-response/, DOI: https://dx.doi.org/10.17176/20170603-165621.

[11] Closa asks many reasonable questions. 'And, on a different front, it seems fair to ask if the hegemonic-preservation claim actually holds true as a general explanation for the emergence of constitutionalism. Is it plausible to claim that countries in Southern Europe, such as Spain and Portugal, develop their charters because of reasons related to preserving the hegemony of elites? Did the countries in Eastern Europe follow this path to protect their elites?', C. Closa, Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, Harvard University Press, 2004, 4 *ICON 3 (*2006): 581–586.

idea of political constitutionalism seem to be embraced by many Hungarian and Polish scholars and members of constitutional court.[12] In this paper, by reviewing the recent constitutional history of Hungary and Poland and contrasting them with the ideas developed by Bellamy and Hirschl, we simply argue that the 'newest' Hungarian and Polish constitutionalism is not a political constitutionalism. Furthermore, we argue that the label of 'juristocracy' is not applicable when describing the period of 1990-2010/2015, but its reverse form, which is the judicialization of politics as theorised by Armen Mazmanyan[13], is emerging in the post 2010/2015 era.

To justify our claims, firstly we provide a general context for our analysis (point II), in which we discuss the recent constitutional history of Poland and Hungary and the role of the constitutional courts. This is the foundation, based on which we claim that juristocracy is not a proper concept here, and that our countries experience something else than political constitutionalism. To support our opinion, we present arguments for (point III) and against (point IV) relating to the presence of political constitutionalism in Hungary and Poland, and explain how the judicialization of politics, instead of juristocracy emerges in both Hungary and Poland (point V). The final conclusions of our research are presented in point VI.

[12] See the works of B. Pokol on juristocracy and A. Antal and others on political constitutionalism.

[13] Judicialization of politics: The post-Soviet way, 13 *I-CON* 1 (2015): 200-218.

2. Context: constitutional law

We base our analysis on liberal democracy, or simply democracy, which characterised Hungary and Poland since 1989/1990. We conceive the abovementioned system as constitutional democracy that assures the most important values, such as human rights, the rule of law and democracy consisting of, among others, competitive elections and guaranteeing the rights of minorities.

In our opinion, a political system is democratic as far as it is able to provide substantial meaning of the mentioned values and not only their formal dimension. Moreover, every element of such system and mutual relations among its components should be described in the constitution, no matter whether it is a political or a legal document. The most important aspect of constitutional democracy is the existence of a proper and functional constitutional defence mechanism.

Both political and legal constitutions have long, history-based, and separate ways of development. Sometimes, the need to replace the actual models may be a necessity.[14] Nevertheless, it should be an organic development, it should embrace an inclusive constitutional process and should reflect societal needs and demands. This means that replacing the existing political or legal constitution(alism) cannot be based only on a decision of the ruling majority even if it is a constitutional majority.

[14] See the transformative nature of the Community Act and the Human Rights Act, and the Brexit in the UK.

2.1. Systemic backgrounds: contextual constitutional history

After turning from the totalitarian/Communist system, constitutional democracies were set up in the CEE region. In our understanding, the new solutions pursued to comply with or, depending on the national needs, even exceeded the minimum standards of the rule of law, human rights and democracy expectations in Europe, under the regime of the CoE and the EU demands.[15] Constitutional democracy requires a constitution in a legal sense that encompasses all of the important principles, which arose during the (Western European) constitutional development as the most fundamental values for the societies in our era. As a counter effect of the Socialist regime (as previously Nazi and Fascism regimes), the legal procedures and legal constitutions were preferred over any political considerations of the public power.[16] The constitutions, based on Kelsenian tradition and relying on the very notion and function of the legal understanding of a constitution, were considered to be senseless unless defended and enforced.

A constitution, constitutional situation without having a written constitution (UK) or a Treaty considered as a

[15] On these impacts in general, see R.R. Ludwikowski, Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy, 9 CARDOZO J. INT'L & COMP. L. (2001): 253-296.

[16] This preference seemed to be more adequate after the totalitarian period. Moreover, following the approach and concept of the political constitution requires a long period of political and constitutional evolution. From a comparative perspective, one can evaluate political constitutionalism as evolutionary type system and legal constitutionalism rooted in revolutionary traditions, see L.F.M. Besselink, Constitutional Adjudication in the Era of Globalization: The Netherlands in Comparative Perspective, 2 *European Public Law* 18(2012): 232–234.

constitution (EU) may in many ways be defended and enforced. Depending on the concept of a constitution, whether it is a political, as defined by *Bellamy*[17] concerning the UK, or a legal notion applied mostly in Europe, different procedures (political processes such as elections and public discourse, UK) or institutions, such as constitutional courts (Hungary, Poland), ordinary courts (e.g. in the Nordic countries, US), or even Council of State-type institutions (Netherlands) may be used for this purpose. In states having common law traditions (e.g. UK, Canada and New Zealand), human rights, which are regulated by different types of legal sources, are defended by ordinary courts. This phenomenon is called new constitutionalism.[18]

In the case of Hungary and Poland (as in other CEE countries), a written (legal) constitution was and still is preferable. Independent Constitutional Court and Constitutional Tribunal were established in 1989 (Hungary) and 1982/1997[19] (Poland) to effectively ensure implementation of the constitutions. Until 2010 (CC) and 2015 (CT), these bodies could exercise their wide powers independently, with an *erga omnes* effect: they could provide an abstract interpretation of any provision of the constitutions,[20] interpret specific constitutional rules that had been challenged, annull unconstitutional laws, ensure conformity of international obligations with national law,

[17] R. Bellamy, *supra* note 6.
[18] S. Gardbaum, *supra* note 7.
[19] Under the Constitution of 1952, in 1985 the Sejm passed the first Law on the CT and in 1986 the CT delivered its first judgement. The Court became fully independent two years after the Constitution of 1997 entry into force, when Sejm forfeited the competence to reject some of the CT judgements (Art. 239 of the 1997 Polish Constitution).
[20] In Poland it was possible until 1997.

declare unconstitutionality of legislative omission, require Parliament to adopt the necessary legislation, etc. These constitutional courts could (and formally still can) annul laws with an effect of *ex nunc* and *pro futuro*, which was the very intention of the legislative power, due to the need to remove (older, socialist) laws that could no longer be constitutional because of the new systemic order, and in order to preserve the achievements of the transition. This latter involved a political agenda which intended to prevent earlier state parties from regaining power and thereby reversing the transition process. This was quite unusual and opposed to the original legislative intention of other jurisdictions, e.g. Belgium, Germany, Austria, where, due to the different focus of powers (either protecting an individual or observing a proper division of power between the federal government and the states),[21] the main rule has always been to ensure an *ex tunc* effect.[22]

As already pointed out, these Polish and Hungarian courts, from the very beginning, have had the power, to interpret vague constitutional provisions on democracy, rule of law and certain fundamental rights. The Hungarian CC facilitated legality of the transition. In one of its landmark decisions, determining understanding of the transition, it stated that the rule of law cannot be weighed against the rule of law: the CC cannot allow to disregard the rule of statutory

[21] T. Drinóczi, P. Schneider, 'The legitimation of a re-enactment of former law and temporal effect of judgments in a constitutional democracy. Comparative study in the light of recent jurisprudence of Croatia's Constitutional Court' *Prvani Vjesnik* GOD 32, BR 3-4 (2016): 29-44.

[22] It was the constitutional courts which in it jurisprudence developed the idea of diversion form this main rule. See P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe, (ed.), *The Effects of Judicial Decisions in Time*, Cambridge (2014).

limitation and to get it restarted because the system has been changed. (Interestingly, the Czech Constitutional court came to the opposite view on the very same issue.)[23] Until the Polish Constitution was adopted in 1997, the Constitutional Tribunal had delivered necessary gap-filling provisions, the essence of which was later incorporated into the new constitution.[24] Undoubtedly, there have been many constitutional interpretations by the constitutional courts which might be seen as informal constitutional amendments.[25] However, the political power has always been free to act, provided that it had constitutional majority (independently or with coalition partners),[26] or could make a compromise with the opposition due to the importance of the issues[27] to address them in the formal constitutional amendment. Therefore, if there had been a widespread disagreement about an active or dynamic interpretation by the constitutional courts, and a consequent fear of 'juristocracy' or 'governance by constitutional courts', the constitution-amending power (the constitutional majority)

[23] See decision 11/1992. (III. 5.) of the CC and its Czech counterpart: Pl. ÚS 19/93.

[24] L. Garlicki, *Polskie prawo konstytucyjne* [Polish constitutional law], Warszawa (2016): 76-78 and I. Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP* [The rule of democratic state ruled by law in judgements of the Polish Constitutional Tribunal], Toruń (2010): 48-50. L. Sólyom, 'Alkotmányértelmezés az új alkotmánybíróságok gyakorlatában [Constitutional interpretation in the practice of new constitutional courts]',2 *Fundamentum* (2002): 18-20.

[25] T. Drinóczi, F. Gárdos-Orosz, Z. Pozsár-Szentmiklósy, Formal and Informal Constitutional Amendment. Report on Hungary and J. Trzcinski, M. Szwastm, Formal and informal amendments to the Constitution. Both are national reports (manuscripts) for the Comparative Law Congress, Fukuoka, Japan, 2018.

[26] See a more detailed account T. Drinóczi, Constitutional politics in contemporary Hungary, 1 ICL (2016).

[27] It happened with the formal constitutional amendment on the NATO and EU accession.

could have changed it.[28] However, what usually occurred was that the constitutional majority respected the courts' ruling to the extent that it incorporated the most essential findings into the new constitutions. In this regard, we have already mentioned the Polish case, whereas with respect to Hungary, we can refer to the constitutional interpretation of the CC on the powers of the President of the Republic and the relation between the direct and indirect exercise of popular sovereignty (referendum vs. representative republic) as stipulated in the former Constitution. The core of these findings was incorporated into the Fundamental Law in 2011.

Against this background, it is clear that what Hirschl asserts in connection with the reason why constitutional rights and judicial review are established in some common law states, does not simply hold true in Hungary and Poland, or even more broadly, in the former socialist states of Central and Eastern Europe. He claims that the political origin of the introduction of judicial review to protect fundamental rights was only the intention of the elite to preserve their hegemonic status ('hegemonic preservation').[29] In our region it was clearly not. The driving force was to establish constitutional democracy that had not existed before. At the same time, one of the core assumptions was to introduce and implement human rights protection, and as a correlating duty, to join international human rights systems. Another constituent part was the protection of the constitution that was perceived back then as a legal and not only a 'paper' document, a political manifest of the ruling Communists. To

[28] As occurred in 2013 in Hungary with the Fourth Amendment.
[29] Hirsch, *supra* note 9: 16.

achieve these goals and accommodate themselves among other European constitutional democracies, Hungary and Poland, by establishing their constitutional courts, created a fully-fledged constitutional review system and process. In the 1990s, the activism of these courts, e.g. the doctrine of the invisible constitution of the Sólyom Court, was criticised by some scholars who, using the labelling of Hirschl, claimed that the interpretative activity and annulment power of the CC resulted in ~~a~~ juristocracy in Hungary, which endangered the free political formation power in Parliament. In Poland, the situation is slightly different. The CT was set up in 1982, as a consequence of demands of lawyers and the Solidarność (Solidarity) movement.[30] Therefore, the Tribunal was perceived as a Communist relic (which preserved the Communist elite). Nowadays, the ruling power uses this terminology and ideology just to weaken the CT's position. However, it is neither a valid claim, nor a common opinion. What is widely acknowledged is that the jurisprudence of the CT enabled the Polish transformation process (systemic changes) by establishing and safeguarding the rule of law (which, as mentioned before, was constitutionalised in December 1989).

Thus, the above-described phenomenon is not juristoracy but one of the features of the ordinary operation of constitutional democracy established after a socialist and autocratic period in Central and Eastern Europe.

The transition and the roles of the CT and the CC during this process have caught special attention by scholars. Siems argues that in the CEE countries, the so called Third Legal

[30] The Law on the CT dates to 1985 and first judgement was delivered in 1986.

Tradition emerged after the transitory period.[31] Uzalec identifies this as the 'socialist legal tradition without socialism'[32]. We disagree with the mentioned opinions. Taking into consideration what we presented above, it seems to be justified to claim that Siems's and Uzelac's views falsely describe the period of 1989/1990-2010/2015, but they seem to be more accurate to explain post 2010/15 era. Our argument is made on the basis that Poland and Hungary use law as an instrument to protect political elites and reject the liberal understanding of constitutionalism, which focuses on the rights and freedoms of individuals and promotes their protection against any state abuse and intrusion.

2.2. Systemic backgrounds: current context

The instrumentalisation of law resulted in the ruthless disabling (Poland) and packing of the constitutional courts (Hungary and then Poland). Abusive constitutionalism (Hungary) and violating the constitution (Poland; *Verfassungsbruch*)[33] are also in the political-legal tool-box of those who are in power.

The series of events does not really fit into the explanation offered by the scholarly literature on the Third Wave of Democratization. According to these views, liberal democracy that emerged in the worldwide process, named the 'third wave of democratization,' led to three results. The first one is constitutional democracy that still has not shown

[31] M. Siems, *Comparative Law*, Camebridge (2014): 78-79.
[32] A. Uzelac, Survival of the Third Legal Tradition, 49 *Supreme Court Law Review* (2010), S.C.L.R. (2nd): 377-396.
[33] See more about it under point IV.2

any sign of regression.[34] Secondly, it resulted in an authoritarian (re)consolidation, which, according to Steven Levitsky and Lucan Way, is not to be seen as a democratic rollback.[35] Alternatively, it reverted to a more or less authoritarian form, as Alina Rocha Menocal and others observe, based mainly on Latin-American and African experiences which, however, may be adapted to the case of Hungary and Poland.[36] Whereas the second of the presented effects would not feature the CEE states, because the power-holders of the regime from which the democratic transition emerged (the communist-socialist party) differ from those having the power now (conservatives), the third one could fit in the CEE context, regardless of the label we attach. Even if we assume that the current party in power is different from the previous one (i.e. the one before the systemic changes), being defined as its totally opposite (anti-communist), it still uses similar structures (monolith society, powerful and privileged partisans, strong centralised state and powerful party leader, hierarchy of organs and people) and means (force, army, limitation of freedoms, non-inclusive democracy). Yet, one can identify dissimilar objectives (national identity, national state without 'sovereignty-loss') to those that were embraced by communist regimes. All the abovementioned solutions are possible, because the power-holders were schooled and

[34] See e.g., the Baltic states, especially Estonia.

[35] S. Levitsky, L. Way, The myth of democratic recession, 1 *Journal of Democracy* 26 (2015): 48-52.

[36] A. R. Menocal, V. Fritz, L. Rakner, Hybrid regimes and the challenge of deepening and sustaining democracy in developing countries, 1 *South African Journal of International Affairs* 15 (2008): 30-35.

socialised in the previous, socialist regime.[37] We claim that the socialist way of thinking has become more visible after 2010/2015, as compared to the pre-2010 era.

The reason of the democratic erosion in Hungary and Poland is simple, as stated by Menocal and co-authors about the countries of their interest: the main political players, forces, and institutions do not accept democracy as 'the only game in town'[38]. However, in our cases, the only game in town is, due to the constitutional and historical development of modern Europe, liberal democracy. Nevertheless, the system is not taken seriously at all by the Hungarian and Polish actors and - in consequence - it has been transformed to something else.[39]

2.3. Legal constitutionalism

As we stated above, the Third Wave of Democratization brought legal constitutionalism, together with Kelsenian model of law and the defence of constitution as the most suitable concept for the CEE countries with communist and totalitarian tradition. Legal constitutionalism[40] is conceptualised as a system where democracy, democratic processes, the will of Parliament (in place of the popular

[37] As F. N. Fesnic stated: 'the civic skills and the political values acquired in schools are retained into adulthood', 'the effects of civic education are long term', F.N. Fesnic, Can Civic Education Make a Difference for Democracy? Hungary and Poland Compared, 4 *Political Studies* 64(2016): 966. The most visible example is Mr. Piotrowicz, a former prosecutor before 1989 who is responsible for the CT 'reform' during legislative procedure.

[38] Menocal, Fritz, Rakner, *supra* note 36: 31.

[39] Labelled as authoritarianism at borderline, illiberal regimes, 'grey-zone' countries, the transition away from democracies, democracies in regression, competitive authoritarianism, or authoritarian constitutionalism. Hungarian events are even considered as counter-constitutional revolution and abusive constitutionalism.

[40] R. Bellamy, *supra* note 6.

representation), which is constrained by referring to and applying the superior constitutional rules, and which thus undermines legitimacy and efficacy of law and the courts. Due to the structural changes or the newly created constitutional settings (e.g. the CEE), legal constitutionalists generally place more trust in the judge to decide on reasonable disagreements instead of political actors and citizens who should be equally treated. For the legal constitutionalists, it is the constitution which represents a fundamental structure for reaching collective decisions in a democratic way. The constitution is a legal document which is binding to all and which is protected by the constitutional review mechanisms.

However, the features of legal constitutionalism challenge the position of Parliament, which is the body of popular or national representation. Constitutional interpretation delivered by constitutional courts sometimes prevails and limits the will of the people. It can cause tensions between the constitutional interpretation and the will of the people aggregated and highly influenced by populist political parties. Therefore, the concept of political constitutionalism is used in Hungary and Poland (post 2010/2015) to justify the disabling and the capture of constitutional courts.

This attitude of the power-holders is not without precedent. Before the transition, the socialist states had started to pretend to have a prescriptive constitution which needed protection. Socialist types of constitutional courts had been established with far less powers as compared to their modern counterparts. To give an example, there had been no annulment power, so the Parliament could just ignore the rulings. Both in Hungary and Poland, it was the Parliament

which was named not only as the supreme representative body but also, and most importantly, the supreme organ in the state hierarchy. Both the Constitutional Tribunal in Poland and the Constitutional Court in Hungary, during their short existence in the 1980s, were subordinated to Parliaments in the systems which did not recognise the principle of separation of powers. The supremacy of the political will prevailed in these one-party systems. However, after the transition, the CT and the CC functioned differently and became symbols of a democratic change (as well as for example, ombudsmen and the Polish Supreme Administrative Court). From a binary perspective of political and legal constitutionalism, and disregarding another binary system of autocratic and democratic systems, the socialist constitutional courts did not obstruct the free policy formulation and lawmaking of the party and Parliament. It was not their mission.

3. Towards political constitutionalism?

In the post 2010/2015 period, the almost mythical concept of the 'will of the people' (or that of the Nation) to which populist politicians try to relate, has been more and more supported by scholars, first in Hungary and then in Poland. There are several scholarly works advocating the concept of political constitutionalism in their respective states.[41] Thus, one can notice that even the academia to a certain extent

[41] A. Antal, Politikai és jogi alkotmányosság Magyarországon [Political and legal constitutionalism in Hungary]' 3 *Politikatudományi Szemle* (2013), A. Czarnota, *The Constitutional Tribunal, VerfBlog*, 2017/6/03, http://verfassungsblog.de/the-constitutional-tribunal/, DOI: https://dx.doi.org/10.17176/20170603-164015 (31.10.2017).

supports the ruling majorities in their efforts to justify their political actions.

3.1. The concept of political constitutionalism

For political constitutionalists, the constitution is a democratic process itself, representing a political, rather than a legal system. Thus, due to the fact that the idea emerged in the UK, the constitution is not treated as a superior norm. Disagreements are to be solved within this political framework, which obviously rejects the idea of any kind of review conducted by apolitical, independent and non-elected but otherwise selected actors, such as judges. This way of solving disagreements seems to be a good theoretical explanation to provide academic background for disabling and packing constitutional courts.

3.2. The misunderstanding in scholarly works (arguments pro political constitutionalism)

With respect to Hungary,[42] Attila Antal describes[43] the period 1990-2010 as legal constitutionalism whereas the period following 2010 as political constitutionalism. Other scholars share this point of view. Year 2010 is perceived as a dawn of ~~a~~ political constitutionalism in Hungary. Antal evidently misuses Bellamy's concept. He arguably states that both legal and political constitutionalism are present in

[42] See T. Drinóczi, *Does the constitutional review breach the principle of separation of powers? A shifting perspective. In Iulia Motoc , Paulo Pinto de Albuquerque , Krzysztof Wojtyczek eds.: New Developments in Constitutional Law: Essays in honour of András Sajó. Eleven international publishing 2018. pp. 75-96.*

[43] A. Antal, *supra* note 41. Antal's position is referred to e.g., I. Stumpf, *Erős állam – alkotmányos korlátok* [Strong state – constitutional restrictions], Századvég, Budapest (2014): 239, 247.

Hungary at the same time and they are able to feasibly form a healthy political and public law culture together.[44] By taking this position, which is similar to the model of new constitutionalism, Antal explains and even justifies recent constitutional changes including the theory of Bellamy, which - despite his criticism[45] - is coherent in his own logic and framework. Antal, however, neglects to consider whether constitutional, political and social preconditions of political constitutionalism are present in Hungary. As mentioned, these requirements encompass among other things: the existence of competitive elections, which were doubtful in Hungary in 2014 at least to a certain extent; the genuine participation in the legislative processes, on which Hungary also features some defects.

In addition, one can say that the theory of political constitutionalism is political in nature, since it considers the constitution itself as a product of political processes, which needs to be protected by legal and other, conventional means and not because the political decision-maker has an omnipotent role without any restraint and legal limitation. For that reason, the strong Hungarian judicial review model should not be forgotten when evaluating the type of constitutionalism applied by this state and when considering the best means of the CC for defending the Fundamental Law (FL). It is constitutionally mandated *expressis verbis* that the CC has the power to annul unconstitutional laws, other normative acts and judicial decisions.[46] If the CC

[44] Antal, *supra* n. 41: 66.

[45] See e.g. Turtles all the way down? Is the political constitutionalist appeal to disagreement self-defeating? A reply to Cormac Mac Amhlaigh,1 *I-CON* 14(2016).

[46] Art 24 (3) a) c) points FL.

considers itself as a body functioning in a system where also political constitutionalism applies, then this Court may come to the conclusion not to annul unconstitutional pieces of legislation but to reinforce the efforts of the political decision-maker by using softer measures, as it was openly suggested by one of its former presidents. In this case, the CC will indeed be an engine of governance by not blocking its rapid reactions[47] and will spare the prestige and authority of Parliament, which is the supreme organ of popular representation.[48] However, it will do this at the cost of not properly performing its constitutional duty as being the 'principal organ for the protection of the Fundamental Law'[49] and constitutionalism.[50]

The scholarly works in Poland still have not been elaborated to this extent. Many Polish authors, due to the short period of time which has elapsed since 2015, describe the ongoing situation with almost no theoretical reflection.[51] Nevertheless, there are also essays mixing theoretical

[47] Interview with Barbabás Lenkovics, president of the CC, March 2015 in Radió Kossuth. Summary can be found in Hungarian at *http://nol.hu/belfold/lenkovics-az-ab-feladata-hogy-ne-blokkolja-a-kormanyzati-munkat-1519643*. See also in English at http://hungarianspectrum.org/2015/07/18/chief-justice-lenkovics-on-the-fidesz-constitutional-court-part-i/ (18.05.2017).

[48] Art 1 (1) FL.

[49] Art 24 (1) FL.

[50] See e.g. decisions on the integration of credit institutions set up as cooperative societies in decision 20/2014 (VII. 3.) and on the mentioned decision 3194/2014. (VII. 15.) of the CC. For an analysis *see* http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf, 8 (18.05.2017) and *https://hungarianspectrum.wordpress.com/2013/04/25/hungarys-national-tobacco-shops-who-are-the-happy-recipients-of-the-concessions/*, https://theorangefiles.hu/state-monopoly-on-the-retail-sale-of-tobacco-2/ (18.05.2017).

[51] A. Bień-Kacała, Polish Constitutional Tribunal: a systemic reform or a hasty political change, 1 *DPCE* online (2016), J. Fomina, J. Kucharczyk, Populism and protest in Poland, 4 *Journal of Democracy* 27 (2016): 58-65.

perspectives[52] or trying to justify the government's decisions under the laws in effect.[53] According to the latter claims, the will of the people and, in consequence, justice is more important than the law, and this can be seen as the realisation of political constitutionalism.

The recent assessment on the current CT's activity (including the delivery of judgements along with the recognition of the supremacy of Parliament and the exercise of judicial restraint) also supports the assumption that political constitutionalism is in the rise in Poland. However, such conceptualization on the emergence of political constitutionalism and fading the legal constitutionalism is not needed when (the CC and) the CT act as a mere supporter of the political majority. Instead, this is the judicialization of politics. If the CT (and the CC) is captured and acts according to the political will of the party in power, then no argument in favour of political constitutionalism deems necessary. The more adequate expression of legal constitutionalism is still applicable with 'benefits'. The system pretends to uphold legal constitutionalism, with its written constitution and enforcing mechanism, but the rulings of the constitutional courts are nothing else but the assertion of the political will.[54]

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[52] A. Mrozek, A. Śledzińska-Simon, *Constitutional Review as an Indispensable Element of the Rule of Law? Poland as the Divided State between Political and Legal Constitutionalism*, http://verfassungsblog.de/constitutional-review-as-an-indispensable-element-of-the-rule-of-law-poland-as-the-divided-state-between-political-and-legal-constitutionalism (18.05.2017).

[53] B. Szmulik, Opinia w sprawie uwag do nowelizacji ustawy z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym przygotowanych przez Komisję Wenecką [Opinion on the comments to the amendment of the Act of 25 June 2015 on the Constitutional Tribunal by the Venice Commission], 5 *Przegląd Sejmowy* (2016): 81-100.

[54] More about it see under point 6.

4. Dismantling the democratic commitment (arguments against political constitutionalism)

So far it has been argued that the events starting from 2010 (Hungary) and 2015 (Poland) have clearly not lead to political constitutionalism as understood by scholarly works. They are based on abusive constitutionalism and unconstitutional informal constitutional change. These actions cannot build a new fair system. This is clear when we consider the Hungarian CC statement regarding the legal assessment of the transition that the rule of law cannot be weighed against the rule of law.

4.1. Abusive constitutionalism

In Hungary, all changes have been made by the constitution-making and -amending power, for which it was enough to have the constitutional majority, i.e. a two-third majority votes of the MPs in Parliament. The formal constitutional amendment process, save for the two-third majority, is not entrenched in the FL; there are neither any special procedural rules (e.g. referendum) nor eternity clauses established. In the course of adopting the Fundamental Law, the constitution-making power did not organise a referendum even though it could have done so. At the end of the day, the ruling elite clearly monopolised not only the constitution-making process but - by the prohibition of referendum on constitutional amendments - also the constitution-amending process. None of the amendments to the FL was supported by referendum, including those overruling the then recent rulings of the CC. The most known example is the case of the retroactive taxation that led to the curtailment of the powers of the CC, and the

Fourth Amendment, which generated debates both within the CoE and the EU. The case of the Seventh Amendment is outstanding. It had been preceded by a referendum on the so-called quota decision of the European Council,[55] which had been invalid, because less than the required statutory number of voters had participated. It is true, however, that their overwhelming majority (98%) did not want to accept the 'quota decision'. Therefore, it did not trigger any legal response, but still, the political decision-maker decided to initiate a constitutional amendment, which was communicated as the implementation of the will of the people that had been expressed in the referendum. There was no constitutional majority in Parliament, so this amendment failed, and was followed by the decision 22/2016 (XII. 5.) of the CC, which assisted to informally constitutionalise one of the essential components of the failed formal amendment, i.e. constitutional identity of Hungary.

In Poland, the ruling political power cannot amend the constitution by itself because it has no constitutional majority.[56] Nevertheless, in certain circumstances,[57] an abuse of constitutional power is still possible: if the opposition is absent or if it blocks the legislative process. This indeed happened in December 2016 during the

[55] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248), p. 80

[56] See Art. 235(4) of the Polish Constitution.

[57] Art. 235(4) A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies (half of statutory number of Deputies is 230 and PiS has 235 Deputies which means that when opposition is excluded PiS can act by itself), and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators (PiS has 64 Senators).

legislative procedure. The voting took place outside of the main chamber, because the room was blocked by the protesting opposition. Thus, the opposition had only a restricted access to the new chamber and the voting process. It shows how the political majority, which assumes itself as representing the will of the Nation, can act in an abusive way and exclude not only an individual MP but also the opposition from a parliamentary process.

In addition, we can predict that after gaining the constitutional majority in the next parliamentary election, a new constitution might be adopted in a non-inclusive way, similarly to Hungary. The draft is apparently in preparation.[58]

4.2. Breaching the constitution: informal unconstitutional constitutional change

Since 2015, it has been a frequent practice in Poland, particularly in politically sensible issues, e.g. the CT or judiciary reforms, that new laws 'breach the Constitution' instead of trying to amend it formally. Thus, it is not what David Landau describes as abusive constitutionalism,[59] and what were employed in Hungary. The reason is that the PiS did not get the constitutional majority in 2015. However, it still managed to act in a way that has led to the

[58] A questionnaire on the rules of a new constitution was sent by PiS to the academia members. At the same time, the Polish President revealed his willingness to initiate a referendum on the rules of the new constitution, which is not connected with the PiS questionnaire http://www.prezydent.pl/aktualnosci/wydarzenia/art,635,prezydent-rozmawial-o-referendum-z-marszalkami-sejmu-i-senatu-.html.

[59] D. Landau, Abusive constitutionalism 3 *UC Davis Law Review* (2013), Forthcoming; FSU College of Law, Public Law Research Paper No. 646, SSRN: http://ssrn.com/abstract=2244629.

transformation of the constitutional system by causing and upholding the long-lasting constitutional crisis and incapacitating the proper implementation and enforcement of the constitution. What the Polish political decision-makers did with the CT (refusal of accepting the oaths, not publishing the judgments) was based on one kind of constitutional interpretation and the disregard of the rulings of the CT.

Such practice can be marked as an 'informal constitutional change'.[60] In Poland, however, this informal constitutional change is at the same time unconstitutional,[61] as it has been achieved by the political power (the legislative and the executive) through the ordinary legislation and has led to change in the meaning of the constitution's text without a former amending procedure. Additionally, the government created a legal basis for not publishing the decisions of the CT which runs counter to its role in the Polish legal system and the constitutional obligation to release judgments in the official journal.[62] Although lacking the constitutional

[60] It is theorised by R. Albert with regards to the US constitutional law, or D. Oliver and C. Fusaro, or X. Contiades and A. Fotiadou with regards to selected European and common law tradition states. None of the latter however focus on the theory of informal constitutional amendments. See recently e.g., R. Albert, *How unwritten constitutional norms change written constitutions*, Dublin University Law Journal 38 (2015); Boston College Law School Legal Studies Research Paper No. 364. D. Oliver, C. Fusaro (eds.), *How constitutions change? A comparative study*. Hart Publishing. Oxford (2013), X. Contiades (ed.), *Engineering Constitutional Change*. Routledge (2016).

[61] This phenomenon is labelled as constitutional dismemberment by R. Albert, Constitutional amendment and dismemberment. Research paper 424. November 25 (2016).

[62] See e.g, Opinion 860/2016, Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108 the Plenary Session (Venice, 14-15 October 2016), 16. An overall description can be found in A. Bień-Kacała, *supra* note 51. The possibility that the next election might bring a change in the government will not change the fact that serious unconstitutional actions have been already taken.

majority, the party in power tends to apply this practice using other political instruments. By having unconstitutional pieces of legislation in effect, the meaning of the text of the constitution is changed or even emptied, because it is not the constitutional but the statutory provision that is to be applied. These events weaken the rule of law, democracy and the protection of human rights.

In Hungary, beyond the formal constitutional amendments since 2010,[63] we can also experience an informal constitutional amendment as a result of the constitutional interpretation of the CC concerning the constitutional identity of Hungary, which is deduced from the constitutional text, in which it had no textual basis. This decision is the one that helped the political elite constitutionalise the identity concept, which could not be achieved by using the formal amendment process.[64]

5. Disabling mechanism of defending a constitution

The practices of both the abusive constitutionalism and the informal unconstitutional constitutional change aim at weakening the constitutional courts and other independent institutions. Therefore, the 'new system' in none of the countries can be perceived as a political constitutionalism. Neither is it, as already said, a legal constitutionalism compared to the pre-2010/2015 period. The main reason is that the system currently lacks in an efficient defence mechanism of the rule of law, democracy and human rights. First, in Hungary, the nomination of the CC judges was modified by shifting from the parity to proportional

[63] T. Drinóczi, *supra* note 26.

[64] See the 'quota referendum case' and the failed Seventh Amendment.

representation in the nominating committee in Parliament. This was caused by the fact that the parity system made the nominations impossible or degraded them to a simple political bargaining. In the course of preparation of the new constitutional rules and powers of the CC (constitutional complaint), the number of judges was increased from 11 to 15 and the CC's President was decided to be elected by a 2/3 majority of Parliament, departing from the prior regulation providing for an election by the members of the CC.[65] The principal ideas of the change, i.e. ensuring the functioning of the Court and transforming it to a more juridical-type organ are legitimate goals. The chosen means, however, are not necessarily acceptable, as it - by monopolizing the nomination process - excludes a possibility of any political compromise as far as there is a two-third political majority.

On the other hand, in Poland, after the over-two-year long crisis,[66] the CT still cannot fulfil its function as it is partially captured by the PiS with the election of the PiS-friendly judges and the new CT President. Additionally, as a consequence of the extreme polarisation and disagreement caused by the new composition, the CT cannot properly deliver any judgements. CT judges are split into two groups. New judges tend to recognise the supremacy of the political

[65] Act LXI of 2011 on the modification of the Constitution. See T. Drinóczi, Węgry, in A. Michalak, J. Sułkowski, A. Chmielarz (ed.), *Powoływanie sędziów konstytucyjnych w wybranych państwach europejskich* [Appointment of constitutional judges in the selected European countries], Wolters Kluwer Polska, Warszawa (2017).

[66] Which is described in detail by M. Wyrzykowski, Antigone in Warsaw, in *Human rights in contemporary world, Esseys in Honour of Professor Leszek Garlicki*, M. Zubik (ed.), Warszawa (2017): 370-390 and by T. T. Koncewicz at Verfassungsblog, http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/ (31.10.2017).

majority and reject the supremacy of the constitution which is supposed to be safeguarded by the CT. Others stick to the well-established constitutional rules. This situation deteriorated after the election of the CT President (20 December 2016).[67] The paralysation and capture of the CT ruins its reputation[68] and legitimization[69]. Putting the CT in the middle of the political conflict brings lack of an appropriate support which is essential to oppose the political pressure. So, the neutral (as expected) organ is unjustifiably involved in the political decision-making process.

As a result of these events in both states, the newly elected persons are still politically biased (and sometimes less qualified but politically reliable) and therefore they act as servants of the political will. Furthermore, the constitutional court itself does not take the constitution into account but serves the will of the government (Hungary[70]), or their

[67] M. Matczak, http://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/ (31.10.2017).

[68] T. Ginsberg, When courts compete: a reputational perspective, in *Human rights in contemporary world, Esseys in Honour of Professor Leszek Garlicki*, M. Zubik (ed.), Warszawa (2017): 61-70 and P. Pasquino, Neutrality in constitutional conflicts' resolution. Preliminary observations, in *Human rights in contemporary world, Esseys in Honour of Professor Leszek Garlicki*, M. Zubik (ed.), Warszawa (2017): 180-193.

[69] Created by proper, reasonable, clear and short (as far as language of statements of reasons is concerned) justification. A. Młynarska-Sobaczewska, Rytualne ofiary a moralność publiczna. Analiza argumentacji Trybunału Konstytucyjnego (K 52/13) i Sądu Najwyższego USA (508 U.S. 520.1993) [Ritual sacrifices and public morality. Analysis of arguments of the Constitutional Tribunal (K 52/13) and US Supreme Court (508 U.S. 520.1993),], 4 *Państwo i Prawo* (2017) and A. Młynarska-Sobaczewska, Wybór sędziów konstytucyjnych jako element legitymizacji sądu konstytucyjnego [Election of the constitutional judges as an element of legitimacy of the constitutional court], (in publication), p. 8.

[70] 22/2016 (XII.5) on the limits of the EU law, Decision 3194/2014 (VII. 15.) on the monopolization retail trade of tobacco products (the right of those formerly carrying out tobacco retail activities was restricted, and in the future, they could continue their business only if they get a concession the tender for

decisions are not considered at all (Poland[71]). Thus, one can presume that the real mechanism of safeguarding democracy does not exist.[72]

6. Judicialization of politics

The Polish CT started to act as its Hungarian counterpart, thereby safeguarding the limitless power of the parliamentarian (political) majority. Such behaviour is known as the special kind of judicialization of politics.[73] An ostensive example of this practice is the already-mentioned decision 22/2016 (XII.5) of the Hungarian CC.[74] One can observe here a constitutionalisation of the will of the political power (Fidesz) that could not get the necessary parliamentary support in an earlier time. As said before, this

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which was very limited in numbers; the objective criterion of a kind of '*numerus clausus*' was considered subjective limitation allowing more room for the legislative power to restrict the fundamental right to enterprise).

[71] The following still not published judgments concerning the statutory provisions on the CT: 9 March 2016 r. (K 47/15); 11 August 2016 r. (K 39/16); 7 November 2016 r. (K 44/16).

[72] And the mechanism cannot be fixed by taking over constitutional review by the ordinary courts. R. Balicki, Bezpośrednie stosowanie konstytucji [Direct application of a constitution], 4 *Krajowa Rada Sądownictwa* (2016): 13-19; P. Kardas, M. Gutowski, Konstytucja z 1997 r. a model kontroli konstytucyjności prawa [1997 Constitution and a model of constitutional review], 4 *Palestra* (2017): 11-30; L. Garlicki, Sądy a Konstytucja Rzeczypospolitej Polskiej [Courts and the Constitution of the Republic of Poland], 7-8 *Przegląd Sądowy* (2016): 23-25; L. Garlicki, Z.A. Garlicka, External Review of Constitutional Amendments? International Law as a Norm of Reference, 44 *Israel Law Review* (2011): 343-368.

[73] A. Mazmanyan, *supra* note 13.

[74] T. Drinóczi, *The Hungarian Constitutional Court on the Limits of EU Law in the Hungarian Legal System*, Int'l J. Const. L. Blog, 29 December 2016, < http://www.iconnectblog.com/2016/12/the-hungarian-constitutional-court-on-the-limits-of-eu-law-in-the-hungarian-legal-system>. For criticism, see T. Drinóczi, Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System, 1 *Vienna Journal on International Constitutional Law* (2017): 139-151.

formal amendment (Seventh) to the FL intended to create a 'constitutional identity' clause as a defence mechanism against the Council decision on a refugee quota (Council decision, 2015/1601 of 22 September 2015[75]). However, shortly after the invalid referendum on the EU's quota decision[76] and just one week after the Seventh Constitutional Amendment had failed,[77] the already packed CC,[78] informally amending the FL, declared as follows: by exercising its competences, the CC can examine if the joint exercise of competences infringes, among others, Hungary's self-identity based on its historical constitution.[79] On 16 March 2017, the Polish CT delivered the judgement on freedom of assembly, thereby exercising *ex ante* constitutional review (Kp 1/17).[80] President of the Republic of Poland, before signing a bill, challenged the amendment to the Law on assemblies before the CT. The main scope of the change is a preference to the cyclical (repeatable in certain period of time, e.g. every 10 day of each month) assemblies, which the CT upheld. This judgement was the

[75] http://eur-lex.europa.eu/eli/dec/2015/1601/oj.

[76] There are many voices of criticism (on moral ground, political objections and constitutional problems) concerning this referendum. For a collection of them and a legal analysis see Z. Szente, *Analysis: The Controversial Anti-Migrant Referendum in Hungary is Invalid*, https://iacl-aidc-blog.org/2016/10/18/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/ (18.05.2017).

[77] See e.g., G. Halmai, *Constitutional Court Decision on the Hungarian Government's Constitutional Identity Defense*, https://blogs.eui.eu/constitutionalism-politics-working-group/2017/01/11/constitutional-court-decison-hungarian-governments-constitutional-identity-defense/ (12.01.2017).

[78] *See* e.g. http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf.

[79] Although there are other similar examples, this paper does not allow on their further elaboration

[80] See also A. Bień-Kacała, Gloss to the judgement of Constitutional Tribunal of 16 March 2017 (Kp 1/17), 4 *Przegląd Prawa Konstytucyjnego* (2017): 255-262.

first sign of the judicialization of politics in Poland, not only because of its merit, but because of the procedural issues. It is important to recall here the motion of the Prosecutor General (PG) for excluding from this adjudication some judges (who joined the CT in 2010 due to the flaws of their election**)**. Moreover, in the same case, another judge (elected in 2017) was not excluded despite his own motion, in which he expressed his impartiality. Under these circumstances, it is clear that the guiding idea of adjudication was the political loyalty of the judges. Therefore, the question arises whether the judgment (Kp 1/17) is a mere acceptance of the political agenda of the leading majority.

Political loyalty of the judges and the judicialization pattern are more ostensive in another judgement from 20 June 2017 (K 5/17) because of its merit (substance).[81] The decision is connected to the judiciary reform.[82] The said bill intended to change the constitutional character of the National Council of Judiciary (NCJ), the terms of office of its members and its organisation. Taking into consideration that the Constitution only contains provisions regulating the main role of the NCJ (i.e. to safeguard the independence of the courts and judges)[83] and determines its composition,[84]

[81] M. Matczak, *How to Demolish an Independent Judiciary with the Help of a Constitutional Court*, VerfBlog, 2017/6/23, http://verfassungsblog.de/how-to-demolish-an-independent-judiciary-with-the-help-of-a-constitutional-court/ (31.10.2017).

[82] However, this reform has been slowed down by the veto of the President http://www.president.pl/en/news/art,508,president-to-veto-two-judicial-bills-says-will-sign-bill-on-common-courts.html. At the moment of writing the paper (November 2017), the reform is in preparation by the President and is consulted with J. Kaczyński.

[83] Article 186(1) of the Constitution of 1997.

[84] Article 187 of the Constitution of 1997.

such reform would be legally possible. The detailed regulations are to be adopted by Parliament.[85] Nevertheless, it must be emphasised that only independent and politically non-biased organ can safeguard independence of the courts and judges. In case of Poland, however, the said reform might politically influence the NCJ, because the draft intends to create two units within this body – a political (composed of, for example, the Minister of Justice, an individual appointed by the President, 4 Deputies and 2 senators) and a judicial (composed of judges elected by politicians, for example the Sejm which indirectly means the party in power). The draft legislation on the reform (especially in scope of the NCJ) has been criticised by different entities (e.g. the Ombudsman) from a constitutional perspective. Therefore, on a motion of the Prosecutor General (simultaneously acting as the Minister of Justice who prepared the draft legislation of the reform), the CT delivered the judgement concerning currently binding regulations. In the ruling K 5/17, the CT created a legal basis for the reform. According to the interpretation of the Constitution, the legislative power is authorized to create an almost totally different organ from the current NCJ as intended in the draft. This position, equalling to an informal constitutional change by constitutional interpretation, and it is also a perfect example of the judicialization of politics.

These examples enlighten that the constitutional courts act as agents of politicians who exploit them for their own strategic purposes. In consequence, this judicialization of

[85] Article 187(4) of the Constitution of 1997- The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

politics in both countries is more often than not a product of political instruction and manipulation of constitutional law. Constitutional courts allow the realization of the Parliaments', thus the peoples' will.

7. Conclusion

As far as the representative democracy is concerned, it seems to be clear that the Hungarian and Polish practices are procedurally or formally similar to what political constitutionalism represents. This is, however, a façade, because neither the constitutional basis nor substantive preconditions exist, which would allow us to consider the Hungarian and Polish newest constitutionalism as political constitutionalism. If we seek any typology for both the Hungarian FL and the Polish Constitution or constitutional practice since 2010 or 2015, it is misleading to employ the theory of political constitutionalism, mostly since it may lead us to the ill-founded impression that the prerequisites of political constitutionalism are also valid in these states and we do not have a legal constitution but a political one, which is neither *de facto* nor *de iure* true. The Hungarian and the Polish constitutions are the products of the constitution-making process, even if this process can justifiably be criticised from many perspectives. This fact alone makes it a written constitution, which according to its own rules is the foundation of the legal system, binding for everyone, including the state power. The constitutions prescribe that it is the CC (explicitly) or the CT

(implicitly[86]) which is the principal organ for the protection of the constitution. Our systems show some features departing from legal constitutionalism. They are less than legal constitutionalism as well: both the Polish and the Hungarian constitutions ceased to be legal and prescriptive documents and along with the constitutional courts, mostly in certain, politically sensitive cases, they cannot limit public power.

The events in Hungary and Poland show clearly that the systemic changes in both states cannot be perceived as bringing political constitutionalism. In our countries, we still observe a kind of legal constitutionalism which can be best described by the label of 'illiberal constitutionalism'[87]. The illiberal constitutionalism, the 'newest constitutionalism', is the result of a peaceful constitutional development, in which democracy, the rule of law and human rights are not respected in the same way as before, in the context of constitutional democracy. Additionally, one can observe the selective and arbitrary application of the constitution and the non-inclusive character of the constitution-making process. In case of both states, the illiberal democracy was and still is formed by capturing the constitution and constitutionalism in a legal way by a populist political majority lacking self-restraint, with formal and informal constitutional change and packing or paralyzing the constitutional courts. The process of capturing constitutionalism is supported and theorised by

[86] Compare Art. 24 FL and Art. 188 of the Polish Constitution. There is a consensus in Poland that the CT is the principal organ for protection of the Constitution.

[87] T. Drinóczi, A. Bień-Kacała, *supra* note 5.

the misunderstood concepts of political constitutionalism and constitutional identity.

Illiberal democracy is not in opposition to liberal democracy. It rather refers to a state in which the political power relativizes the rule of law, democracy, and human rights in politically sensitive cases, constitutionalises populist nationalism as well as the identity politics. Consequently, constitutional democracy still exists but its formal implementation overweighs the substantial realization. The three pillars of liberal constitutional democracy (the rule of law, human rights and democracy) are defectively worded in a constitution or poorly implemented or enforced. This means, that the states are developing constitutional democracy in a mere formal sense but it does not amount to political constitutionalism. Notably because they still have a written constitution and they maintain and allow the functioning of the constitutional review mechanisms, even if the mechanisms are defective.

The constitutional courts in both countries were designed for defending the (liberal) constitutional democracy as a reaction to totalitarian and non-democratic regimes. Thus, the most visible element of the illiberal system is capturing the constitutional courts by changing the judges' nomination process (Hungary, capture *de iure*) and annulment of the election and the election of new judges (Poland, capture *de facto*). In consequence, the states face the 'judicialization of politics' which means that the constitutional courts are servants of the ruling political parties.

Against this background, the 'juristocracy' or the estrangement of the citizens from the constitution, which they might have never had an affection for, thus

constitutional patriotism[88] could have never arisen,[89] cannot be a reason of turning aside from the constitutional regime established in the 1990s. Employing these otherwise feasible and applicable concepts and descriptions for the Polish and Hungarian situation is misleading and cover up how the power-holders actually behave and legitimize their actions. This use of doctrinal works, as presented in this paper, has a potential to become a mere politically motivated indoctrination.

Thus, juristocracy as identified by Hirschl, and understood by us (as a phenomenon that can be linked to the legal constitutionalism) cannot be applied to Hungary and Poland 1990-2010/2015. In the post 2010/2015, we experience exactly its opposite: the judicalization of politics which cannot result in a juristocracy as the constitutional court judges are the servants of the political will.

[88] See e.g., J.-W. Müller, *A general theory of constitutional patriotism. 1 I-CON (2007): 72–95.*

[89] A. Cieger, *Alkotmányosság és nemzeti identitás – a magyar történelem kontextusában. Vázlat*. http://atelier.org.hu/upload/category/mta_elte_atelier/kotoerok1.3_cieger_andras.pdf

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The role of 'controlled' referendum in Polish democracy[1]

1. Introduction

In the light of art. 4 of the Constitution of the Republic of Poland, the nation as a sovereign has the right to steer the state's policy, express an opinion on governing of the state, as well as co-decide with the state organs in the governing process. The nation is a source of power and may assume the role of an arbitrator in conflict situations

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[1] This paper is an extended and revised version of article: Z. Witkowski, M. Serowaniec, The Views of the Polish Political Class on the Institution of a Nationwide Referendum, Kultura i Edukacja 2016, No. 4 (114), pp. 165–174 DOI: 10.15804/kie.2016.04.12, which was presented in the International Society of Public Law (ICON·S) 2017 Conference on 'Courts, Power, Public Law' in Copenhagen, July 5–7, 2017.

between constitutional state organs but also in disputes between the subjects of the political scene, which is reflected in the targeting of the activities of public authorities according to the will expressed via a referendum. The Polish Constitution of 2 April 1997 provides for holding a referendum in three following cases:

1) in matters of particular importance for the state (art. 125);
2) in a matter of expressing a consent to the ratification of an international agreement on whose basis Poland will transfer onto an international organisation or an organ with the competences of a national authority certain matters (art. 90);
3) in a matter of an approval of a law on amending the Constitution, as far as its provisions interfere with the content of Chapter I – 'Commonwealth', II – 'Liberties, rights and obligations of the man and citizen' and XII – 'Amendments to the Constitution' (art. 235).

In none of the above cases, however, there is an obligation to conduct a referendum, it is always optional and held if an authorised entity files a motion and a proper decision is taken by authorised organs. In light of the current referendum practice, it should be noted that in Poland there is a type of referendum that was classified by Gordon Smith as the so-called controlled referendum. It has the following three characteristics: those in power decide whether or not to hold a vote at all, when it is going to take place and they also decide on the questions being asked.

The objective of this paper is to discuss the the role of 'controlled' referendum in matters of particular importance

for the state (art. 125) in Polish democracy. Such a referendum can be called by the Sejm by an absolute majority of the votes in the presence of at least half of the statutory number of members of the Sejm or by the President of the Republic of Poland with the consent of the Senate expressed by an absolute majority of the votes in the presence of at least half of the statutory number of senators. In the first, the Sejm can make a resolution on holding a referendum by an absolute majority of votes. A draft resolution on the order of a nationwide referendum may be submitted by the Presidium of the Sejm, a Sejm committees or a group of at least 69 deputies. Moreover, a request to order a referendum can be submitted to the Sejm by the Senate, the Council of Ministers, or a group of 500.000 citizens. The popular initiative, however, may not concern such issues as expenditures, incomes, defence capability of the State and amnesty. It is the Sejm duty to examine the submitted request, however ordering a referendum is left to the recognition of the chamber. For the second, the decision to hold a referendum can be made by the President. Such a decision must be approved by the Senate by an absolute majority of votes. The Senate should take the appropriate resolution within 14-days of the date of submission of the draft provisions of head of state[2]. At the same time it should be noted that it is the President who determines the entire content of an ordinance to conduct a referendum, thus he decides which matters are of particular significance for the state, formulates the questions and indicates the date thereof, whereas the role of the Senate is limited to issuing a consent, i.e. passing a resolution that allows or rejects a referendum

[2] Cf. K. Prokop, Polish constitutional law, Białystok 2011, p. 80-81.

in the date and form defined by the President[3]. ln this way, the Polish Constitution precludes the Head of State from holding a referendum without the consent of the Parliament. Such solution remains in accordance with the rationalised parliamentary system, which operates on the basis of the Constitution 1997.

Moreover, a key element in the evaluation of the analysed referendum category is also an explanation of the meaning of the expression 'matters of particular importance for the state'. M. Jabłoński is right to note that utilising the expression 'does not constitute any model allowing for a suitable level of a priori identification of a matter to be resolved via a referendum vote. Such a solution may on the one hand prove the rational approach of the legislator in the sense that it is difficult to indicate a closed catalogue of such matters, thus such indefiniteness will allow for a universal reference to the existing competence, while on the other, considering the political character of the majority taking a decision on calling of a referendum, it is presumed that in many cases the assessment of the proposal to conduct the vote will be strictly political'[4], which precludes any influence of civic character. Pursuant to art. 125 sec. 3 of the Constitution, if a national referendum is participated by more than a half of the citizens with the right of vote, the result is binding.

[3] Cf. L. Garlicki, Komentarz do art. 125 Konstytucji [w:] Konstytucja Rzeczypospolitej Polskiej. Komentarz, pod red. L. Garlickiego, Warszawa 2001, p. 8.
[4] Cf. M. Jabłoński, Polskie referendum…,p.104.

2. The role of 'controlled' referendum in Polish democracy

Due to the introduction of the principle of nation sovereignty in the Constitution of the Republic of Poland it seemed that a nationwide referendum was bound to become an important instrument allowing the expression of opinions and formulation of decisions by the sovereign. In fact, as a form of participation of those governing in determining public matters it serves the immediate expression of the political will allocated to the citizen[5]. However, it needs to be remembered that according to the intentions of the founders of the Constitution the direct democracy institutions should not restrict the dominant position of the parliament, hence a national referendum was attributed in the Constitution a 'supplementary character' in relation to the activities of representative organs – the Sejm and the Senate[6]. The above view was also shared by the Polish Constitutional Court in point 11.5 of judgement K11/03 as of 27 May 2003[7]. The Court recognised there that 'the thesis on the supplementary character of direct democracy finds its justification... in the legal character of a referendum from the point of view of the entity entitled to refer to (initiate) the referendum procedure. In the Polish legal system we do not speak of a civil right to a referendum, as the citizen

[5] See more Z. Witkowski, M. Serowaniec, The Views of the Polish Political Class on the Institution of a Nationwide Referendum, Kultura i Edukacja 2016, No. 4 (114), pp. 165–168 DOI: 10.15804/kie.2016.04.12.

[6] Cf. M. Pietrzak: Demokracja reprezentacyjna i bezpośrednia w Konstytucji RP [Representative and direct democracy in the Polish Constitution], [in:] Referendum konstytucyjne w Polsce [Constitutional referendum in Poland], ed. M. T. Staszewski, Warsaw 1997, pp. 31-32.

[7] An identical opinion on this issue is expressed by Prof. M. Jabłoński in: Polskie referendum akcesyjne [Polish accession referendum], Acta Universitatis Wratislaviensis No2965, Wrocław 2007, p.106, fn. 333.

(group of citizens) does not have a legally effective possibility to initiate actions whose immediate result consists in calling a referendum'[8]. Thus, an authorised motion is the one in whose light it explicitly follows from the current Polish constitutional regulations that the institution of a referendum only seemingly has a systemic meaning, while in fact it only to a small extent constitutes the guarantee for citizens of direct participation in decision-making processes regarding matters of particular significance for the state[9].

The conclusions that can be drawn from the current practice of the use of the institution of referendum in Poland are also less optimistic. From the very beginning of the implementation of this institution in the Polish legal order it was accompanied by political horse-trading. The members of the of the Constitutional Committee of the National Assembly challenged the importance of the institution of referendum by raising the argument that it created the premises for the establishment of 'a permanent referendal republic' thus providing 'a very dangerous window for numerous initiatives that would create divisions in the society and burden the state's budget', which was seconded by some of the representatives of legal science[10]. It was prophesied that instead strengthening the democratic legitimacy of a new state a referendum would act as a convenient form of exerting constitutional pressure on the Sejm and create cycles of tensions that would destabilise the state should the motions for a referendum be rejected by the

[8] Ibid., p. 106.
[9] Cf. ibid., p. 103.
[10] Cf. ibid. and see Biuletyn KKZN XLIV, pp.151-152

Sejm. The final resolution concerning the institution of a referendum in the Constitution of 1997 clearly showed that within the members of the National Assembly passing the Constitution the dominant conviction was that the sovereign, and thus the totality of citizens, are not only 'fully prepared for personal and direct governance' but, moreover, that the faint political culture of the sovereign means that he should not be provided by the basic law the real possibility to influence the initiation of procedures that could result in the participation in shaping of the most important state decisions that concern him (the sovereign). It was recognised that such civic participation would lead to destabilisation and threaten the state of law rather than contribute to the development of civic democracy. And this was the principal reason why a nationwide referendum was turned into a merely decorative and secondary element. It should be straightforwardly admitted that the institution of referendum was marginalised in Poland by being assigned the features of a supplemental mechanism for indirect rule or responsible government[11]. Hence, although the adopted nationwide referendum mechanism in Poland fulfils the task of protection against its too frequent and not always justified use, at the same time it does not eliminate the risk of its entirely instrumental *ad hoc* use by currently ruling political majority[12]. However, the worst part is that this way the Polish political class expressed its real negative view on the need to 'establish citizens', the necessity to transform citizens into the actual public authority and not merely

[11] Cf. on that topic M. Jabłoński, Polskie referendum... [Polish accession referendum], p. 105.
[12] Cf. ibid., p. 106.

addressees and subjects/objects of its imperative actions[13]. Moreover, according to the beliefs represented by the majority of politicians the institution of referendum may only be identified with the time-consuming and costly vote of no-confidence referring to actions undertaken by democratically elected representatives. Further, they also emphasised the lack of social recognition in voting, considering the fact that each vote may turn into a sort of a survey and not a substantive determination of a crucial national matter[14]. Simultaneously, attention was paid to the fact that a referendum is not a mechanism allowing for negotiations, thus it does not create the opportunities to foster consensus capable of satisfying the demands of all the stakeholders. On the contrary, it forces opting for a particular solution, which may lead to major societal conflicts. Unfortunately, constant references to the above arguments also prove that the political class do not treat citizens as equal and full partners in the processes of governance[15].

[13] Cf. D. Dudek, Konstytucyjna aksjologia wyborów [Constitutional axiology of elections]. In: F. Rymarz, Iudices electionis custodes (Sędziowie kustoszami wyborów), Warszawa 2007, Wydawnictwo Krajowego Biura Wyborczego, s. 47.

[14] Cf. M. Jabłoński, Referendum ogólnokrajowe w pracach Komisji Konstytucyjnej Zgromadzenia Narodowego (1993-1997) [National referendum in the works of the Constitutional Committee of the National Assembly (1993-1997)], Acta Universitatis Wratislaviensis No 2341, 'Przegląd Prawa i Administracji' XLIX/2002, pp. 99 – 118.

[15] Cf. M. Jabłoński, Referendum ogólnokrajowe w polskim prawie konstytucyjnym [National referendum in the Polish constitutional law], Acta Universitatis Wratislaviensis No 2331 seria 'Prawo' Nr CCLXXIV, Wrocław 2001, p. 135.

3. The referendum's practice in Poland

The first referendum to be held after the year 1989 was the so-called enfranchisement referendum of 18 February 1996 which was initiated by the decree of the President of the Republic of Poland on the common enfranchisement of the citizens[16] and the resolution of the Sejm on holding a referendum on some of the directions of state property use[17]. The citizens had four questions to answer during the referendum:

1) Are you in favour of the liabilities due to pensioners and public sector employees, arising from the decisions of the Constitutional Tribunal, to be satisfied from the privatised state assets?
2) Are you in favour of the part of privatised state assets to supply the general pension funds?
3) Are you in favour of increasing the value of participation certificates of National Investment Funds by extending the programme on other companies?
4) Are you in favour of accounting for privatisation certificates in the common enfranchisement programme?

From the legal point of view on 18 February 1996 two different referenda were called. However, the voter turnout was just above 32%. Therefore, they proved inconsequential on account of the statutory necessity of fulfilling the turnout

[16] See the Decree of the President of the Republic of Poland of 29 November 1995 on holding a referendum concerning the common enfranchisement (Journal of Laws No 138, item 685).
[17] See the Decree of the President of the Republic of Poland of 21 December 1995 on holding a referendum concerning some of the directions of state property use (Journal of Laws No 154, item 795).

criterion for the validity of the referendum (over a half of those entitled to vote). The doctrine concludes that such a low turnout was caused mainly by the lack of a pre-referendum debate and the complexity of the questions. Secondly, the lack of a long-standing tradition of taking part in a referendum and a belief that it may have a real impact on the affairs of the state might have been attributed to its failure[18].

The latest national referendum so far took place on 6 September 2015 on the initiative of Bronisław Komorowski, the former President of the Republic of Poland[19]. In this referendum, the citizens were requested to provide answers to three questions concerning: single-mandate electoral districts, political party funding and the principles of settling ambiguous issues in favour of the taxpayer. In a common view, this initiative, on account of the questions posed was treated as an attempt to take over Paweł Kukiz' constituents and save the second ballot. However, less than three months before that time, before the referendum campaign commenced, the majority of Poles (58%) had no awareness of what it would be about. Only 39% of people declared to have knowledge on the issue, with only 17% being able to vouch for their knowledge[20]. As the commentators emphasised, presidential decision 'will not increase the citizens' trust of democracy, but conversely, the citizens will distance themselves from politics, from democracy, and will

[18] Cf. M. Jabłoński, Referendum ogólnokrajowe w polskim prawie…, [National referendum in the Polish Law] pp. 44-47.

[19] See the Decision of the President of the republic of Poland of 17 June 2015 on calling a national referendum

[20] Cf. CBOS survey message No 89/2015 Referendum – first reactions before the commencement of the campaign ,available on-line at: http://www.cbos.pl/SPISKOM.POL/2015/K_089_15.PDF (12.07.2016).

not feel subjectified'[21]. Eventually, the turnout was only 7.8% and has been the lowest of all recorded national elections held in Europe after 1945[22]. The referendum became a symbolic defeat of entire Polish democracy, for which politicians hold the responsibility.

Another attempt at an instrumental use of the institution of referendum could be the initiative of the President of the Republic of Poland, Andrzej Duda, by conducting a referendum with regard to changes in the Constitution. According to the President, the Poles should be able to comment on the constitution that has been in force for 20 years and the political system defined in it. Moreover, the President wants the referendum on constitutional changes to be held next year on November 11 or to be extended onto two days: November 10 and 11. The said referendum is to be nationwide and intended as a consultative referendum. The constitutionalist stressed that, according to the rules in force, an outcome of a national referendum may be of a consultative or advisory character when the turnout is less than 50% of those entitled to participate, whereas a higher turnout means that the referendum is binding. Thus, one can ask the following question: what happens if the referendum – meant by the President as consultative, yet conducted in the area of the constitution – is binding? This would mean that the Sejm and the Senate are required to adopt the constitution in concord with the results of the referendum, however in order to adopt amendments to the constitution it

[21] Cf, A. Szczęśniak: Referenda became a toy in the hands of politicians, available on-line at: http://wiadomosci.onet.pl/szczesniak-referenda-staly-sie-zabawka-w-rekach-politykow/kvs33q (15.07.2016).
[22] Cf. G. Osiecki, M. Potocki, *Referendum przeszło do historii [Referendum went down in history]*, 'Dziennik Gazeta Prawna', 8 September 2015.

is required to obtain two-thirds (votes) in the Sejm and an absolute majority in the Senate. At the moment it seems impossible to achieve such a majority. Thus, what would this commitment of the Sejm and the Senate mean? In political terms, such a referendum makes sense, for example, as a challenge to ensure such a majority with regard to constitutional changes in the present and incoming parliament. On the legal side, with regard to this particular parliament it seems that it would be difficult to enforce the results of the referendum if it were binding. This would mean a commitment that in practice would be difficult to keep. The discussion on the constitution and its possible changes is needed, although to many people these issues are very difficult. Another problem is concerned with a constitutional referendum which is to acknowledge the amendments to the constitution adopted by the parliament. According to the provisions of the constitution such a referendum may – but does not have to be ordered if the amendments pertain to the provisions stipulated in chapters I, II or XII of the constitution. These are chapters concerned with the principles defining the political system of the state, freedoms, rights and obligations of persons and citizens, and the procedures for amending the constitution. Indeed, it is clearly visible that the procedure of introducing changes in the constitution was intended for the purpose of correcting the constitution rather than changing it completely. In the situation where the entire constitution is subject to modification, i.e. also chapters I, II and XII, the matter of conducting a confirmatory referendum thus becomes more complicated. Therefore a question arises: what should be the object of such a referendum? Should it be chapters I, II and

XII or the entire constitution? It seems that the latter as what would it mean, for example, if the amendments to the three chapters were rejected (in the referendum)? In such a situation the entire constitution should be submitted to a referendum as a completely new normative act. A confirmatory referendum is not obligatory and if an agreement is reached on the political scene such as referendum is not conducted. However, with current extensive and sharp political disputes, it can be assumed that there will be a will to hold a referendum that is 'constitutional by character' to end the procedure of changing the constitution.

As practice shows, the issues that were the subject of voting were not sufficiently recognised by a larger part of the society. From the society's point of view, the referenda did not appear as procedures of direct participation in the process of exercising power but as a call for taking sides or even granting political support to a particular person or political group. A referendum, on account of the properties of human psyche, has a tendency to turn into a personal plebiscite which aims at building or denying support to a particular politician, or a group of politicians who authored the draft that has been put to vote. The draft and its properties, advantages and disadvantages are of secondary importance. As shown in practice, most frequently it becomes an act of investiture, approval or disapproval of the representatives.

4. The Views of the Political Class on the institution of Referendum

A referendum has been and still is commonly treated by the political classes as an element of political struggle between particular parliamentary and extra-parliamentary groups that take advantage of it for their ongoing purposes. Different political hubs attach different expectations to referenda. Some politicians treat them solely as a test of popularity of their own group. Hence, a referendum is oftentimes considered as a test for political elites, which provides more of an indication of what the current distribution of powers on the political scene is, rather than binding solutions on issues that are essential to the state. Referenda have become toys in the hands of politicians who use them as tools in electoral competition and an element of the 'power game'. The institution of the referendum has thus become another means for running their political campaign on an extended scale, which enables the gathering of numerous constituents rather than a real procedure that ensures direct exercise of power for the public[23]. It is not uncommon for the political classes to use the institution of a referendum as a tool that ensures political success for the purpose of achieving a particular electoral goal. A further point concerns taking advantage of a referendum to build a position on a political scene by the actors of political life who wish to remind the voters about their existence. This certainly does not build the authority of the institution contributing to a low turnout and its gradual devaluation.

[23] Cf. Z. Witkowski, Siedem grzechów głównych polskiej klasy politycznej wobec wyborców, wyborów i prawa wyborczego [Seven cardinal sins of the Polish political class in relation to their voters and the election law], Toruń 2015, p. 7.

Political parties try to convert the issue posed at the referendum into a plebiscite around particular people or political orientations that support or contest a given solution. In the experience to date, vague questions, ambiguity, insufficient, substantive and organisational preparation of the voting contribute to a low turnover in a referendum. It thus may be *a priori* assumed that the answers to questions formulated in such a vague manner will not lead to any accurate conclusions. Worse still, the result of such a referendum will do very little in practice, but it will surely become a subject of political disputes between the governing party and the opposition. In such atmosphere the citizens may be dissuaded from taking part in law-making procedures in this form. If the decision-makers assume that social engineering of that kind will help them reach their intended goals, then the referendum will not bring the desired result. If a referendum is to fulfil what is expected of it, then the questions must be formulated with the highest possible degree of precision, as only then the correct interpretation of its results will be possible. Otherwise, it is possible to imagine a situation in which a referendum turns into a plebiscite of popularity and resentment, and not a way of making binding decisions[24].

The political powers treat also referendum campaigns not as debates about pivotal issue for the state, but as a way of building electorate and mustering up the voters. The studies show that campaigns that propagate the referendum in mass media have been delivered to the public in a limited manner. It is far from being optimistic to realise

[24] Cf. M. Jabłoński, Referendum ogólnokrajowe. Wybrane zagadnienia [National referendum. Selected issues], 'Palestra' No 5-6/2003, pp. 16-17.

that the campaigns prior to the referenda have been a display of demagogy rather than a substantial and factual debate with arguments[25]. A referendum has thus become 'a tasty morsel' for politicians in their fight to strengthen the position of their parties rather than educate the voters. However, what is even more surprising, the referendum-holding authority, as seen in previous cases, refrains from running an extensive referendum campaign and utilising the dedicated transmission time. In such a situation, the subject of the referendum becomes less important as the main goal of the participation in the referendum campaign is the emphasis of one's own political independence and distinctness. It should come as no surprise that the information campaigns held to date have been shallow in terms of substance, chaotic and focused on political competition. An obvious underlying political context, badly prepared questions and the lack of a real referendum campaign held in the media and the largest parties, translates into a very low turnout. Thus, the voters' indifference as regards the possibility to make decisions about the affairs of the state comes as no surprise. They have lost a sense of any real impact on the actions of the authorities as they have no guarantees that, regardless of the governing political elites, they will make decisions on the affairs that are essential to the state and, most importantly, for themselves[26].

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[25] Cf. M. Rachwał, Demokracja bezpośrednia w procesie kształtowania społeczeństwa obywatelskiego w Polsce [Direct democracy in the process of shaping the civil society in Poland], Wydawnictwo Sejmowe, Warsaw 2010, pp. 89-90.

[26] Cf. M. Jabłoński, Referendum *de lege lata i de lege ferenda*, Acta Universitatis Wratislaviensis, 'Przegląd Prawa i Administracji' vol. XXXIX/1997, p. 84.

5. Conclusions

A general reflection on the lost opportunities in terms of the functioning of political institutions due to insufficient professionalism both in the process of shaping appropriate legal measures as well as applying them in practice, remains. In order for a referendum to be able to fulfil its basic functions, certain requirements need to be met. Firstly, the issues that are to be regulated must be clearly and precisely formulated. It must also be preceded by a sufficiently long and thorough campaign, in which the society will have a chance to be confronted with different standpoints. This way it becomes subjectified and at the same time the possibility of any manipulations that political parties may be tempted to effect is diminished[27].

[27] Ibid.

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Impact of UN Human Rights Monitoring Mechanisms in Kenya

1. Introduction

International human rights scholarship has for years highlighted the adoption of binding norms and establishment of monitoring mechanisms as signs of progress in global human rights protection. This scholarship has however lacked a definitive answer on the causal effectiveness of the international human rights regime, specifically, the domestic impact of the international human rights regime. Studies on impact of the international human rights regime examine impact with reference to implementation of the judgements, decisions and recommendations of monitoring mechanisms. These studies have so far pointed to an 'implementation crisis'.

Writing on the implementation of the decisions of the Human Rights Committee, Alebeek and Nollkaemper put

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the rate at 30% in 2002 and at 12% based on 2009 data.[1] Similarly, on recommendations of the UN special procedures, Piconne puts the rate of full implementation at 18% based on the 2004 to 2008 data.[2] In regard to concluding observations of UN monitoring bodies, Krommendijk finds similar trends of low levels of implementation in Netherlands, New Zealand and Finland.[3] Acknowledging this 'implementation crisis', a related question arises with regard to explanation of implementation: what accounts for implementation of the decisions, judgements and recommendations of monitoring mechanisms at the national level? While studies on the description of implementation are well developed, the same cannot be said of the concept of what accounts for implementation. Studies repeatedly demonstrate low levels of implementation without providing an explanation on what accounts for implementation or non-implementation.

In view of this deficiency in scholarship, this paper addresses the following research question: what is the impact of the UN human rights monitoring mechanisms in Kenya and how do the findings on impact correlate with theoretical explanations of state compliance? The paper will advance the argument that the impact of human rights

[1] R Aleebek, A Nollkaemper, 'The Legal Status of Human Rights Treaty Bodies in National Law' in H Keller & G Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press (2012) pp.356-357.

[2] T Piconne, *Catalysts for Rights: The Unique Contribution of the UN's Independent Expert on Human Rights*, The Brookings Institution (2010), pp.22.

[3] J Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper Pushing or Policy Promoting?*, Intersentia Publishing Ltd. (2014), pp.368-375.

monitoring mechanisms is shaped by the domestic processes that occur once implementation shifts to the domestic level and that impact can be enhanced by focusing on these domestic processes, institutions and actors.

The paper makes two important contributions to existing literature. First, the research offers new insights into the study of impact of UN human rights monitoring mechanisms by drawing from international law compliance theories to explain impact. Second, by applying a theoretical approach, the study provides causal explanations of empirical facts as a basis for proposals to maximize national level impact.

The paper is organized as follows. The second section defines and operationalises the concept of impact, then offers a brief narrative of Kenya and the UN human rights system and finally presents the transnational legal process theory. The third section discusses the methodology used to assess the impact of the UN human rights monitoring mechanisms in Kenya. The fourth section presents the empirical results, while the fifth section examines the empirical results under the optics of the transnational legal process theory. The sixth section draws on the study findings to make suggestions on the how the UN human rights monitoring system should evolve.

2. Literature review and theoretical framework

This section, firstly defines impact which is the main concept in this study. The section then presents the literature review and introduces the transnational legal process theory.

2.1. Impact

Heyns and Viljoen in their study on the impact of UN human rights treaties on the domestic level define impact as 'any influence that the treaties may have had in realization of the norms they espouse in individual countries'. The influence could occur as a result of the engagement with treaty monitoring mechanisms or internalisation of the norms at the national level. The study assessed impact through adoption or review of legislation or constitutions, policy formulation and implementation of concluding observations as well as infiltration of treaty norms to educational programmes and media coverage.[4] A 2012 study on the impact of the African Charter and the Women Rights Protocol on select African countries defines impact as state compliance with the African Charter and Women's Protocol and 'more direct forms of influence'.[5] Viljoen and Louw in their study on state compliance with the findings of the African Commission draw a distinction between direct and indirect impact of human rights treaties and law.[6] The study defines direct impact as immediately demonstrable expressed, for instance by implementation of a finding of a treaty monitoring body. Indirect impact is on the other hand defined as incremental and occurring over time.[7] Okafor in his study of the impact of the African human rights system

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[4] CH Heyns, F Viljoen, *The impact of the United Nations Human Rights Treaties on the Domestic Level*, Cambridge University Press (2002), pp.1-2.

[5] Centre for Human Rights, *Impact of the African Charter and the Women's Protocol in Selected African Countries*, Pretoria University Law Press (2012), pp.7.

[6] F Viljoen & L Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994-2004' 101 *American Journal of International Law* (2007): 1.

[7] *Ibid.*

in Nigeria, South Africa and other select African countries extends the measurement of impact beyond state compliance with decisions of monitoring regimes to influencing the thinking processes of key domestic actors. Okafor thus examines 'the influence of the African system' in relation to its influence on national courts, executive action and policy making, legislative processes and as deployed by civil society activists.[8] Krommendijk in his study on the domestic impact of the concluding observations of UN treaty bodies defines impact as the use and discussions of the reporting processes and concluding observations at the domestic level by parliament, courts, national human rights institutions, ombudsman institutions, non-governmental organisations and media.[9]

Drawing from this literature, this paper defines impact as the influence of the decisions, recommendations and concluding observations of UN human rights monitoring mechanisms on actions of key domestic actors. Impact is assessed through the influence of the decisions, recommendations and concluding observations on: national courts, executive action and policy making, law making, activities of non-state actors and the 1997-2010 constitution-making process in Kenya. Influence is thus observed through national courts decisions and judgements, government policies including policy statements, legislative action including hansard proceedings, reports of civil society organisations and archival documents of the constitution-making process.

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[8] OC Okafor *African Human Rights System, Activist Forces and International Institutions*, Cambridge University Press (2007), pp.3-5; *See* also pp.91-93.

[9] Krommendijk, *supra*, note 3, at p25.

2.2. Kenya and UN Human Rights Monitoring Mechanisms

Kenya has ratified seven of the nine core international human rights treaties,[10] while it has not ratified any protocols or accepted any of the individual complaints procedures.[11] It has however accepted the inquiry procedure under the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment.[12] In terms of actual engagement with the UN human rights treaty monitoring bodies, Kenya's engagement traces back to the 1979 submission of the first state report to the Human Rights Committee and issuance of the resulting concluding

[10] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465, U.N.T.S 85 (Kenya ratified 21 Feb. 1987); International Covenant for Civil and Political Rights, *adopted* Dec. 19 1966, 999 U.N.T.S 171 (Kenya ratified 01 May 1972); International Convention on All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S 13 (Kenya ratified 9 March 1984); International Convention on Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S 195 (Kenya ratified 13 September 2001); International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 19, 1966, 1993, U.N.T.S 3, (Kenya ratified 01 May 1972); Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M 1448 (Kenya ratified 31 July 1990); Convention on the Rights of Persons with Disabilities G.A Res. 6/106, *adopted* Dec. 13, 2006, (Kenya ratified 19 May 2008). Kenya has signed but not ratified the Convention on the Protection of All Persons from Enforced Disappearance, G.A Res. 61/177 *adopted* Jan. 12, 2007. Kenya has neither signed not ratified the International Convention on Protection of the Rights of All Migrant Workers and Members of their Families, G.A Res. 45/158, *adopted* Dec. 18, 1990.

[11] Office of the High Commissioner for Human Rights, Kenya Home Page, Ratification Status, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN (accessed 31 March 2017).

[12] *Ibid.*

observation in 1981.[13] As of March 2017, Kenya had submitted a set of 19 state reports and received 17 concluding observations.[14]

Turning to the charter based mechanisms, while Kenya has not issued standing invitation to the special procedures, as of March 2017, Kenya had received nine special rapporteur visits.[15] In regard to the Universal Peer Review, Kenya has undergone two cycles in 2010 and 2015 resulting in 128 and 192 recommendations respectively.[16]

While Kenya's engagement with UN monitoring mechanisms is well documented, no systematic investigation has been undertaken to determine the level of implementation of the concluding observations and recommendations. Consequently, the impact of the monitoring mechanisms at the national level remains unknown. This paper addresses this gap by first conducting a systematic study on the level of implementation of the concluding observations and recommendations in order to assess the impact of monitoring mechanisms. Further, in view of Kenya's constitutional review process spanning

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[13] Office of the High Commissioner for Human Rights, Kenya Home Page, Reporting Status for Kenya, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN (accessed 31 March 2017).

[14] *Ibid*.

[15] Office of the High Commissioner for Human Rights, Kenya Home Page, Country and Other Visits by Special Procedures Mandate Holders, http://www.ohchr.org/EN/HRBodies/SP/Pages/CountryvisitsF-M.aspx (accessed 31 March 2017).

[16] Office of the High Commissioner for Human Rights, Kenya Home Page, Kenya and Charter Based Bodies, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/064/59/PDF/G1506459.pdf?OpenElement (31 March 2017). Of the 128 recommendations issued in 2010, Kenya rejected 7, while in 2015, of the 192 recommendations, it rejected 61.

1997 to 2010, the study assesses the impact of the concluding observations and recommendations on the process and on the drafting of the Constitution, 2010. The study considers concluding observations and recommendations issued between 1981 and 2014.

2.3. Theoretical framework – Transnational Legal Process Theory

The theoretical starting point of this paper is the observation that UN human rights monitoring is essentially a vertical process entailing engagement of state and non-state actors at both the national and international arena. Further, that implementation of the recommendations of monitoring mechanisms is a domestic affair involving state and non-state actors, domestic institutions and politics. Accordingly, theoretical explanations that are state centric cannot account for impact of monitoring mechanisms at national level.

Koh defines transnational legal process as the theory and practice of repeated interaction of both public and private actors in domestic and international as well as public and private fora to make, interpret, enforce and ultimately internalise rules of international law.[17] The features of the transnational legal process are: (i) non-traditional in that it saddles domestic, international, public and private law divisions; (ii) non-state centric as it considers both state and non-state actors; (iii) dynamic as transnational actors engage in repeated interaction; and (iv) normative in that from the process new rules emerge which are interpreted, internalised and enforced.[18] The transnational legal process theory is

[17] H Koh, 'Transnational Legal Process', 75 *Neb. L. Rev*. (1997): 183-184.
[18] Koh, *supra*, note 17 at 184.

thus a vertical process in which state and non-state actors interact in domestic and international fora to persuade non-complying states to accept certain norms in their domestic value set, so that the norms are obeyed as part of national law.[19] The primary elements of the theory are the chronological phases of interaction, interpretation, internalisation and obedience.[20] Internalisation at the domestic level occurs as a result of incorporation of international legal norms in the legal and political systems through executive action, legislation and judicial interpretation.[21] The theory argues that the repeated participation of states in law creating and interpretation fora results in vertical internalisation or domestication of norms which is a powerful way of international law compliance. Koh identifies three forms of norm internalisation: social, political and legal internalisation.[22] Social internalisation occurs when a norm acquires so much public legitimacy that there is general adherence to it; while political internalisation occurs when the political elites accept a norm and champion for its adoption as government policy.[23] Legal internalisation occurs 'when an international norm is incorporated in the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation or some combination of the three'.[24] Legislative internalisation occurs when international norms

[19] H Koh 'Transnational Legal Process After September 11', 22 *Berkeley J. Inter'l. L*(2004): 339.
[20] H Koh 'Bringing International Law Home', 35 *Hous L. Rev* (1998): 644.
[21] Koh, *supra*, note 17 at 204.
[22] Koh, 'Bringing International Law Home', *supra*, note 20 at 642.
[23] *Ibid.*
[24] *Ibid.*

are made into national legislation or incorporated into national constitutions hence binding on states. Judicial internalisation occurs through domestic litigation leading to incorporation of international norms in national law and as constitutional norms.[25] The forms of internalisation are not sequential and may vary.[26]

The theory identifies the agents of internalisation as: transnational norm entrepreneurs, government norm sponsors, transnational issue networks, interpretive communities and law declaring fora, bureaucratic compliance procedures and issue linkages.[27] Transnational norm entrepreneurs are non-governmental organizations and individuals who mobilize political and public support for norm creation and internalisation.[28] Government norm sponsors are government actors who support and promote the specific norms, while transnational issue networks are 'epistemic communities' that debate and generate political solutions at global and regional levels.[29] Interpretive communities and law declaring fora include treaty regimes, courts at the domestic, regional and international levels, domestic and regional legislatures, *ad hoc* tribunals and non-governmental organizations.[30]

Transposing the transnational legal process theory to international human rights law, Koh argues that compliance

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[25] Koh, 'Bringing International Law Home', *supra*, note 20 at 643.

[26] *Ibid.*

[27] Koh, 'Bringing International Law Home', *supra*, note 20 at 647.

[28] *Ibid.*

[29]Koh, 'Bringing International Law Home', *supra*, note 20 at 647. Political scientists define epistemic communities as 'network of professionals with recognized expertise and competence in a particular domain and authoritative claim to policy-relevant knowledge within that issue area'.

[30] Koh, 'Bringing International Law Home', *supra*, note 20 at 649-650.

is achieved through repeated interaction and interpretation leading to international human rights norms acquiring a 'stickiness' and are obeyed out of perceived self interest which transforms to institutional habit.[31] Norm internalisation is set in motion by transnational norm entrepreneurs who lobby and mobilize public support for the creation of a universal human rights norm.[32] The transnational norm entrepreneurs also enlist the support of epistemic communities that debate the issue and generate political solutions at the domestic, regional and global levels.[33] Additionally, the transnational norm entrepreneurs seek government actors who champion the norm while law declaring fora akin treaty monitoring mechanisms form interpretive communities which define, clarify the particular norms and their violation.[34] The norm interpretations issued by the law declaring fora are internalised into domestic political structures reshaping state identities and interests, hence compliance.[35]

This paper hypothesised that the concluding observations and recommendations of monitoring mechanisms are implemented through repeated interactions of the state and non-state actors in multiple fora in which the state is persuaded to accept the recommendations and ultimately internalise them in its political, legal and social order.

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[31] H Koh, 'How is International Human Rights Law Enforced?', 74 *Indiana Law Journal* (1999): 1411.

[32] Koh, 'How is International Human Rights Law Enforced?', *supra*, note 31 at 1409-1410.

[33] Koh, 'How is International Human Rights Law Enforced?', *supra*, note 31 at 1410.

[34] *Ibid.*

[35] *Ibid.*

3. Research design: methodology used to assess impact

This section outlines the methodology that was used to assess the impact of the UN human rights monitoring mechanisms in Kenya and thus answer the research question. The study adopted an empirical and theoretical analysis. As stated earlier, no systematic investigation had been undertaken on the implementation of the concluding observations and recommendations of UN monitoring mechanisms in Kenya. To undertake the study on impact, data and information was first collected to assess the level of implementation.[36] The analysis traced the implementation pathways of the recommendations and concluding observations to determine the extent of influence on government actors, non-state actors and the constitutional review process. The study took into account

[36] Data and information on implementation was collected between October 2013 and July 2015 through desk review, participant observation and semi-structured qualitative interviews involving key government officials, civil society organizations, human rights experts and experts in the constitution review process. In relation to desk review, a variety of sources including government policies and statements, national court decisions, hansard proceedings, annual reports of non-state actors and newspaper reports were analyzed for information on implementation. Participant observation was used in instances in which implementation could be deduced from observed phenomena such as reduction of water prices in informal settlements. Semi-structured in-depth qualitative interviews were conducted using a standard interview guide. The interviewees were identified using purposive sampling to ensure that only persons with first hand information and from whom relevant data and information could be obtained were interviewed. The mode of interviewing was face to face with each interviewee met individually. Telephone interviews were used to follow up or to obtain more information. Email correspondence was sparingly used in instances in which an interviewee was not available for a face to face interview.

the concluding observations and recommendations issued between 1981 and 2014.[37]

The study defined implementation as taking action that is responsive to the concluding observations and recommendations of monitoring mechanisms to improve the enjoyment of rights.[38] The study did not view implementation as binary, that is full or non-implementation, but rather located it along a continuum, hence the broad categories of implementation adopted were: full, partial and non-implementation.[39]

- 'Full implementation' connoting that the action taken in largely responsive to the concluding observations or recommendations.

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[37] The study excludes concluding observations and recommendations that are vague, too broad and do not point to any specific measure that the government was to undertake to be deemed to have implemented the concluding observation or recommendation. For instance, a recommendation to 'address poverty' was deemed to be too broad and incapable of assessment as to a specific measure the state ought to take. Similarly, a recommendation to the state to 'address impunity' was considered vague and too broad. In instances in which impunity was localized such as 'address impunity in relation to the 2007/08 post-election violence' or 'address impunity in extrajudicial killings', the recommendations were assessed for implementation. In addition, recommendations that were not reflective on Kenya's circumstances such as a recommendation requiring Kenya to ensure children are not subjected to the death penalty, yet national legislation outlaws imposition of the death penalty on children.

[38] *See* Office of the High Commissioner for Human Rights, Human Rights Documents, 'Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights' E/2009/90, 8 June 2009, para 3, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/362/90/PDF/N0936290.pdf?OpenElement (accessed 2 April 2017).

[39] *See* Viljoen & Louw, *supra*, note 6 at 3-5. The authors describe five categories of compliance with the recommendations of the African Commission which include full compliance, noncompliance, partial compliance, situational compliance and unclear cases.

- 'Partial implementation' connoting that action taken is to some extent responsive to the concluding observation or recommendations or it does not implement certain aspects.
  Example: Legislative framework put in place but does not encompass all the provisions contemplated in the concluding observations or recommendations.
- 'Non-implementation' connoting that no action has been undertaken in regard to the particular concluding observations or recommendations or where action taken by the state is contrary to the concluding observations or recommendations.
  Example: Prohibition of the death penalty which instead the Constitution, 2010 provides for the death penalty by enshrining the death penalty saving clause.

Partial implementation is classified both as a stable end in response to the concluding observations and recommendations and also as a pathway towards full implementation. Accordingly, the following sub-categories of partial implementation are drawn:[40]

[40] D Hawkins, W Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts on Human Rights', 6 *Journal of International Law and International Relations* (2010): 77-83. Hawkins and Jacoby in their study of partial compliance with the judgments of the Inter-American Court of Human Rights and the European Court of Human Rights describe four types of partial compliance. These are: split decisions, state substitution, slow motion compliance and ambiguity compliance amid complexity. Split decisions signify compliance with part of the overall decision but not the other, while state substitution implies that the state circumvents the specific court order and implements and offers a different response. Split implementation is implied when the state takes remedial action based on the court's decision but does not

- Split implementation: concluding observations or recommendations have been implemented in part but not other parts of it. Split implementation represents an end point in the state's actions in that the state does not intend to take further measures in regard to particular concluding observations or recommendations.
- State substitution: the state implements an alternative response rather than what was recommended by the monitoring mechanism. In this instance, the action taken is responsive to the spirit of the concluding observations or recommendations but is not the specific terms recommended by the monitoring mechanism.
- Slow motion: responsive action has been initiated or the state has indicated that it will implement the concluding observations or recommendations.

These sub-categories of partial implementation are not mutually exclusive. Additionally, under full and partial implementation a further sub-category of situational implementation is drawn which denotes implementation occurring as a result of change in circumstances within the state, for instance the constitution review process.[41]

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fulfil the requirement completely and in some instances indicates that it will fulfil the requirement. Finally ambiguity compliance signifies instances which state compliance is challenging as it is difficult to determine compliance due to the complexity of the requirement or when compliance is beyond the state's capabilities.

[41] *See* Viljoen & Louw, *supra*, note 6 at 6-7. The authors describe situational compliance as compliance that occurs as a result of change in circumstances in a given country, for instance transition from a repressive or undemocratic government to a democratic system. Accordingly, they posit that since the

For ease of analysis, the concluding observations and recommendations were categorised in five thematic groups: personal liberty and physical integrity and political rights; economic, social and cultural rights, women's rights, children's rights and rights of collective groups such as indigenous persons, refugees and persons with disabilities. In each of the thematic groups data and information was collected, examined and analyzed to determine the extent of implementation of particular concluding observations and recommendations and the influence on domestic processes and actions of key actors. For full and partial implementation the assessment year was 2014. The study used the term 'recommendations' generally to include the concluding observations of treaty monitoring committees and recommendations of the UPR and of the special rapporteurs and independent experts.

4. Empirical results

The study considered 144 recommendations issued between 1981 and 2014 by the treaty monitoring committees, the Universal Peer Review and special rapporteurs. On the overall, the study found low level of implementation of the concluding observations and recommendations of monitoring mechanisms and minimal impact at national level. Of the 144 recommendations assessed only 43 were fully implemented in the 34 year period. Non-implementation was the most prevalent outcome followed by partial implementation (See table below). Notably, full and partial implementation was characterised by state

changes occurred as a result of change in circumstances as opposed to government action, then it does not count as compliance.

obstructionism. In addition, most of the fully and partially implemented recommendations were implemented through constitutional review process, hence situational implementation.

Table 1. Quantitative overview of the status of implementation of concluding observations and recommendations of monitoring mechanisms

	Thematic rights	**Full impl.**	**Partial impl.**	**Non-impl.**	**Total**
1.	Personal integrity and liberty and political rights	11	12	26	**49**
2.	Economic, social and cultural rights	3	7	8	**18**
3.	Women's rights	11	10	6	**27**
4.	Children's rights	14	9	8	**31**
5.	Rights of collective groups	4	8	7	**19**
Total		**43**	**46**	**55**	**144**

Thematically, recommendations on personal liberty and physical integrity and political rights, exhibited the highest levels of non-implementation. Full implementation under this thematic group was as a result of the expressly mandated constitutional reforms and mainly related to institutional reforms such as independence of the Judiciary, police reform, vetting of judges and police officers and independence of the office of the public prosecutor. In partial implementation, the most common sub-category was slow motion implementation in which the government indicated that action would be taken, although this was characterised by delays and state obstructionism. This was in relation to enactment of laws: the anti-torture legislation

and freedom of information legislation and also in relation to payment of compensation to victims past post-electoral violence and human rights violations under the Truth Justice and Reconciliation Commission Report.[42] The non-implemented recommendations related to individual accountability for human rights violations and ratification of human rights treaties mainly, the individual complaint procedures. Similarly, in relation to recommendations on abolition of the death penalty, decriminalization of consensual same sex relations, accountability for the 2007/08 post-election violence, the government took contrary action indicating unwillingness to implement.[43] On impact, the study found that the recommendations had minimal impact and only influenced the actions of non-state actors in two instances. Firstly, relying on the recommendations non-state actors initiated draft legislation on anti-torture and freedom of information. Secondly, non-state actors engaged in strategic litigation before national courts, the East Africa Court of Justice and filing of a communication at the African Commission on Human and

[42] For instance, in regard to the anti-torture legislation, which was initiated and drafted by non-state actors, the government had on two occasions before the Committee Against Torture in 2013 and in March 2015 during the Universal Peer Review indicated that it would table the bill in Parliament. However, as of November 2015 the bill had not been tabled for debate. Similarly, in relation to the Access to Information Bill, the Bill which was initiated by non-state actors, the government had failed to table the Bill for Parliamentary debate since 2007.

[43] The Constitution, 2010 contains a death penalty saving clause thus making the death penalty legal. On decriminalization of homosexuality, the Constitution, 2010 enshrines provisions on marriage that impliedly outlaw homosexuality. In relation to accountability for the 2007/08 post-election violence, the President in the 2015 State of the Nation address indicated that the county would pursue restorative justice measures, thus foreclosing any possibility of prosecution.

Peoples' Rights to pressure the state to investigate and prosecute perpetrators of human rights violations.[44]

On economic, social and cultural rights, implementation was as a result of actions of non-state actors, the constitutional review and notably through the Executive. All the partially implemented recommendations fell in the sub-category of slow motion implementation, in which measures had been initiated towards implementation. The explanation for notable Executive action in the implementation of the recommendations under this thematic group was that between 2005 and 2009, concluding observations were routinely submitted to cabinet for discussion, approval and authorization to implement.[45] This in particular relates to the 2008 concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR). The concluding observations on regularising and controlling water pricing by private vendors and low price housing for slum-upgrading were proritised as they also coincided with the government development agenda. In regard to impact, the recommendations influenced the actions of the Executive, the Judiciary, non-state actors and also legislative action. On the Executive, as pointed out the 2008 concluding observations of the CESRC influenced the National Water Policy provisions on water pricing by private vendors and the slum-upgrading programme. On

[44] Interview with A Kamau, Programme Officer, Independent Medico-Legal Unit, Kenya, Nairobi, 17 January 2015. *See also Independent Medical Legal Unit v Attorney General of the Republic of Kenya and 4 others*, reference no. 3 of 2010 East African Court of Justice; African Commission on Human and Peoples' Rights, Communication 385 of 2010.

[45] Interview with M Njau-Kimani, Legal Secretary Justice and Constitutional Affairs, Department of Justice, Kenya, Nairobi, 4 March 2015.

influencing judicial decisions, the 2005 Human Rights Committee (HRC) concluding observations on evictions and 2004 recommendations of the independent expert on housing were repeatedly pleaded in domestic litigation on evictions thus influencing court decisions.[46] In regard to influencing legislative action, mainly content and direction, the 2005 HRC concluding observations and the 2004 recommendations of independent expert on housing influenced the initiation and the content of the Evictions and Resettlement Bill, 2014. On influencing the actions of non-state actors, relying on the recommendations, non-state actors initiated litigation on evictions in domestic courts and also drafted of the Evictions and Resettlement Bill, 2014.

On women's rights, implementation was as a result of the constitutional review process and actions of non-state actors. In partial implementation, the category of state substituted implementation was most observable, in which the state implemented measures that mirrored the spirit of the recommendations but were not in the precise or specific terms required by the monitoring mechanisms. The state substituted implementation related to recommendations on prohibition of polygamy, prohibition of bride price and criminalization of marital rape.[47] One would note that these recommendations relate to issue areas that attract

[46] See *Ibrahim Sangor Osman versus the Minister of State for Internal Security and Provincial Administration & 3 others* [2011] eKLR; *Satrose Ayuma & 11 others versus Registered Trustees of the Kenya Railways Staff Benefits Retirement Scheme & 2 others* [2011] eKLR.

[47] On prohibition of polygamy and payment of bride price, the state in the Marriage Act, 2013 introduced provisions to regulate them, rather than prohibit. Similarly, on criminalization of marital rape, the state in the Protection against Domestic Violence Act, 2015 recognized marital rape as a form of domestic violence without attaching any criminal sanctions.

contestation between women's rights and culture. The non-implemented recommendations in which the government took contrary action related to female quotas for political representation and access to medical abortion in cases of rape and incest.[48] Notably, the study observed a number of instances of state obstructionism in implementation of recommendations in women's rights even in instances in which recommendations were classified as fully implemented.[49] Turning to impact, the study found influence on legislative action, the actions of non-state actors and on the constitutional review process. On influencing legislative direction, the Prohibition of Female Genital Mutilation Act was enacted as an initiative of non-state actors in response to the concluding observations of HRC, 2005, the Committee on Elimination of Discrimination Against Women (CEDAW Committee) in 2003, 2007 and the Universal Peer Review (UPR) in 2010. Similarly, the enactment of the anti-trafficking in persons

[48] The state in October 2010 when ratifying the Protocol on the Rights of Women in Africa placed a reservation on the provisions requiring states to guarantee access to medical abortion in cases of rape or incest.

[49] The anti-trafficking in persons legislation was drafted as an initiative of non-state actors and submitted to the government for publication and tabling in Parliament in 2006. The government failed to table for Parliamentary debate leading to its tabling as a private member bill in 2009. The legislation was passed in July 2010 but the government delayed assent to it until October 2010 following pressure from civil society organizations. Further, the government only operationalised the legislation in October 2012 following a court petition by civil society organizations. By 2015, the government was yet to fully operationalise the legislation by setting up a critical fund to assist victims of trafficking in persons. Similarly, even though the Prohibition of Female Genital Mutilation Act was enacted in 2011 as an initiative of non-state actors, the government delayed implementation by failing to set up the implementing body until January 2014.

legislation was an initiative of non-state actors in response to the concluding observations of the CEDAW Committee, the HRC, the Committee Against Torture (CAT) and the recommendations of the UPR. On the influence of the recommendations on the actions of non-state actors, as alluded to above, non-state actors relying on the recommendations initiated legislation. On influencing the constitutional review process, non-state actors in their submissions on the constitutional provisions relating to marriage and divorce deployed the 1993 CEDAW Committee concluding observations.

In regard to children's rights, the recommendations were mainly implemented through the constitutional review process and executive action. Notably, children's rights had the highest number of fully implemented recommendations, including ratification of treaties which was absent in all other thematic groups. In partial implementation, the most observable sub-category was slow motion implementation, in which the government had indicated willingness to implement the recommendations or initiated measures towards implementation. Pointedly, the study did not find any instances of state obstructionism to non-state actors' initiatives to implement the recommendations. On the non-implemented recommendations there was no finding of state unwillingness to implement any of the recommendations, demonstrated by the fact that no contrary action was taken in regard to any recommendation. On impact, the concluding observations and recommendations influenced Executive action, legislative action and non-state actors' activities. In relation to Executive action, the government undertaking to set up the children's ombudsman was in

response to the 2007 concluding observations of the Committee on the Rights of the Child (CRC). On the influence on legislative action and non-state actors' actions, the Child Justice Bill was initiated by non-state actors and the national human rights institution in response to the 2002 concluding observations of the CRC.

Lastly, on the rights of collective groups, recommendations were mainly implemented through the constitutional review process. In partial implementation, the most observable sub-category of implementation was split implementation, in which the government initiated measures that were only partly responsive to the recommendations. These recommendations related to issuance of identity cards to indigenous people, consultations with indigenous people prior to exploitation of resources in their ancestral land, payment of compensation to internally displaced persons and provision of legal aid to indigenous peoples. The non-implemented recommendations in which no action was taken related to refugees and internally displaced persons, including the ratification of the AU Kampala Convention on Internally Displaced Persons and the UN Declaration on the Rights of Indigenous Persons and the ILO Convention 169. The government took contrary action in regard to the concluding observation on relaxing the refugee encampment policy. Assessing impact, the recommendations influenced the actions of non-state actors, legislative action and the constitutional review process. The drafting of the Internally Displaced Persons Act was initiated by non-state actors with technical support from the special rapporteur on internally displaced persons. On influencing the constitutional review process, the

recommendations of the Special Rapporteur on indigenous peoples influenced the discussions on the constitutional provisions on recognition of indigenous peoples.

5. Examining the theoretical framework

This section examines the empirical results in light of the transnational legal process theory. The discussion is structured around four key questions emanating from the empirical results: (i) what accounts for implementation?; (ii) what accounts for the variation in the degree of implementation across different thematic rights?; (iii) why the state has taken deliberate steps to implement certain recommendations while yet obstructing implementation of others; and (iv) why the recommendations influenced the actions of some domestic actors and yet failed to influence the desired kind of action from others, particularly the executive?

The transnational legal process theory argues that international human rights law is enforced through the three phases of institutional interactional whereby global international human rights norms are debated and interpreted and the norms are ultimately internalised in the domestic legal systems.[50] The theory further argues that the main determinant on whether an international rule will be obeyed is the degree of internalisation in the domestic legal system.[51] The empirical results demonstrate that implementation was characterised by vertical strategies in which government and non-state actors interacted in either

[50] Koh 'How is International Human Rights Law Enforced', *supra*, note 31 at 1399.

[51] Koh 'Bringing International Law Home', *supra*, note 20 at 674-676.

public or private or domestic or international fora to debate and interpret the norms expressed in the recommendations to persuade the government to accept and adopt the norms as part of domestic norms. Answering the question of what accounts for implementation, the picture that emerges is that of domestic processes involving a variety of actors including state and non-state actors, domestic and international institutions. These actors continually engage in multiple fora in which the government is persuaded of certain violations and to accept the recommendations and adopt the norms expressed in them as part of its domestic norms. Implementation therefore can be attributed to the domestic processes triggered by non-state and transnational actors with a view to persuading the state to adopt certain norms as domestic norms.

Flowing from the above, the question that presents is what accounts for the varying degrees of implementation across thematic rights. The recommendations on women's rights and children's rights exhibited high levels of full and partial implementation. Dissected further, one finds considerable differences in implementation between the two thematic rights. On the recommendations on women's rights, implementation is mainly through the constitutional review process, hence situational implementation, and through non-state actors. Further, implementation is characterised by state obstructionism, while in partial implementation, state substitution is prevalent. Conversely, in regard to the recommendations on children's rights, implementation was mainly through the constitutional review process and executive action. In addition, recommendations on children's rights did not reveal any instance of state

obstructionism. How then do we account for the differences? First, the transnational legal process theory propounds that whether the process of norm-internalisation will occur depends on the particular norm for which internalisation is sought. In this context, the high level of implementation of children's rights through executive action and without any instance of state obstructionism demonstrates acceptance of norms on children's rights in the domestic value set. This assertion was confirmed by interviewees working on children's rights, that the government was more receptive to children's rights compared to other thematic rights.[52] The opposite proposition holds true for women's rights. The study results indicate that implementation was characterised by state obstructionism, delays even in instances in which implementation had occurred as a result of the constitutional review process and state substituted implementation. The transnational legal process theory would attribute this to lack of internalisation of the norms enunciated in the recommendations on women's rights in the domestic system. The only possible explanation for the high level of implementation despite state obstructionism is the initiatives of non-state actors. Turning to low levels of implementation, personal liberty, physical integrity and political rights and rights of collective groups exhibited low levels of implementation. Similarly, for the recommendations under these two thematic rights, the explanation for low levels of implementation lies firstly in lack of internalisation of particular norms in issue. For

[52] Interview with P Mutiso, Programme Officer, CRADLE, Nairobi, 23 March 2015.

instance, on rights of collective groups, the concept of indigenity remains contested at the national level. Illustratively, one interviewee, the Kenyan Ombudsman, stated, 'the fact the one community arrived in Kenya fifty years earlier or later should not be a basis for special recognition'.[53]

Revisiting the issue of state obstructionism, the question posed is why the state would take deliberate steps to implement some recommendations while obstructing the implementation of others? The paper has so far demonstrated that implementation occurs as a result of norm-internalisation. Looking at the empirical findings, it is plausible to deduce that the widespread non-implementation and partial implementation is as a result of lack of or ineffective norm-internalisation in the domestic system. Even then, legal internalisation of the norms enunciated in the recommendations has largely occurred through constitutional review process which incorporated these international human rights norms as domestic constitutional norms. Additionally, legal internalisation has also occurred as a result of judicial incorporation as demonstrated through domestic litigation, for instance in the case of the recommendations on evictions. If legal internalisation has largely occurred, how then do we explain state obstructionism which characterised both full and partial implementation? As observed from the empirical findings, legal internalisation matters little if the Executive is determined to obstruct implementation. The transnational legal process theory offers two answers to state

[53] Interview with O Amollo, Ombudsman and Member of the Committee of Experts in Nairobi, 1 April 2015.

obstructionism. First, that it signifies lack of political internalisation, as political internalisation occurs when political elites accept a norm and promote its adoption as part of government policy. Evidently then, state obstruction of implementation signifies lack of political internalisation of the recommendations among government bureaucracies. Second, obstructionism can be explained as 'grudging compliance'. According to the transnational legal process theory, once an international norm has been incorporated in the internal value set of a state, internalised compliance occurs, which is obedience. Grudging compliance means that the norm has not been incorporated in the domestic political and social structures of the state. This in the study was observed in instances in which the government obstructed implementation, for instance by failing to table bills in Parliament or where full implementation had occurred, by failing to operationalise legislation or regressing on constitutional standards.

The final issue relates to impact, which was central to the study. The question posed is why the recommendations influenced the actions of some domestic actors such as the Judiciary and yet failed to influence the desired kind of action from others, particularly the Executive? Linking impact to the theoretical framework, for impact to occur, there must be internalised compliance, hence obedience. This implies full norm-internalisation, that is incorporation of norms in the domestic legal, political and social structures and bureaucratic structures, hence deliberate implementation as the recommendations are part of the state's internal value set. Drawing from the above, the recommendations should influence key government actors

towards implementation. The concluding observations and recommendations indicate that the empirical findings have had little impact in Kenya and only influenced the actions of the Executive in limited instances. Further, as already pointed out, full norm-internalisation has not occurred in many issue areas. While legal internalisation occurred in relation to norms expressed in the recommendations, political and social internalisation remained elusive, which explained non-implementation, partial implementation and state obstructionism. Conclusively, the failure of recommendations to influence the actions of the Executive is due to lack of political and social internalisation. This point finds support by examining some of the recommendations in which the Executive deliberately took contrary action such as abolition of the death penalty, decriminalisation of consensual same sex relations and access to medical abortion. These recommendations point to issues that remain politically and socially contested in Kenya.

6. Conclusion

This paper has demonstrated that the UN human rights monitoring mechanisms have had limited impact in Kenya. Additionally, the paper revealed that recommendations of monitoring mechanisms were mainly not implemented, and in the few instances of implementation, it was mainly partial. The paper also demonstrated how the theoretical explanations of state compliance with international law correlate with the findings of impact. The empirical findings on limited impact and non-implementation and partial implementation correspond to existing studies alluded to in

Section 1 of this paper which similarly find limited impact and point to an 'implementation crisis'.

Relying on the transnational legal process theory, the limited impact can primarily be explained by lack of full norm-internalisation of the norms expressed in the recommendations of monitoring mechanisms in Kenya's internal value set. Specifically, while legal internalisation has largely, occurred political and social internalisation has not occurred. For full norm-internalisation to occur, particularly political and social internalisation, the transnational legal process theory suggests triggering repeated institutional interaction, interpretation and further attempted internalisation. First, on the issue of repeated institutional interaction, this would imply empowering more actors to trigger institutional interaction with a view to expanding the set of domestic, international and transnational actors that provoke the transnational legal process. In view of the limited political and social internalisation, it turns to empowering more actors, particularly epistemic communities to debate and generate political solutions in contested issue areas among individuals, government agencies, international organizations and domestic non-governmental organizations. Contextualising to the UN human rights monitoring mechanisms, the question that presents is what roles can treaty monitoring committees and special rapporteurs play in provoking the transnational legal process once implementation shifts to the domestic arena? This study demonstrated one instance in which the special rapporteur on internally displaced persons offered technical support on implementation of recommendations on

enactment of legislation. Additionally, on epistemic communities, how can their participation be amplified in the implementation process for political internalization. Second, in relation to interpretation, the theory advocates for creation of new fora for debate, articulation and elaboration of norms. In this context this would point to exploring the extent to which other domestic and international institutions can be enhanced to play a role in implementation of the recommendations. Third, on further attempted internalisation, the theory suggests combining strategies of legal internalisation with strategies of political and social internalisation to make human rights norms 'feel familiar' to political actors and to the public. In the context of human rights monitoring mechanisms, what strategies can be employed for political and social internalization and how can those be combined in the already existing strategies of legal internalisation.

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The collision of national security purpose secret information gathering and the right to privacy. The present and future of Hungarian regulation

'It is not good that the man should be alone' – says the Bible on its first pages.[1] Human beings are social; human life can hardly be complete without community. Being part of a community, human life takes place in public. At the same time it also follows from the human nature that they have secrets; they want to exclude the public from a section of their life, at least they intend to leave a part for their own sphere. Therefore, human life takes place in the duality of the public and the private.

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[1] Gen 2; 18

There are pieces of the individual's life that anyone can freely learn, but there are also parts that contain facts, data, and information that are specifically personal. The flow of information between the public and the internal sphere is one-sided. Once information flows out of the internal sphere, they will never be hidden again. Everyone is responsible for deciding what information they are releasing from the internal sphere to the public. In this respect these are subjective areas, since not all of us are sensitive to the same circumstances, some give more, others give less information to the public, plus there is a difference between the individuals on which types of data they allow to flow. However, there is a general measure of privacy (protecting family life, home, and so on) that requires a strong protection of the law. This, as a general guideline also helps to seek the definition of the 'thresholds of sensitivity'.

Present essay analyses how such 'thresholds of sensitivity' can be defined at the case of secret information gathering. It is a current issue in Hungary as the European Court of Human Rights established the violation of the Convention and the national Parliament is about to introduce a new law in the topic. In the following we evaluate the ECHR's decision and the new draft and we also intend to give a general outlook on the Hungarian legislation on secret information gathering.

1. Privacy protection in the frame of basic human rights

It is essential to differentiate if the flow of information is upon the free will of the person concerned or is it caused by a public authority. In legal terms, the latter case is the

restriction of privacy that should be under constitutional protection in democratic societies.

The notion of privacy is not new, as Warren and Brandeis already wrote its basics in the 1890s.[2] However, privacy has changed a lot since, therefore it's protection must be reconsidered. Privacy is affected by historical development and, even today, privacy faces many challenges. Part of such challenges are modern technology: on the internet, with smartphones and drones, much less information can be excluded from the public than before. The other part of the challenge is society itself and, of course, people living in it. People raised in virtual reality shows and social networks find it natural that their work, relationships, diet, all their life are of public data. Obviously, people are free to determine the parts of their life they share and they take all the consequences of their decision. In this context, the state has a passive role: on the one hand, it enables individuals to protect what they want to protect – within limits that they do not violate the rights of others – without interfering their privacy (protection of basic rights). On the other hand, the continuous development of technology clearly requires an active privacy protection from the state: it shall help to protect private information, so that it does not become public in spite of the individual's will (for example protection against online hacking attacks, or protection of the individual's home).

The question therefore arises whether the concept of privacy needs any reconsideration at any level, and whether the

[2] Warren, Samuel D. – Brandeis, Louis D. 'The Right to Privacy' Harvard Law Review (1890/4): 193–220.

scope of protection itself shall be widened or is it necessary to encircle its meaning?

2. The objective and subjective protection of privacy

2.1. The ‘Threshold of sensitivity’

There is a strange controversy in the 21st century’s privacy protection: the technological developement of the modern era seems to necessitate a greater protection of privacy, it is essential to widen the ’protection net’. On the other hand, due to technological advances society is increasingly expanding its privacy to the outside world. Every time it depends on the individual, what interference reaches his or her 'threshold of sensitivity’.

The human rights dilemma appears as follows: it is the question of the individual's freedom of self-determination how much of his or her privacy they share with the public. The limit between the information kept private and the information shared with the outside world is called a ‘threshold of sensitivity’; this is the threshold beyond which the individual does not want to share information. The right to privacy therefore protects the confidentiality of information above the threshold of sensitivity.

It differs from person to person that how much and what kind of information are shared with the public. Therefore, for each individual, the threshold of sensitivity is different. This results in a subjective level of privacy protection: the protection, for each individual, concerns to information and data above their own threshold of sensitivity.

Is there an objective protection of privacy? At first glance, objective protection seems to be a paternalistic idea: if

everyone is free to decide what they concern to keep private and what to share, then the state cannot require people not to publish information from their privacy.

However, in our view, an objective level of privacy protection can also be defined, which is human dignity. If the impact on privacy violates human dignity – regardless of the individual's (subjective) threshold of sensitivity – this impact will be unconstitutional.

As a consequence, there is a parallel subjective and objective protection level of privacy, where the subjective level of protection cannot be lower than the objective one. Based on this theory, in addition to subjective protection, privacy has an objective boundary, which – regardless of the will of the individual concerned – shall be protected.

2.2. Secret information gathering and privacy

The spread of communication and privacy are inversely proportional; the extension of communication results in a decline in private life. One reason for that is our own behaviour. The other one is that, in response to different national security challenges, the law imposes mandatory data handling on a wider scale. The clear distinction between the two cases is that in the former case the information becomes accessable for others by the individual's own free will, but in the latter case it is regardless of his or her will. There is an even more severe restriction – and therefore it is a particularly sensitive area of the restriction of privacy – when the person concerned does not even know about the interference, because not only does it happen regardless his or her will but without his or her knowledge. Secret information gathering is therefore

such a severe restriction of privacy; the person who collects the information receives a fully presenting and thus identifiable picture of the individual concerned, about his or her characteristics, habits and secrets, and by storing and transmitting such data, others may also become information holders. Due to the earlier mentioned effects of technical developments, secret information gathering expands to more and more data. These data can be utilesed in a more and more professional way and at the same time, there is less and less chance for detection (i.e. there is less chance that the person concerned could be aware of the fact of the secret information gathering).

As a consequence the data the individual intends to treat as an internal secret in his or her private sphere will flow to the public side irrespective to the person's will. Such a procedure can only be carried out under appropriate constitutional and procedural guarantees.

2.3. Basic features of secret information gathering

The concept of secret service tools has so far been defined in literature in a wider and narrower sense. In a wider sense, it is the method of collecting data by authorities without the knowledge of the person concerned and with the necessary harm caused in basic human rights (privacy protection of residence, mailing, personal data and the right to respect private and family life). In the narrow sense, it means technical equipment, technical and IT solutions for data collection by authorities.[3] It is noteworthy that both

[3] István Solti 'Changes in National Security Interest Secret Information Gathering' (Hungarian title: 'A titkos információgyűjtés és a titkos adatszerzés') Szakmai Szemle (2013/1): 119.

legislation and legal literature make distinction between secret information gathering for criminal and for national security purposes.[4] Without questioning the distinction between national security and criminal law enforcement purpose of data gathering, in a constitutional sense the main importance in both cases are on that the proceeding itself is about (1) the collection of private data (2) without the knowledge of the person concerned, (3) for some governmental/state purpose. In this regard the concept of secret information gathering is understood for both issues. Also the regulation of information gathering for criminal and for national security purposes are similar,[5] with respect to the constitutional aspects of the two procedures, both must be consistent with the same constitutional guarantees, ensuring that the interference with privacy is constitutional.

3.The regulation of secret information gathering in Hungary

3.1. The legislative background of regulation

According to Article 46 of the Basic Law of Hungary, detailed rules relating to the organisation and operation of the national security services, the rules for the use of special investigative means and techniques, as well as the rules

[4] The two categories are similar in a way, that the new Criminal Procedure Act of Hungary (entry into force 1st July 2018) will use the determination secret information gathering.

[5] László Kis: 'Secret Data Gathering in Criminal Law Procedures, Especially in Cooperation with the European Union' (Hungarian title: 'A titkos adatgyűjtés szerepe a büntetőeljárásban, különös tekintettel az Európai Unió keretében folytatott együttműködésre' PhD study): 56. http://www.uni-miskolc.hu/~wwwdeak/drkisl_ertmh.pdf (accessed 30 September 2017)

concerning national security activities shall be laid down in a cardinal Act (i.e. in an Act that is adopted by the supermajority of MPs).

The specific regulations are stipulated by the Act on National Security Services (hereinafter referred to as: NSS Act). Accordingly, in the course of the secret information gathering process, legal guarantees are available at both during and after the procedure.

The most general test for evaluating the constitutionality of the restriction of a human right is the necessity-proportionality test. This test should also be applicable for national security issues if they concern human rights. The NSS Act defines the 'necessity-proportionality' test shall be applied throughout the whole proceedings and must be considered when ordering the procedure and under its implementation.

In certain cases, when there is a higher intervention to human rights, the procedure is subject to external permission (judicial or by the Minister of Justice). The decision of the judge or the Minister of Justice is based on the submission of the Directors-General of the services, and the terms of its content are regulated in the NSS Act. Accordingly, the submission must include the location of information gathering, the names or the scope of the parties concerned – which, from a constitutional point of view, require a high level of protection, as a very wide group of people can be observed this way. In such a case, compliance with the principle of necessity-proportionality is essential, as well as of the data applicable for identification, the description of the data collection, the justification of

necessity[6], the beginning and the end of the procedure (defined in days) and its justifications in case if it is based on an exceptional permit. The third guarantee, which is after the completion of the procedure, is a post-external control over the procedure. Such control might be the Parliament's Commission, by the Hungarian National Authority for Data Protection and Freedom of Information (hereinafter reffered to as: DPA) and the Commissioner for Fundamental Rights.
The Hungarian National Security Service (hereinafter referred to as: NSS) also proceeds secret information gathering. In this case, the NSS is responsible for the accuracy of data they provide as a data supplier, and for the use of it or for taking or failing to take measures based on it, the requesting body is responsible. According to the NSS Act, if the data collection was performed by the NSS as a service provider, they transmit the data obtained solely to the ordering body and then delete the data from its own register. The NSS keeps records of the activities conducted as a service provider, and it does not store any personal data beyond that specified.
The NSS Act also provides that national security services may only use data in their possession for the purpose of the legal basis of collecting the data, unless the data refer to the implementation of a criminal offense and the law provides for its handover, or it requires obligatory information

[6] The Court of Justice of the European Union stated in case Digital Rights Ireland v Minister for Communications & Others: 'So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the Court's settled case-law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary.'

handover to other national security services, and the data receiver itself is entitled to receive the data.

For the reason that it effects basic rights, the constitutional requirement of the principle of necessity and proportionality must prevail at all stages of the proceedings. It is a constitutional guarantee that secret information gathering can only be obtained to the extent and for the time necessary to achieve the purpose set out in the task described by the law, unless it can be achieved otherwise. The NSS Act emphasises that secret information gathering should be a measure of ultima ratio; it is essential to use the least restrictive measure to the person's privacy.

However, there is a further guarantee that the NSS Act defines the cases where the procedure shall be terminated immediately and obligates to delete the obviously unnecessarily collected data.[7]

3.2. The control of secret information gathering

The secret information gathering is first controlled when the procedure is ordered. Directors General who are in charge of the service submit a proposal for the order, the contents of which are set forth in the NSS Act. The Directors General in charge for the service decide on the content of the proposal, which decision must be justified. Subsequently, in the course of the procedure, the role of the permitting judge

[7] Section 60 (1) NSS Act: Collective secret gathering of data subject to external authorization shall be terminated immediately if:
(a) it has reached its purpose defined in the permit;
(b) no further result is expected;
(c) the deadline has expired;
(d) collecting secret information for any reason is illegal.

or in the cases specified in the NSS Act, the Minister of Justice is the next step in the procedure.
The ministers responsible for the control of services shall control the legitimate and proper functioning of the services, the implementation of their tasks, approve internal rules of procedure and permission of secret information gathering and investigate complaints concerned to the functioning of the service.

3.2.1. Parliamentary scrutiny

Parliamentary scrutiny is mostly carried out, by the National Security Committee of the Parliament. The Committee may request information on the operation of the national security services and may also recieve information on the activities and operation of the services on the basis of a complainant's submission or notification of the personell of the services. The Committee may also request information from the Minister and from the Directors General concerning secret information gathering that requiers external permission and about authorization procedures based on exceptional authorizations. Moreover, the Committee investigates complaints suspecting illegal activities of the services. The Committee may ask the Minister to conduct a supervision, and in some cases, it may itself conduct a fact-finding investigation, where it has access to the records of the services, and has the right to interrogate the personell of the service. In case of detecting illegal or improper operation, the Committee calls the Minister to conduct an investigation, to take action, and the Committee may also initiate an investigation of liability. In addition, the Committee takes resolution on the Commissioner for

Fundamental Rights's report on the review of the procedure of the National Security Service.

It shall be highlighted, that the Minister's and the service's obligation to inform the Committee does not expand to information that in a particular case, would endanger the high priority national security interests related to the method or the protection of the source. However, if the Committee investigates the legal functioning of the national security services, in agreement with the two-thirds of its members, may oblige the Minister and the Director General to provide such information on the methodology used in domestic secret information gathering, that the knowledge of which is necessary for the judgement of legality. The information accessed this way can only be used in the Committee's procedure. In addition, the ministers in charge shall report on the activities of the services on a regular basis, but at least twice a year.

It shall also be noted that, besides the National Security Committee, the Defense Committee is also involved in parliamentary control by continuously monitoring the implementation of the tasks of the Military National Security Service.

3.2.2. Legal control: The role of the DPA and the Commissioner for Fundamental Rights in monitoring the procedures

The DPA has the power of control over the protection of personal data, privacy violations and the publicity of public interest data, which power also expands to the control of the legality of secret information gathering. During the investigation procedure of the DPA, similar to the

ombudsman's procedure and based on the regulations of the Act on the Right to informational self-determination and freedom of information (hereinafter referred to as Information Act. It has a wide range of access, such as copy requests, data recognition and information requests and inquiries to initiate investigations and provision of information. This provides a broad scope for external control for the authority; anyone can submit a complaint on the suspect of illegal secret information gathering by the national security service, or on the possible direct danger of it. The DPA has the right to use the data collected during the investigation procedure – even classified data – for its data protection procedure. In case the Information Act is infringed, the DPA also has administrative powers, such as ordering the destruction of illegaly stored personal data, informing the data owner if information request has been denied unlawfully, and it also has the authority to impose fines.

The Commissioner for Fundamental Rights may investigate national security services in a human rights aspect. Nonetheless, the Commissioner's right of access is limited. It can not, for example, view the document containing the technical data of the devices and methods used and the identification of the persons using it, and to any documents that can identify the source of information.

3.2.3. Time of procedure

The NSS Act defines the longest possible period of secret information gathering. It ensures that privacy cannot be infringed continuously: secret information gathering procedures, if they require external permissions, can only be

conducted for up to 90 days. The time limit might be extended for a further 90 days if justified.

There is also a time limit for one special case, the so-called exceptional authorisation, under which the Director General of the services may authorise the procedure prior to the decision of the judge or the Minister of Justice if the external authorisation would result in a delay that would obviously undermine the effective functioning of the national security service. When ordering an exceptional authorization, the Director General of the services must also initiate authorisation from the judge or the Minister of Justice. The authorisation shall be decided within 72 hours from the submission. The duration of the exceptional authorization, therefore, can only be maintained within this deadline, if it meets the statutory conditions.

However, there are no statutory time frames for secret information gathering procedures by national security services that are not bound by an external permit. However, the principle of necessity-proportionality must be considered; long-lasting information gathering may result in a disproportionate restriction of privacy.

The termination of the data handling and the obligation of immediate delete of data are prescribed by the NSS Act for the deadline foreseen by the law, if the court has ordered the cancellation, if data handling is illegal, if the exceptional secret information gathering was later not authorised and if data handling is unnecessary.

Article 50 of the NSS Act provides regulations for the time of data handling if the national security services received data from the register of other organs; they may handle data for 70 years from the date of data gathering. There is a

shorter time limit for handling data received from security management and in the surveillance and management of cryptographic activities (10 years) and for data generated during the performance of national security control (20 years).

The Information Act also stipulates indirect regulations on the time for handling data. Personal data can be handled if such activity is indispensable for achieving the purpose of data handling procedure and is suitable for the purpose. Furthermore, personal data can be handled only to the extent and time required to achieve the purpose of the data handling. It must also be ensured that the data holder cannot be identified after the time of data handling purpose lapsed.

4. The constitutional aspects of secret information gathering

4.1. Secret information gathering based on the practice of the Constitutional Court

The Basic Law of Hungary ensures the respect for private and family life, home, communications and that everyone has the right to protect their personal data.[8] This also pertains to secret information gathering and any limitation must meet the above-mentioned necessity-proportionality basic right test. On the other hand, the Constitutional Court pointed out that protection of national security interests is a constitutional purpose and an obligation of the state.[9] The constitutional purpose legitimises the secrecy of information gathering; the observed person will not be

[8] Article VI
[9] Decision 13/2001. (IV. 14.) CC.

informed of the observation itself and national security tools and methods are especially hidden.[10] These are constitutional restrictions on information rights. In addition it must also be considered that the restriction should not be abusative and discretionary decision-making should be limited to the greatest possible protection of fundamental rights (esp. fair trial).

The Constitutional Court also pointed out that national security services have an essential role to safeguard the country's sovereignty and its political, economic and defense interests.[11] National secret and special security activities require adequate legal regulation and guarantees to ensure that national security services under no circumstances constitute a threat to democracy. Therefore, states may only limit basic rights if, and to the extent that it is necessary and justified to safeguard the national security of the country and enforce its sovereignty.

The secret information gathering was the object of Decision 2/2007. (I 24) CC. In this case, the Constitutional Court reckoned that 'state interference shall be a matter of severe public interest and must be proportionate to the threat to be avoided and the disadvantage caused.' The Court also highlighted that, in the constitutional judgement of the secret information gathering, 'a stricter standard applies to the requirements in this procedure than in other procedures as they are not open to public. The use of national security

[10] Géza Finszter points out the importance of the legitimate purpose of collecting information, saying that 'it is forbidden to put positions of the observation into political or unfair economic interests and it is forbidden to subordinate the observations to organizational interests'. Finszter, Géza 'Criminalistics of Secret Observations' (Hungarian title: 'A titkos felderítés kriminalisztikája' In: Bócz, Endre Criminalistics II. BM Publisher, Budapest, 2004): 971–972.

[11] Decision 16/2001. (V.25.) CC

tools provides extraordinary power to the users and makes the individuals concerned higly vulnerable.'

The main idea of the decision was to strengthen the requirement of legality: 'For the protection of public order and public security, which is recognized as a constitutional purpose of the use of secret means, it is not possible to give a general mandate to law enforcement that restricts basic rights without the respect of necessity and the proportionality princples and without certain conditions of the authorisation could be verified both in general and in the particular cases. This, in certain cases, also eliminates procedural guarantees on the legality of the evidences, all in all the fair trial'. The decision was not primarily emphasising the posterior control of the procedure's content, but the importance of the existance of a real (and obviously preliminary) legislative mandate.

Decision 32/2013. (XI. 22.) CC further analysed the requirements under which the use of national security measures are permissible. The Court analyzed whether it was constitutionally acceptable that the Minister of Justice allows secret information gathering and, with regard to the legal environment, concluded that the guarantee system was sufficient. The decision considered the Parliament's National Security Committee to be appropriate for functioning as the external control but pointed out that 'the National Security Committee and the Commissioner for Fundamental Rights (i.e. the ombudsman), can only provide effective external control over the authorising power of the Minister of Justice, if the Minister's decision to permit secret information gathering activities contains sufficient and detailed justification. The reasoning must be deep and

detailed enough for the external control to review the deliberation of national security interest and the basic rights concerned'. Therefore, the decision stated as a constitutional requirement that the Minister has to give reasoning for the decision.[12]

4.2. The Szabó and Vissy v. Hungary case

The collision of the authorisation of secret information gathering and privacy and the revision of Hungarian legislation were also examined by the ECHR. In the Szabó and Vissy v. Hungary case,[13] two workers of an NGO turned to the ECHR for the reason, that the Counter Terrorism Centre (that is part of the Police) was authorised to conduct secret information gathering to investigate suspect of specific crimes and national security interests to help the fight agianst terrorism and help Hungarian citizens who were in trouble outside Hungary by using the methods and tools enlisted earlier.

The complainants have not stated that they have been observed for the purposes of national security. Yet they have stressed that the mere existence of the law itself is a suitable reason for people to be victims of this procedure.[14]

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[12] Justice Péter Paczolay and justice András Bragyova pointed out in their concurring that the Minister of Justice cannot be considered as external control, therefore the model is not a sufficient guarantee of privacy protection. 'The collision of the state's national security interests and privacy rights should not be decided by political organs (like the parliamentary committee) but by a court that evaluates the necessity and proportionality of the restriction of rights.'

[13] No. 37138/14. 12 January 2016

[14] In case Roman Zakharov v. Russia (2015) the Court stated, thath firstly it 'will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affect all users of communication

However, they have emphasised that they were more likely to become observed by secret means than ordinary civilians would be, as they are employees of an NGO, which creates a critical opinions towards the government. [15]

The complainants have pointed out that, without the absence of effective control over the secret information gathering conducted by external authorisation, there is nothing to prevent the executive power from discretionary authorising the national security services to exercise the special powers specified in the NSS Act.

The ECHR declared, that the existence of the law itself entails the risk of observation and the danger that the state intervenes in the freedom of communication of users of postal and telecommunications services, thus to exercising their right to respect for private and family life and their free communications, as the scope of persons who may be subject to observation is not precisely regulated.

It was also concerned that the order of the measures was entirely in the hands of the executive power. Thus, it can interfere in the privacy of the citizens without control, providing the possibility of an unrestricted observation and a massive, systematic data gathering, especially because it did not have any obligation for reasoning. The government this way would have the possibility to create a detailed profile of intimate aspects of the lives of citizens, too.

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services by instituting a system where any person can have his or her communications intercepted'.

[15] Related to suitable reasons for being victims of secret information gathering see for example case Esbester v. the United Kingdom (1993), Matthews v. the United Kingdom (1996), Redgrave v. the United Kingdom (1997) where it is declared that 'the Commission required applicants to demonstrate that there was a ‘reasonable likelihood’ that the measures had been applied to them.'

The ECHR has warned that such a threat to privacy must be strictly controlled, but under the law, effective external control is not ensured. The ECHR found that the Hungarian legislation does not meet this criteria, as secret information gathering is permitted by the Minister of Justice instead of the courts. The Minister makes decision upon the initiative of police organs, without the knowledge of the details, the documents and facts and this way the consideration of the proposed measure and the possibility of informed decision making is not ensured. Moreover, it is also problematic that the extension of the authorisation is not clarified. Thus, the ECHR concluded that the member of the executive power gaining political responsibility, in this case the Minister of Justice, does not constitute an effective assurance of respect for basic rights concerned.

On this basis, the ECHR found an infringement of Article 8 of the Convention. The decision said: 'A central issue common to both the stage of authorisation of surveillance measures and the one of their application is the absence of judicial supervision.[16] (75) The ECHR added that 'the authority competent to authorise the surveillance, authorising of telephone tapping by a non-judicial authority may be compatible with the Convention provided that that authority is sufficiently independent from the executive. However, the political nature of the authorisation and supervision increases the risk of abusive measures. The Court recalls that the rule of law implies, *inter alia*, that an interference by the executive authorities with an

[16] See also Klass and Others v. Germany 1978, Weber and Saravia v. Germany 2006, Kennedy v. the United Kingdom 2010

individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure. In a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge. […] Either the body issuing authorisations for interception should be independent or there should be control by a judge or an independent body over the issuing body's activity. Accordingly, in this field, control by an independent body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny.' (77)

According to the decision of the ECHR, the reviewer of the authorization should either be a judicial body or an independent institution. To fulfil the requirements stated in this decision, the legislator therefore can decide whether the authorization (or its revision) shall be delegated to a judge appointed in accordance with the rules set out in the Act on Criminal Procedure, or shall create an independent body specifically for this purpose or to entrust an independent institution currently operating with the review of the authorization.

4.3. Response to the ECHR's decision

The legislator, according to present knowledge, chooses the latest solution; it intends to make amendments to the NSS Act and the Information Act (hereinafter referred to as:

Draft).[17] The Draft does not intend to implement the control mechanism through an independent body of judiciary or judicial status, but wishes to ensure that the Hungarian legislation is consistent with the Convention by delegating the external control to the DPA. From the point of view of compliance with the Convention, it is therefore necessary to consider whether the DPA is an independent external body that fulfils the requirements of the ECHR's decision.

According to the Information Act, the task of DPA is to control and promote the right to the protection of personal data and the right to access data of public interest. In this regard the DPA fulfils quasi-ombudsman functions; it contributes to the prevail of basic rights declaired in Article VI. of the Basic Law. On the other hand, the Information Act also stipulates authoritative powers; in this regard the DPA exercises executive power in connection with information rights. As a consequence, the DPA has dual status: on the one hand, it acts as a quasi ombudsman, contributing to the protection of information rights and acts as an authority on the other.

Performing its activity the DPA is independent from the Government; it is an autonomous authority that the Government cannot direct or supervise individual cases. It is also independent in its structure that is regulated by law (meaning that it is defined by the Parliament), but it can freely establish its own internal structure. However, its personal independence cannot be compared to the courts, as its president is appointed by the President of the Republic

[17] Draft Law BM/8652/2017. https://goo.gl/BZBUjT

upon the Prime Minister's proposal. Besides its autonomy the DPA, as an authority, is not out of the executive branch; on the contrary, it is part of it.

Article 36/A of the Draft on the Information Act states that the observation complaint is conducted by DPA as a quasi-ombudsman body. It conducts a wide-ranging investigation in order to prevail basic rights, which results in indirect action. It does not give remedy to the violation of the basic right, but through giving information and initiative it contributes in the effective remedy. The ECHR considered it necessary to lay down rules which 'provide effective safeguards and guarantees to avoid misuse' (59). We conclude that the solution to *the Draft can only be considered effective if it contains further rules on what procedure is to be followed in case DPA considers that the observation complaint is well-founded.*

At the same time, the regulatory solution of the Draft appears to indicate that under the supervision of the Minister of Justrice's order for sercret information gathering, DPA makes a decision as an authority. If the DPA brings an administrative decision on this subject, then its judicial review must also be ensured. The DPA makes a decision on the legality of the ordering decision during the review, so it does not have the power to examine whether it is justified to order secret information gathering. In order to comply with the Convention, it is in any case necessary to clarify the extent to which DPA controls the authorization of secret information gathering. Overall, it can be stated that the DPA is the appropriate forum for reviewing the authorisation of secret information gathering, but only in case a law determines in which competence the DPA prevails, the

consequence of its decision and whether the decision has a further supervision.

Another issue is whether it fulfils the criteria the ECHR set that the approval of the DPA only takes place after the Minister's authorization only, i.e. after the secret information gathering had already begun.

The Draft itself is disputed. According to the NGO initiated the ECHR's decision, the proposed regulation does not meet the requirements of the ECHR because it does not entrust the review for the authorization of a court, and the review, with a few exceptions, is only ex post.[18] Kinga Zakariás has just the opposite view; she states that the collection of information is only possible in case of an 'individual suspicion', authorization is being investigated by an independent authority and this examination seems to be an effective control in individual cases.[19]

The interpretation of 'prior judicial authorization' in item 73 of the ECHR's decision is an interesting issue. If the prior authorization is interpreted in a way that only after the authorisation can the secret information gathering be started, then the Draft's solution is not a preliminary one. On the other hand, if prior authorization means that the approval concerns the initiation of secret information gathering and not the (ex post) utilization of the data collected, then the criteria is fulfilled.

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[18] The Eötvös Károly Institute's position the draft law on the independent revision of the secret information gathering for national security purposes. https://goo.gl/8SVqp5 (accessed: 15 October 2017)

[19] Kinga Zakariás: The Collision of the Right to a Private Sphere and National Security Interests through Secret Intelligence Gathering – From a Constitutional Point of View *(forthcoming)*.

5. Summary

Secret information gathering is probably the most slippery issue in the collision of privacy and national security interest. This is one of the most powerful restriction of the right to privacy, since it is not just done without the will of the person concerned, but without his or her knowledge. Consequently, there is no way for him or her to protect basic rights or enforce the law. At the same time, the objective of national security (or criminal law enforcement) may make such a restriction of this basic right constitutional; but only if it has adequate safeguards.

The constitutional prerequisite of secret information gathering is the predictable legal environment. It is particularly important to define the scope of organs, competences, time frames and the content of information gathering. The case law of the Constitutional Court, and in particular the decision of the ECHR in Szabó and Vissy v. Hungary coclude that legal regulation is not sufficient in itself and the effective and independent control of the enforcement of secret information gathering is also necessary. As for now it is an open question if the Draft fulfils the criteria derived from the Basic Law and from the Convention. The main question how it will prevail in practice, if it will be appropriate to protect the privacy of the persons concerned.

We conclude that the DPA is a sufficient forum of supervising secret information gathering only if the law stipulates the aspects of supervision, the consequence of the DPA's decision and clarifies if DPA is an ombudsman-like organ or an authority in this repsect.

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The Legality of National Security[1]

National security is a seemingly transparent, one dimensional concept, focusing on maintaining the functionality of the state – including mainly intelligence and counter-intelligence. However, if we dare to take a closer look, we can identify, among other matters, the political goal of good governance.[2] On one hand, the concept of national security [policy] has the cultural-institutional context of policy, and on the other, the constructed identity of states, governments, and other political actors.[3] National security, in addition, cannot be separated from governmental policy, as it is a component of it. National security services are part of the state administration and they represent the state's point of view on the concept of *protego ergo obligo* and its interpretation in the political and legal sense. However,

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[2] http://unpan1.un.org/intradoc/groups/public/documents/un/unpan022332.pdf

[3] P.J. Katzenstein: 1. Introduction: Alternative Perspectives on National Security. In: The Culture of National Security: Norms and Identity in World Politics. (ed. P.J. Katzenstein), Columbia University Press, New York, 1996.

submission of some sort, more than in the case of an average public servant, is expected from the staff of national security.[4]

Dicey defines the rule of law as the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government.[5] All institutions and members of the public administration, particularly those with public authority, are required to follow the instructions of the constitution and the laws. The elements of legality are found in constitutional provisions[6] and regional international human rights documents, like the ECHR. There are some requirements of government that must prevail at all times, e.g. normativity, transparency, and oversight. The authority they practice separates national security from the rest of public administration and clarifies the necessity of a relevant act of parliament.

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[4] See Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel: Chapter 9 Military Unions and Associations p. 65-73. http://www.dcaf.ch/content/download/35589/526395/file/HandbookHumanRightsArmedForces-080409.pdf; J. Slater: Homeland Security vs Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why. In: U. Pa. Journal of Labour and Employment Law. Vol. 6. No. 2. pp. 295-356. www.law.upenn.edu/journals/jbl/articles/volume6/issue2/Slater6U.Pa J.Lab.%26Emp.L.295(2004).pdf; This appears to be the case for the staff of Hungarian national security, according to the report of the ombudsman AJB-2047/2016.

[5] A.V. Dicey: The Law of the Constitution, p. 120.

[6] In the case of Hungary Articles B (1) and C (1) and (3) of the Fundamental Law of Hungary, in France Article 1 of the Constitution of France, in Germany Article 20 (3) of the Basic Law for the Federal Republic of Germany, in Poland Article 2 and 7 of the Constitution of the Republic of Poland are the key elements of establishing the democratic rule of law, just to mention some.

1. Features of the law on national security

The rule of law expects that individuals have knowledge if their rights are limited, as acts of parliament are made public, but directives of the government are not necessarily made public. In fact, the existence of a declassified law makes it possible to have proper oversight by independent forums such as the national audit office, the judiciary, the ombudsman, and, in some cases, specialized tribunals. Law on national security can cover four aspects of national security 1) organisation, 2) authority, 3) staff, and 4) oversight. Budget and finances are mentioned as well, but unlike the previous four categories, they are usually considered as parts of those and certainly not as their independent peers. These aspects can enter legality in one legislative step or several, it does not affect the outcome, that is national security under the rule of law. Defining the authority of national security shapes the public field as well as the relationship between individuals and the state. If the legislation passes an overall act on national security, including oversight, powers, procedures and organisational structure of national security services, in light of the law, the administrative features of national security will share the same legal and political protection as the status of oversight bodies for example. Stability of the state administration is a democratic value, but at the same time, providing a conditional legal protection for human rights and the names and headquarters of a government agency is more than futile. Governments should have the freedom of shaping their administration the way it suits their security politics, international relations etc. the best, without the necessary give-and-take of national politics, which is likely to happen

in order to the gain the same level of political support of the opposition as if the government had proposed to get rid of all privacy rights. The national security services in the UK have their own acts,[7] but at the same time their role and corresponding authority have been shaped by terrorism, which appears separately in independent legislation, covering the law enforcement spectrum as well.[8] In Estonia the law on national security services[9] identifies two organisations, although it provides no relevant information on their tools and methods, which appear to be a key element in the Hungarian legislation.[10] Not every country shares the same legislative approaches when dealing with national military intelligence. Perhaps, the authority of military intelligence and security services usually[11] does not cover the civilian population, and thus the political necessity for a unified national security legislation can be challenged. It could well be reminiscent of the past, when all the intelligence and security activities of the state were kept in the shadows. All in all, there is a tendency between countries participating in joint operations, like NATO member states, which makes it easier to share experiences and give the opportunity to copy or *transplant*[12] legal solutions. Be that

[7] Security Service Act 1989, that covers MI5,) Intelligence Services Act 1994, that covers MI6 and GCHQ.

[8] The Terrorism Act 2000, The Anti-Terrorism, Crime and Security Act 2001, The Criminal Justice Act 2003, The Prevention of Terrorism Act 2005, The Terrorism Act 2006, The Counter-Terrorism Act 2008, The Justice and Security Act 2013, The Counter-Terrorism and Security Act 2015.

[9] Julgeolekuasutuste seadus (2000. 12. 20.) JAS https://www.riigiteataja.ee/en/eli/514112013020/consolide.

[10] Article 53-56 § of the Hungarian law on national security services.

[11] On the other hand, see Centro National de Inteligencia of Spain.

[12] For the original concept of *legal transplantation* see L. K. Donohue: Transplantation. *Global Anti-Terrorism Law and Policy*, V. V. Ramraj. – M. Hor – K. Roach – G. Williams, George (eds.), Cambridge University Press,

as it may, some aspects[13] of international cooperation between national security services can raise questions regarding the protection of human rights and dignity.

Most European countries adopted declassified legalisation on military national security after the end of the cold war: Germany[14] in 1990, Slovakia[15] and the Czech Republic[16] in 1994, the Netherlands[17] in 2002, and Poland[18] with the division of the previously unified military intelligence in 2006.[19] Military intelligence in Switzerland has a

Cambridge, 2012 or in Hungarian a different interpretation see I. Sabjanics: A félelem mint jogi következményekkel járó veszélyforrás. In: (ed.) G. Finszter – I. Sabjanics: Biztonsági kihívások a 21. században. 838 p. Budapest: Dialóg Campus Kiadó, 2017. pp. 745-753.

[13] Basically, if a piece of intelligence material crosses the borders of a country, the same rules apply as if it was acquired there in the first place. This concept was forgotten when governments accepted information shared by countries that had torture and other inhumane methods in practice for questioning.

[14] Militärische Abschirmdiens (MAD), Gesetz über den militärischen Abschirmdienst (1990. 12. 20.) MADG http://www.gesetze-im-internet.de/madg/, Bundesnachrichtendienst (BND), Gesetz über den Bundesnachrichtendienst (1990. 12. 20.) BNDG http://www.gesetze-im-internet.de/bndg/BNDG.pdf, Bundesamt für Verfassungsschutz (BfV), Bundesverfassungsschutzgesetz (1990. 12. 20.) BVerfSchG https://www.gesetze-im-internet.de/bverfschg/BJNR029700990.html.

[15] Vojenské Spravodajtsvo, Národnej Rady Slovenskej Republiky (1994. 06. 30) https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1994/198/20160101.html.

[16] Vojenské Zpravodajtsví, Zákon č. 153/1994 Sb. o zpravodajských službých České republiky (1994.07.07.) http://vzcr.cz/shared/clanky/18/153_1994.pdf.

[17] Algemene Inlichtingen- en Veiligheidsdienst (AIVD), and Militaire Inlichtingen- en Veiligheidsdienst (MIVD), both appear in Wet op de inlichtingen- en veiligheidsdiensten (2002. 02. 07.) Wiv http://wetten.overheid.nl/BWBR0013409/2017-03-01.

[18] In Poland, civilian and military national security each had a unified service established between 1990-2002. A functional division of the services was sanctioned by ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu http://isap.sejm.gov.pl/Download;jsessionid=68B6FFFEC2B30A2A822D3B1C7AAED67E?id=WDU20020740676&type=2, while the previous act was passed in 1990 http://isap.sejm.gov.pl/Download?id=WDU19900300180&type=2.

[19] Służbę Kontrwywiadu Wojskowego (SKW) Polish military counter-intelligence, Służbę Wywiadu Wojskowego (SWW) Polish military intelligence, Dz.U. 2006 Nr 104 poz. 709 ustawa o Służbie Kontrwywiadu

government regulation from 2009[20] which was adapted with the authority provided by Article 99 of the law on the army. [21] In Italy, (military) intelligence was established in 1925 after World War I, which, with the change in the form of government in 1946 and the intention of leaving their involvement in the war behind, was replaced by a newly established, still military, organisation. [22] Similarly, to the frequent political crises and government changes in Italy – and contrary to Western Europe – the intelligence services were also subject to several reforms, most notably in 1977[23] with a failed coup, which involved the head of the intelligence service.[24] The latest reform[25] of Italian national security of 2007 focused on following European trends[26] regarding national security legislations.

Wojskowego oraz Służbie Wywiadu Wojskowego (2006. 06. 09.) http://isip.sejm.gov.pl/Download?id=WDU20061040709&type=3.

[20] Verordnung über den Nachrichtendienst der Armee, 2009 https://www.admin.ch/opc/de/classified-compilation/20092339/index.html#a5.

[21] Bundesgesetz über die Armee und die Militärwaltung, Militärgesetz (MG) https://www.admin.ch/opc/de/classified-compilation/19950010/index.html.

[22] A Servizio informazioni militari (SIM) existed between 1925-1945, established by royal decree no. 1809/25. (1925. 10. 15.) http://siusa.archivi.beniculturali.it/cgi-bin/pagina.pl?TipoPag=prodente&Chiave=53534.

[23] Istituzione e ordinamento dei servizi per le informazioni e la sicurezza e disciplina del segreto di Stato, Legge 24 ottobre 1977. n. 801 http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1977-10-24;801.

[24] http://www.nytimes.com/1974/11/01/archives/general-who-led-intelligence-agency-arrested-in-italy.html.

[25] Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto, Legge 3 agosto 2007, n. 124 http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2007;124.

[26] Declassified report of the Italian government on national security threats 2007, p.199 https://www.sicurezzanazionale.gov.it/sisr.nsf/wp-content/uploads/2015/12/relazione-2007.pdf.

In the aftermath of the Cold War, declassified regulation of national security became a possibility[27] and most countries passed their legislation, or at least passed an interim law,[28] so the government and the parliament could win time for reaching the necessary political consensus.[29] The lack of declassified regulation in the former socialist regime did not mean that state security – organisation, authority and staff at least – was something of an uncharted *terra incognita*, for all administrative structured bodies are created by a normative decision, shaped with normativity and all instructions and directives are written on a normative language.[30] In the Netherlands national security was established by a secret royal decree, which was declassified in 1972, and later replaced by an act in 1987.[31]

At least three factors can be listed as the basis of a newly established national security legislation. First, the previously mentioned and most obvious is the end of the cold war, which allowed declassified regulation to appear and was triggered by a new democratic demand of the

[27] Poland was a peculiar socialist state, not just for its method of nationalising private property (see: Broniowski v. Poland, ECHR), but also for having an act on state security (for the 1985 act on state security see: http://isap.sejm.gov.pl/Download?id=WDU19850380181&type=2).

[28] As did Hungary with Act X of 1990 on interim legislation on authorisation of special measures and methods of secret services.

[29] This consensus was blocked, in some cases, like Hungary, for years, because the political parties in parliament could not agree on how to deal with the previous network of state security.

[30] E.g. from Hungary: http://abparancsok.hu/sites/default/files/parancsok/10-22-22_1976.pdf; from the GDR see G. Förster: *Die Juristische Hochschule des Ministeriums für Staatssicherheit. Die Sozialstruktur ihrer Promovenden*, Münster LIT 2001.

[31] A Binnenlandse Veiligheidsdienst (counter-intelligence) and Buitenlandse Inlichtingendienst (intelligence) existed until 2002. 05. 29., from which period between 1949-1972 they were authorised by a classified royal decree, that was declassified in 1972, but the relevant law was only passed in 1987 - http://www.stichtingargus.nl/bvd/par/wiv1987.pdf.

people that all government activity – operated with public funds – should be transparent and accounted for, and second, a copied model legislation between countries that was transferred by international relations. This could have been established between allies, countries with a shared cultural background or for pure political benefit in national politics.[32] Thirdly, case-law of the ECHR regarding national security and, particularly with, privacy, arbitrary in secret investigations and proper oversight had great effect on shaping national legislation regarding national security.[33]

2. Situating national security

National security has a place in a state governed by the rule of law. Gathering intelligence at home and abroad strengthens a democratic government in the same way as security clearances do, regarding integrity and the fight against corruption. The open measures initiated by law enforcement and the military cannot deal with all types of threat against democracy. In order to maintain the rule of law effectively government has to allow national security some sort of independence within state administration.[34]

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[32] For detailed characterisation of the three above-mentioned methods, see in Hungarian I. Sabjanics: A félelem mint jogi következményekkel járó veszélyforrás (Fear, as a source of threat with legal consequences) in: Biztonsági kihívások a 21. században (ed. G. Finszter, I. Sabjanics) Dialóg Campus Kiadó Budapest 2017, pp.745-753. http://www.bm-tt.hu/assets/letolt/BM-konyv_1.pdf.

[33] E.g. see: Malone v. UK [8691/79 (1984)] or Herman & Hewitt v. UK [12175/86 (1989)].

[34] D. Vitkauskas: The Role of a Security Intelligence Service in a Democracy. North Atlantic Treaty Organisation, Democratic Institutions Fellowships Programme 1997-1999, June 1999, p. 53. www.nato.int/acad/fellow/97-99/vitkauskas.pdf; in a previous context see M.G. Raskin: Democracy versus the National Security State. In: Law and Contemporary Problems. Vol. 40. No. 3. 1976. pp. 189-220.

Article 2 of the Slovene ZSOVA[35] and Article 3 of the Lithuanian law on national security[36] invoke the authority provided by the constitution of the state. However, the Estonian JAS[37] which regulates the national security service, KaPo[38] or the Slovakian SIS Act[39] refer back only to the abstract concept of constitutional order without mentioning any specifics. Obviously, the abstract concept of constitutional order can be deduced from the relevant constitutions.[40] Their authority and the service provided by national security prohibits placing them under any other branch of power, other than the executive. Their role in aiding government decision-making puts them in a central position within the state administration, even when the organisation itself lacks independence, as being part of another central body. Functionality prevails over structural framework when dealing with national security. The German MAD[41] is part of the Bundeswehr and looks like a non-essential government body. Though, as the military national security service of Germany, it is vital to the sovereign governmental decision-making and is considered

http://www.scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3491&context=lcp

[35] *Zakon o Slovenski obveščevalno varnostni službi Ministrstva za obrambo* (1999. 07. 29.) http://fra.europa.eu/sites/default/files/fra_uploads/slovenia-study-data-surveillance-si.pdf

[36] Law no. VIII-49 on the basis of the national security of Lithuania (1996. 12. 19.) http://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.120108/format/ISO_PDF/

[37] Law on national security authorities (2000. 12. 20.) https://www.riigiteataja.ee/en/eli/514112013020/consolide.

[38] Kaitsepolitseiamet http://www.kapo.ee.

[39] Act no. 46/1993. On Slovakian Intelligence Service www.sis.gov.sk/about-us/zakon-o-sis.html.

[40] Constitution of Estonia http://www.president.ee/en/republic-of-estonia/the-constitution/; Constitution of Slovakia http://www.prezident.sk/upload-files/46422.pdf.

[41] Militärischen Abschirmdienst.

to be part of the German national security community among the rest of the national security services, that, on the other hand, are independent.

Aspects of national security as a sensitive matter have an impact on national politics and international relations. Keeping it a secret helps the effectiveness of national security and provides a stable environment for diplomatic actions. The existence of counter-intelligence activity in the UK was first mentioned in a speech in Parliament in 1952, while intelligence, despite the several James Bond books and movies, was acknowledged by the British Government officially only in 1986.[42] Before passing national security legislation the cooperation between national security services and other governmental bodies or NGOs was considered a patriotic and civic duty, but talking about it was frowned upon. Basically, governmental approval gave legitimacy to the authority of national security services, for all related norms were classified. The division of national security and law enforcement was always elemental. National security never had investigative powers and was kept outside the criminal procedure, but it was expected to contribute to its success.[43] If a criminal procedure is initiated the role of national security ends[44] in that specific case, or at least there must be a shift in its focus, in order to continue gathering information. There is some overlap[45] in the

[42] http://www.bbc.com/news/magazine-29938135.

[43] H. Born, I. Leigh: Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Publishing House of the Parliament of Norway, Oslo, 2005.

[44] ET Crime Analysis: Organised Crime – Best Practice Survey No. 4, (Strasbourg: CoE, 2002), p. 6.

[45] Security Services Act 1989 1(2) identified the function of MI5 as protection of national security, in particular, its protection against threats from espionage,

authority of national security and law enforcement, which establishes a competitive relationship between the two sides of public interests, one regarding national security, and one regarding criminality. However, proper evaluation of information which concentrates on the benefits that can be achieved in each field of interest, especially referring to the source or the date of expiry of the information, can establish a functioning cooperation between the two interpretations of public interest.

3. Internationalism in national security[46]

With the end of the cold war and the rise of international terrorism, governments gave a green light to international cooperation of national security services outside their traditional alliances. This is based on focusing on the pragmatic benefits of information sharing, rather than the similarities in their respective national politics or democratic institutions. Every piece of information has its own value, correlating with the measures taken and other legal circumstances. The harder it is to obtain the information, the more valuable it will be. In theory, it is hardest, if not impossible, if the information cannot be obtained legally by the authorities, because their chances would be reduced to pure luck. Nevertheless, information that would be illegal to acquire within the legal system of a

terrorism, and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means. However, it was completed in 1996 with a new section 1(5) and the obligatory support of police and investigative authorities.

[46] For a more detailed work on the subject see H. Born, I. Leigh, A. Wills (eds.): International intelligence cooperation and accountability, Routledge, 2011, p. 336.

state, could become the subject of trade via international cooperation between national security services. A practical interpretation of CAT[47] and human rights regarding criminal procedure, or just the individuals Miranda rights alone, if we do not want to go too far, could mean a great difference between the legal circumstances in which the information was acquired. This arrangement suggests a gap in legislation, since national security committees of parliaments usually lack the authority to practice oversight regarding the international cooperation of national security services. This means that joint operations, secret investigations within partnerships abroad, and information-sharing stay hidden in the shadows, out of the sight of politicians.[48] Somehow, only the scandalous cases come up to the surface like the infamous CIA black sites[49] across the world, the Abu Omar-case[50] or now the alleged deception of ABW by Russian intelligence.[51] There were compelling suggestions on how to make intelligence more accountable, yet none of the sides is satisfied with the political

[47] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984).

[48] F. Fabbrini: The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism. In: Human Rights Law Review, Vol. 14, Issue1, 1 March 2014, pp. 85-106.

[49] https://www.amnesty.org/en/latest/news/2013/06/poland-reveal-truth-about-secret-cia-detention-site;
www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF.

[50] Report by the Secretary-General on the use of his Powers under Article 52 of the European Convention on Human Rights, in the Light of Reports suggesting that Individuals, notably Persons suspected of Involvement in Acts of Terrorism, may have been Arrested and Detained, or Transported while Deprived of their Liberty, by or at the Instigation of Foreign Agencies, SG/Inf (2006) 5, 28 February 2006, para. 4.

[51] http://www.thenews.pl/1/10/Artykul/336562,Polish-security-service-targeted-by-Russian-spies-under-previous-gov't-report.

consensus.[52] With the limits of our legal system in mind, we see noteworthy concepts behind glass doors that would never take root in different constitutional circumstances.[53] International cooperation of national security services appears solely in statistics,[54] and in a few cases, governmental approval of establishing the framework for cooperation is mentioned in legislation.[55] If we look at the successive and correlative system[56] of oversight bodies regarding the activity of national security, an apparent gap

[52]Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, Genf, 2009, p. 90.

[53] E.g. the UK's Investigatory Powers Tribunal (www.ipt-uk.com).

[54] E.g. the Danish PET's Annual Report of 2006-2007 pp.24-27. https://www.pet.dk/English/~/media/Engelsk/PETannualreport_2006-2007.ashx, although the Estonian KAPO just mentions topics for international cooperation, such as terrorism, protection against the increasing influence of Russia and migration https://www.kapo.ee/sites/default/files/public/content_page/Annual_Review_2016.pdf.

[55] The legislation of Switzerland is a peculiar example, as federal act no. 510.10 on military and military administration states that the government can sign treaties on international cooperation of military national security regarding data protection and participating in international military informational systems https://www.admin.ch/ops/de/classified-compilation/19950010/index.html.
Art. 36(1) d of the Dutch Wiv states that acquiring information through international cooperation and establishing partnerships with foreign national security services need to be sanctioned by the relevant member of government.

[56] Oversight is carried out as followed: 1) *internal control* (or self-control, focusing on expertise and legal framework), 2) *government control* (which is no longer internal control in the original sense, similarities in their related interest, however, is hard to contest, 3) *oversight of parliament*, 4) *oversight of the judiciary*, 5) *other external* (independent) *oversight* (national audit office, ombudsman etc.) – which does not contain media, since the media lack the authority for direct involvement in staff policy, reorganising institutions etc.; from a different view oversight can be 1) *a priori* (typically internal, governmental and judicial), 2) *continuous* (exclusively internal and sometimes governmental), 3) *ex post facto* (basically all types)
See H. Born – I. Leigh: Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies. Publishing House of the Parliament of Norway, Oslo, 2005 or in Hungarian I. Sabjanics: Gondolatok a polgári titkosszolgálatok közjogi helyzetéről. In: (ed.) B. Páll. A Közjogi Államtudományi Kutatócsoport publikációi III. SZIT, Budapest 2007. pp.169-219.

occurs, that is fit for international cooperation. Even though, the threats challenging national security seem to be continuously shifting in tone and changing surface, legal stability is vital to the rule of law. This means, the only option is to establish a competent framework either in the constitution or, at least, in relevant (declassified) laws.[57]

4. Providing national security in the 21st century

The existing national security legislation, if appropriate, supports the rule of law and establishes the trust of the people in the government, by providing the necessary amount of exposure. Considering, national security needs to operate discreetly, even success stays hidden from the public. Beside the relevant legislation, which establishes and defines national security, the authority exercised by the services, and what can be regarded as none other than a clear message from the government to the public and other governments, national security services have some potential too. National security services must go further, when providing democratic service to the public, than merely being accountable, transparent, and cooperating with oversight bodies. They also can appeal to the public. Reaching out to the public is more than just an opportunity to acquire relevant operational information. It is a gesture of inviting the public to a conversation on threats, measures, and insight as a partner, and obviously not as a peer. But then again, no governmental body, when exercising public authority, considers the people as a peer. Official

[57] See P. Gill: Intelligence, Threat, Risk and the Challenge of Oversight, In: Intelligence and National Security 27:2, 2012, pp. 202-222; also, the Report of the Venice Committee on the democratic oversight of national security services (2007 June).

publications of national security[58] give first hand analyses of policies and prevent political and ignorant interpretations of their work. This way a defensive reaction to a bad press can be avoided before it occurs. It is also a measurement of their involvement in supporting democracy: after all, an independent voice of national security, that focuses on expertise, rather than being just an echo of the government's perspective, is so much more compelling. Public representation of national security requires an online presence, which in the 21st century is essential for the accountability and transparency of the government. In the early days of the Internet, however, it was peculiar for national security services to establish an online interface.[59] National security is as complicated as it is limited in being transparent to the public. Nonetheless, there are great many opportunities for national security services to reach out to the people and even speak the language of the Millennials

[58] See the site of the Danish PET https://www.pet.dk/Publikationer.aspx; the Estonian KAPO https://www.kapo.ee/et/content/aastaraamatu-väljaandmise-traditsiooni-ajalugu-ja-eesmärk-o.html; the Dutch AIVD https://www.aivd.nl/publicaties; the German Office for the Protection of the Constitution https://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/publikationen; the Czech BIS https://www.bis.cz/vyrocni-zpravy.html; the Slovakian SIS https://www.sis.gov.sk/pre-vas/sprava-o-cinnosti.html; the Polish SKW https://www.bip.skw.gov.pl/skw/zamowienia-publiczne; while in the UK it is traditionally printed by the Parliamentary Committee: http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211553/31176_HC_547_ISC.PDF.

[59] According to Wayback Machine the site of the German Office for the Protection of the Constitution was launched on 1996. 12. 28. www.verfassungsschutz.de, while the others followed as listed: www.nbh.hu (1997. 11. 01.); www.mi5.gov.uk és www.gchq.gov.uk (1998. 12. 05.); www.sis.gov.sk (1998. 12.12.); www.bis.cz (1999. 04. 18.); www.uzsi.cz (2002. 06. 06.); www.abw.gov.pl (2002. 08. 06.); www.aw.gov.pl (2002. 10. 19.); www.pet.dk (2003. 12. 11.); www.mkih.hu (2004. 02. 14.); www.fe-ddis.dk (2004. 12. 23.); www.vzcr.cz (2005. 02. 04.); www.bnd.bund.de (2005. 03. 22.); www.sis.gov.uk (2005. 11. 01.); www.skw.gov.pl (2007. 05. 17.); www.sww.gov.pl (2009. 01. 31.); www.vs.mosr.sk (2016. 05. 28.).

or the Alpha generation. Threats to national security, developments in technology, and a shift in the social structure will be continuously besieging national security services. The traditional lines between politics and policies are becoming dynamic, allowing politicians to dictate how experts should operate, and to install political accountability on officers, that were appointed and not elected. The process did not start yesterday, and will not be over tomorrow, but the more vigilant we stay, the better opportunity we will have to avoid being misguided in the field of national security.

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Metamorphosis of Public Security Exception in the EU Internal Market and EU Citizens' Rights

1. Introductory remarks

The EU migration agenda is rapidly growing and it brings a high degree of tensions and instability in the European Union. These concerns are reflected in the political processes with a prominent example of the referendum on Brexit. The migration agenda was also a central topic in recent elections in EU countries with a rise of anti-migration and anti-integration parties.[1] Similarly, these issues are central to EU neighbours, a clear example being recent developments in Switzerland. The Swiss government had a difficult task how to implement the results of referendum that required a limitation of migration from the EU.[2]

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[1] Including f.e. France, Germany, Hungary or the Czech Republic.

[2] A termination of migration agreement with the EU would also cease Swiss participation in the EU internal market due to the Guillotine clause inserted in EU-Swiss contractual set-up as a termination of one of the basic agreements would automatically cause termination of others. For details see f.e.: https://euobserver.com/justice/136398 (28.11.2017).

One of the reasons for high sensitivity of migration agenda is that it gets in clash with traditional values of societies of Member States. It can threaten social well-being of the host society (dependence and even an abuse of national social benefits) and cause changes in national labour markets (taking jobs from locals or reducing price of work). Importantly migration is perceived also as a threat to safety of population and security of states. The aim of this chapter is to focus on legal developments of the EU regulation in relation to public security restrictions. The main emphasis will be put on the status of free moving EU citizens and correspondingly their family members including third country nationals.

Public security exception was incorporated in the founding treaties at the outset of EU integration. It was inserted into several provisions of the EU law. These exceptions are primarily applicable both in the internal market freedoms as well as in measures adopted in the area of freedom, security and justice (Schengen acquis). They likewise proliferate in EU external agreements. Still, in *Johnson*[3] the EU Court of Justice (further referred as CJEU) clarified that there is no inherent general exception from the full application of EU law based on public security and the use of this exception is possible only in cases expressly allowed by the founding treaties.[4]

Neither the EU primary nor secondary law gives any definition what is understood by public security in the EU

[3] 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, point 26.

[4] For a commentary see M. Trybus, The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions, Common Market Law Review 39, 2002, p. 1349.

law. Thus, the concept and conditions for its application are shaped mostly in the case-law of the CJEU. One common characteristics reappearing in many cases is that these decisions often combine both public policy and public security arguments while differences of these two exceptions are not always delineated. Statistics on common or separate application of these exceptions show that the use of public policy exception in the free movement cases is much more common than rather an exceptional recourse to only public security grounds.[5] Still, even if these exceptions are often used together, they still involve a principal conceptual difference as will become apparent from the examination of EU migration rules (especially Directive 20014/38).

The following analysis will focus on the most notable cases where CJEU interpreted public security exception and defined limits of the competence of Member States. The case-law will be chosen across the four internal market freedoms as it will help to give a more complex picture of the CJEU approach. It will focus on the free movement of goods, capital and establishment (subchapter 2), on free movement of workers (including workers from associated countries, subchapter 3) and, finally, on most recent developments in the context of EU citizenship (subchapter 4). It will be shown that the principles adopted in other market freedoms are cross-referred in the migration case-law.

[5] See for statistics see D. Kostakopoulou-Dochery, N. Ferreira, Testing Liberal Norms: Public Policy and Public Security Derogations and the Cracks in European Union Citizenship, 20 Colum. J.Eur. L., 192, 2014, p. 182.

2. The public security exception and the free movement of goods, capital and establishment

This subchapter will focus on the most noteworthy cases in the free movement of goods (*Campus Oil*, *Commission v Greece*, *Richardt*), including its use in external relations (*Werner*, *Leifer*) and one case concerning also free movement of capital and establishment (*Albore*). The aim is not to make an exhaustive survey, nor a full case-note on individual decisions.[6] Rather, the text intends to show the basic principles formulated by the CJEU in these cases which reappear in subsequent case-law, including migration law.

2.1. Free movement of goods

The public security exception in relation to the free movement of goods is articulated in present art. 36 TFEU. The CJEU interpreted it in several decisions, for the first time in ***Campus Oil***.[7] This case concerned Irish rules on the import of the petroleum products to the country. Ireland required importers to take part of their imported petroleum from the state-owned refineries. The justification for this requirement lay in the necessity for Ireland to keep own production in refineries run by state. The CJEU was ready to accept this argument as petroleum products are of exceptional importance as an energy source in economy. They have '*fundamental importance for a country's existence since not only its economy but above all its*

[6] The full analysis of individual cases referred further were done systematically f.e. in Common Market Law Review, usually directly after the adoption of the case. We will refer to some of these comments.

[7] 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others*, ECLI:EU:C:1984:256.

institutions, its essential public services and even the survival of its inhabitants depend upon them'.[8] These conclusions on the content of public security exception regularly reappear later in case-law.

Consequently, an interruption of supplies of petroleum products would endanger country's existence and could, therefore, seriously affect its public security. The CJEU added that the restriction cannot be used for economic ends and country cannot plead economic difficulties caused by the elimination of barriers to intra-Community trade.[9] The CJEU articulated additional conditions for the legitimacy of public security exception by national authorities the fulfilment of which should have been confirmed by national courts in individual cases.[10] Thereby, the *Campus Oil* set up basic principles for the use of public security exception and Member States are not fully free to have recourse to it and common EU based conditions will be applicable.

The conclusions in *Campus Oil* were under scrutiny much later in a similar case ***Commission v Greece***.[11] Even though at the end of the day arguments of the Greek Government were purely economic and could not serve as a justification for the quantitative restriction concerned,[12] the CJEU confirmed conclusions in *Campus Oil*; namely that

[8] See ibid, point 34.
[9] Comp. ibid, point 35.
[10] The CJEU was criticized for judicial activism as the detailed conditions set up in its judgement should be reserved to the EU legislator; see K. Mortelmans, Case 72/83, Campus Oil Limited, and others v. The Minister for Industry and Energy, and others, Judgment of 10 July 1984, (1984) 3 C.M.L.R. 544, Common Market Law Review 21: 687- 713, p. 713.
[11] C-398/98 *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:2001:565.
[12] Comp. ibid, points 30-31.

maintenance of minimum stocks of petroleum products may be crucial for public security.[13]

A successful recourse to public security exception can be found in ***Richardt***,[14] a case on possible limits to the transit of goods which originated in a Member State. The case concerned criminal proceedings brought against Mr. Richardt and four other persons by Luxembourg authorities who were accused of the breach of Luxembourg law requiring an authorisation for transport of security sensitive goods. Namely, it involved a unit for the production of bubble memory circuits which originated in the USA, was imported to France (thus, got into free circulation in the EU) and should have been exported – via Luxembourg territory – to the then Soviet Union. As the goods were already in free circulation, any limit, including a requirement of authorisation, was a clear restriction to the free movement of goods.[15]

To justify the national law, Luxembourg authorities had recourse to the public security exception. The CJEU decided that public security covers both a Member State's internal security and its external security.[16] An importation, exportation and transit of goods capable of being used for strategic purposes may affect the public security of a Member State; therefore, it must be allowed to impose a

[13] Comp. ibid, point 29. In relation to regulation of petroleum product in Greece see also a preceding case C-347/88 *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1990:470.
[14] C-367/89 *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC*, ECLI:EU:C:1991:376, points 47-49.
[15] Also in breach of secondary law, namely article 10 of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, OJ L 38, 9.2.1977, p. 1-19.
[16] See *Richardt*, point 22.

requirement of a special authorisation to verify whether the goods are of strategic character or not.[17]

2.2. External dimension of public security

Whereas the first two cases concerned the internal dimension of public security, *Richardt* indicated that public security definition will cover also external dimension. In this regard there are two interesting examples on the interpretation of public security in the context of EU common commercial policy, namely *Werner*[18] and *Leifer*.[19]

In ***Werner*** the question was whether the common commercial policy concerns exclusively commercial objectives, or whether it covers also measures having foreign policy and security objectives.[20] Common rules for export of goods were at that time regulated on the EU level by Regulation 2603/09.[21] In its art. 11 the Regulation allowed Member States to set limits on the same grounds as are articulated in relation to the free movement of goods (art. 36 TFEU), including also grounds based on public security. In fact the case dealt with a refusal to issue licences for export of furnaces and coiling machines from Germany to Libya. The introduction of that licensing requirement was intended to prevent furnaces and coiling machines from being used for military purposes in Libya's missile

[17] See ibid, point 23.
[18] C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany*, ECLI:EU:C:1995:328.
[19] C-83/94 *Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, ECLI:EU:C:1995:329.
[20] Comp. *Werner*, point 7.
[21] Regulation (EEC) No 2603/69 of the Council of 20 December 1969 establishing common rules for exports OJ L 324, 27.12.1969, p. 25–33.

development programme. Issuing such licenses feared to disrupt foreign relations.

The CJEU confirmed the outcomes of *Richardt*, namely that the concept of public security under art. 36 TFEU covers both a Member State's internal security and its external security. Then the CJEU attributed the same meaning to the concept also in external economic relations and refused the interpretation that Member States would be allowed to restrict movement of goods to thirds countries more than they are allowed to do in the context of the internal market. Put differently, the CJEU chose a parallel interpretation of public security exception both in internal and external movements of goods.[22] Furthermore, the CJEU linked state security to the security of international community as a whole and accepted that the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State. Thus, the use of the public security exception was admissible.[23]

Similarly, the public security exception in the context of common commercial policy and the regulation concerned was the main point in ***Leifer***. This case concerned the requirement of licenses for export of dual-use goods (plant, plant parts and chemical products) from Germany to Iraq. The applicant for a licence was bound to prove that the products will be used exclusively for civil purposes. According to the CJEU a public security concern might justify national licensing procedure and Member States can

[22] See *Werner*, point 25.
[23] See ibid, point 26-27.

refuse to issue a licence if the goods can objectively be used for military purposes.[24]

2.3. Public security in the context of freedom of establishment and capital movement

Public security exception argumentation appeared also in relation to freedom of establishment and capital movement; an exceptional case being ***Albore***.[25] This case concerned Italian rules setting up an authorisation procedure for the purchase of immovable property in a military important area on the Isle of Ischia. There was no limitation to acquire the property for Italian nationals; however, non-nationals intending to purchase such a property were bound to get a prior authorisation by Italian authorities. An open discriminatory nature of these rules clearly indicated that these rules were in breach of internal market rules on the freedom of establishment and capital movements, potentially justified by public security reasons.

The Italian government tried to justify the discrimination with reference to the specificity of relationship between a state and its own nationals. This relationship is based on a common set of values, solidarity as well as obligations. In the area of public security the interests of a state are protected by national criminal law which makes it an offence for any citizen to accept monetary reward or other advantage from a foreign source for behaving in a manner contrary to national interests. On contrary, according to the Italian government persons not having Italian nationality were not in the same position as Italian nationals. They did

[24] Comp. *Leifer*, point 36.
[25] C-423/98 *Alfredo Albore*, ECLI:EU:C:2000:401.

not share Italian national interests and were not subject to the special obligations imposed by Italian law to conform to those interests.[26]

It would be useful to shortly refer to an interesting opinion of Advocate General Cosmas. In his arguments he connects the mere internal market perspective and the developing concept of EU citizenship. Italian rules go against the idea of continuous convergence of the peoples of the Member States and of advancement of European integration. However, these arguments are primarily political, not legal. From the legal point of view Member State still retained the right to make a distinction between its own nationals and those of other Member States. In certain situations a conduct of one's own national is less of a potential risk to national military security than that of citizens of other Member States.[27] In that regard AG Cosmas accepted a difference in treatment based on nationality; however, he lacked a satisfactory explanation regarding the criteria for designation of an area as being of military importance and necessity to control some areas for the purpose of safeguarding national military interests.[28]

In comparably laconic decision the CJEU refused any national rules that would constitute an arbitrary discrimination or a disguised restriction. According to the CJEU a mere reference to the requirements of defence of the national territory cannot suffice to justify discrimination against nationals of other Member States. The restriction must be well substantiated and it must be shown that the

[26] Comp. Opinion of Advocat General in *Albore*, ECLI:EU:C:2000:158, points 63-64.
[27] Comp. AG Cosmas in *Albore*, point 66.
[28] Comp. ibid, points 76 and 78.

'*non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures*'.[29] This was not true for Italian rules.

In *Albore* the CJEU would accept the use of public security exception in relation to military interests of Member States, nevertheless, it did not retreat from the emphasis put on the liberal internal market. The CJEU did not give a *bianco cheque* to Member States and fairly in depth scrutinized national practice and interpreted the internal market exceptions narrowly. It seems that Italian motivation really did not rest primarily on any economic ends and the argument based on the specificity of the liaison of a home Member State and its own nationals was admittedly meant frankly. Still, if the area would be that crucial for military purposes, one would expect a similar safety requirements both to home and host member nationals. In that light the argument of insufficient justification seems to be relevant and acceptable.

Indeed one should have in mind that the progressive and liberalising case-law on the EU citizenship was delivered several years later. Directly after the insertion of EU citizenship in TEU in 1993, the CJEU conceived the EU citizenship more as complementary to national citizenship. The early cases dealing with the EU citizenship closely connect it to other treaty provisions and market freedoms and the extensive reading of rights connected to EU

[29] See *Albore*, point 22.

citizenship were initiated in 2001 by case *Grzelczyk.*[30] Thus, *Albore* decision is still rested on the old reading of EU citizenship, as was openly reflected in the Opinion of Advocate General.[31]

2.4. A summary on the free movements of goods, establishment and capital

Cases in relation to the free movement of goods both in the EU and under common commercial policy rules brought in complex fundaments for the construction of public security exception. The CJEU made it clear that this exception includes safeguarding of state's institutions, essential public services and survival of its inhabitants (*Campus Oil*, *Commission v Greece*), and it covers both internal security and external security of Members States (*Richardt*). The CJEU called for a parallel interpretation of public security exception both in internal and external movements of goods (*Werner*) and made it clear that security may be affected also by a risk of serious disturbances to foreign relations or to peaceful coexistence of nations (*Leifer*). Any discrimination based on nationality must be well justified (*Albore*).

The case-law in this area showed that the concept of public security is comprehensive. Still, the CJEU made it obvious that exceptions in art. 36 TFEU do not form a reserved domain of sovereignty of Member States that would remain in their exclusive jurisdiction. They are

[30] C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458.

[31] For a further detailed analysis of the case see V. Hatzopoulos, Case C-423/98, Alfredo Albore, Judgment of the Sixth Chamber of 13 July 2000, nyr, Common Market Law Review 38: 455–469, 2001.

allowed by the EU law to derogate from the principles in well substantiated cases in order to achieve the objectives set out in Treaty articles concerned.[32] From the few mentioned cases (and there were not many others) it was apparent that the CJEU will analyse individual cases in quite a detail and examine whether the recourse to the exceptions is properly justified.

3. Public security grounds in the context of the free movement of workers

The public security exception is regulated in relation to workers directly in the founding treaties[33] with further details regulated in the former Directive 64/221.[34] According to this Directive measures taken on grounds of public policy and public security could be based exclusively on the personal conduct of the individual concerned and previous criminal convictions in themselves could not constitute grounds for such measures.[35] These conditions were applicable for expulsions founded on both public policy and public security grounds. Clear contours for the use of exceptions were left for national implementing rules. These were applied by national courts and scrutinised for its conformity with EU law via the preliminary ruling procedure. Again the case-law of the CJEU was crucial for the interpretation of these conditions.

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[32] Comp. *Campus Oil*, point 32 or *Richardt*, point 19.
[33] Nowadays art. 45 para 3 TFEU.
[34] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Official Journal 056, 04/04/1964, p. 850-857. It was replaced with Directive 2004/38, see details in the next subchapter.
[35] Comp. art. 3 of Directive 64/221.

The following analysis will refer to decisions where public security exception was directly applied (*Bonsignore)*, or to decisions that concern public policy exception but are conceptually applicable also to public security. This concerns especially the condition of personal conduct which was defined in cases concerning primarily public policy (*Van Duyn*, *Adoui and Cornuaille*). Finally, the subchapter will shortly touch on the transferability of these principles to external relations (*Jany*). The conceptual conclusions from this case-law were later incorporated in the text of current legislation (Directive 2004/38) which will be covered in the next chapter.

3.1. Personal conduct in the early case-law

One of the well-known decisions in this regard is ***Van Duyn***.[36] It actually concerned a public policy exception and the condition articulated in Directive 64/221 that any measures based on public policy (and also public security) must be based on the personal conduct of an individual concerned. The case concerned a Dutch woman who wanted to work as a secretary for the Church of Scientology in the United Kingdom. She was refused a leave to enter the UK as the activities of the Church of Scientology were deemed socially harmful, but no administrative measures against this Church were taken. The key issue[37] was the interpretation of the term 'personal conduct'; in other words, whether the membership in an organisation may be counted as a personal conduct. The CJEU differentiated between

[36] 41/74 *Van Duyn v Home Office*, ECLI:EU:C:1974:133.

[37] **Except that the CJEU for the first time set up that directives can be vertically directly effective.**

past and present membership to an association. Whereas the former cannot justify restrictions to the free movement, the actual membership can become such a ground. It may be connected with the participation in the activities of the organisation and identification with its aims.[38]

Furthermore, the CJEU confirmed that the concept of public policy must be interpreted strictly and cannot be determined unilaterally by Member States without any control by the EU institutions. On the other hand, the CJEU confirmed that circumstances for the application of public policy exception differ territorially (that is in various Member States) and in time; this necessitates a discretion for authorities of each Member State.[39] Importantly, the CJEU accepted that Member States can limit the free movement of workers, in this case the right to take up an offered employment in another Member State even though this is not prohibited to one's own nationals.[40]

In *Van Duyn* the CJEU showed a strong understanding for Member State's discretion. It accepted that the present (but not past) membership to an organisation may be assessed as a personal conduct and also accepted the use of this exception even though Member States did not take the same restrictions to its own nationals. This clear breach of the prohibition of discrimination based on nationality requires a proper justification by Member States. For sure it would be in breach of international law to require that a Member State would expulse one's own nationals.[41] Still, the Member State's concern about the socially harmful

[38] Comp. *Van Duyn*, point 17.
[39] Comp. ibid, point 18.
[40] Comp. ibid, point 23.
[41] Comp. ibid, point 22.

character of activities of the Church cannot seem serious enough if it does not impose any corresponding restriction to the activities of the Church and its own national in this respect. As a result the CJEU left quite a wide discretion to Member States for the use of the exception; especially it did not strictly require restrictive measures required to both the UK and other Member States' nationals.

Not a sufficient apprehension of the lack of possible and maybe desirable steps against own nationals was definitely a shortcoming of the CJEU approach and the Van Duyn principles were later revised as will be shown below. Actually in the same year when *Van Duyn was decided* the CJEU accepted also a stricter reading of the condition of personal conduct presumed by the Directive, even though in a different context.

The decision in ***Bonsignore***[42] concerned an Italian worker in Germany who was criminally convicted for an offence against the firearms law and for causing death by negligence. According to the national court the deportation was not justified by special preventive measures based on the facts or present and foreseeable conduct of the plaintiff, but it was conceived as a general preventive measure. His expulsion was perceived as a prevention against increasing violence among immigrants in larger cities.[43] This primary motivation for expulsion was refused by the CJEU. The CJEU reiterated the condition in Directive that deportation must be based on the personal conduct of the individual and only on breaches of peace and security which might be

[42] *67/74 Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln*, ECLI:EU:C:1975:34.
[43] Comp. ibid, point 4

committed by the individual concerned.[44] The prohibition of an expulsion as a preventive measure was later inserted in the current Directive.[45]

The requirement that only a present threat to public policy may justify an expulsion was further elaborated on in case ***Bouchereau***.[46] This case concerned a French national who was found guilty for unlawful possession of drugs, for which he was conditionally discharged for 12 months. He should have been expelled from the UK. The question was whether previous criminal convictions may be interpreted as a personal conduct required as a condition for expulsion under Directive 64/221. According to the CJEU previous criminal convictions can be relevant only if they are an evidence of a present threat to public policy.[47] Furthermore, the use of public policy exception requires existence of a genuine and sufficiently serious threat to fundamental interests of society.[48] This apprehension of public security was regularly restated in subsequent case-law.

3.2. Reconsideration of *Van Duyn* principles in later case-law

It took nearly a decade before the principles formulated in *Van Duyn* were clearly reconsidered. It happened in joint cases ***Adoui and Cornuaille***[49] which concerned two French women who were refused to be granted a residence permit. The decision was based on public policy grounds as they

[44] Comp. ibid, point 6.
[45] See art. 27/2 of Directive 2004/38.
[46] 30/77 *Regina v Pierre Bouchereau*, ECLI:EU:C:1977:172.
[47] Comp. ibid, point 28.
[48] Comp. ibid, point 35.
[49] Joined cases 115 and 116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State*, ECLI:EU:C:1982:183.

worked as waitresses in a bar suspect of conducting prostitution. The Belgian law did not prohibit prostitution as such,[50] but allowed local authorities to pass regulations of these activities to uphold public morality or to ensure the keeping of the public peace. The city of Liège adopted such local rules. The CJEU reiterated the premise that Member States are free to designate their own set of values concerning public policy exception; the application of these rules cannot lead to arbitrary (non-justified) distinction to the detriment of nationals of other Member States.[51] A conduct may not be considered as being of a sufficiently serious nature where the Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct.[52]

In summary in this decision the CJEU rejected an arbitrary use of the public policy exception and required a proper justification of any discriminatory rule. Moreover, it required that Member States must take adequate steps also against own nationals; otherwise they cannot take steps against free moving nationals of other Member States. By this the CJEU revises outcomes of *Van Duyn* case. The approach of the CJEU seems to be stricter and pushes higher threshold for the use of Member States discretion.[53]

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[50] The law prohibited only some activities such as soliciting, incitement to debauchery, exploitation of prostitution, the keeping of a disorderly house or brothel and living on immoral earnings.
[51] Comp. *Adoui and Cornuaille*, point 7.
[52] See ibid, point 8.
[53] Comp also T. C. Hartley: Joined Cases 1 15 and 1 16/81, Adoui v. Belgian State and City of Liège and Cornuaille v. Belgian State. Preliminary Rulings of 18 May 1982 requested by the President of the Tribunal de Première Instance, Liège, not yet published Common Market Law Review 20: 131 – 145, p. 142-143.

These decisions may be read also in the context of development of free moving case-law**.** Notably in the period between *Van Duyn* and *Adoui and Cornuaille* the CJEU delivered liberalising decisions in the EU internal market which caused a massive revision of national regulations restricting the four freedoms, starting with the free movement of goods. The CJEU formulated a prohibition of restrictions both of discriminatory and indistinctly applicable (non-discriminatory) character which would impede the free movement of goods. These conclusions later overflew to other freedoms. Even though fully liberalising decisions in relation to free movement of workers were delivered later,[54] the emphasis on the limited use of discriminatory restrictions could be seen strongly already in 80s.[55] *Adoui and Cornuaille* decisions seem to be part of this liberal market discourse.

The conclusions in *Adoui and Cornuaille* cases were later confirmed especially in ***Calfa***.[56] The case concerned an Italian national who was criminally convicted for drug possession on her holiday in Crete. She was sentenced for three months and automatically expulsed from Greek territory for life. In its decision the CJEU reiterated that her personal conduct must create a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Consequently, an automatic expulsion for life does

[54] *C-415/93 Union royale belge des sociétés de football association and Others v Bosman and Others*, ECLI:EU:C:1995:463.
[55] See f.e. C-53/81 *Levin v Staatssecretaris van Justitie*, ECLI:EU:C:1982:105, C-139/85 *Kempf v Staatssecretaris van Justitie*, ECLI:EU:C:1986:223 or C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen*, ECLI:EU:C:1992:87.
[56] C-348/96 *Criminal proceedings against Donatella Calfa*, ECLI:EU:C:1999:6.

not allow to consider her personal conduct or the danger which she represents for the requirements of public policy.[57]

The strict reading of public policy exception in *Adoui and Cornuaille* was likewise referred to in the context of external relations. It was namely the decision in ***Jany***[58] on the association agreements (Europe Agreements) between EU and Poland and the Czech Republic. The pre-accession disputes concerned several Polish and Czech nationals who wanted to work as self-employed prostitutes in the Netherlands and were refused the right of residence. They based their rights on the prohibition of discrimination at work and right of residence.[59] The Dutch authorities based their decision on the exceptions inserted in the agreement, namely public policy.[60] In this regard the CJEU explicitly referred to *Adoui and Cornuaille* and confirmed both principles, namely that the conduct must constitute a genuine threat to public order and that the same effective measures to monitor and repress activities of that kind must be taken also to its own nationals.[61]

The same concept and condition for the use of exceptions based on public policy was reiterated in the context of Turkey Association Agreement and Decision No

[57] Comp. ibid, point 25-27. Actually there was a possibility to ask for revision of the decision after three years or family ties to Greece could be taken into consideration. For a full comment on *Calfa* see C. Costello, Case C348/96, Donatella Calfa, Judgment of the Full Court of 19 January 1999, nyr, Common Market Law Review 37: 817–827, 2000.

[58] C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie,* ECLI:EU:C:2001:616.

[59] Comp. art. 37, para 1 and art. 44 para 3 and 4 of Polish Association Agreement. The same rule was also in the Czech Association Agreement.

[60] Article 53(1) of the Association Agreement between the Communities and Poland. The same regulations is also in the Czech Association Agreement.

[61] Comp. *Jany*, point 61.

1/80 of the Association Council[62] in ***Nazli***.[63] The aim of the Decision was to constitute a next stage to secure free movement of workers as it is regulated in EU law. The CJEU required that principles in the corresponding treaty provision should be extended, as far as possible, to Turkish nationals who enjoy the rights conferred by Decision No 1/80.

It actually does not have to mean that the interpretation must be totally the same. What seems to be important, is the objective of the external agreement; the importance of the objective in mirror provisions was assessed in case *Polydor*.[64] A proper interpretation of mirror provisions must be based on the context-related interpretation.[65] Much will depend on whether the objective of EU provision and the corresponding provisions of an external agreement will be the same, in the context of the whole external agreement.[66] Simply said, if the objective is comparable, the interpretation should be the same, and *vice versa*. In *Nazli* the CJEU had recourse to *Adoui and Cornouaille* approach and repeated that the public-policy derogation presupposes that there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[67] It further reiterated the principle that Member States should

[62] Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association.
[63] C-340/97 *Nazli* and Others ECLI:EU:C:2000:77.
[64] 270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*, ECLI:EU:C:1982:43.
[65] Comp. D. Thym, M. Zoetewej-Turhan (eds), *Rights of Third-country Nationals under EU Association Agreements*. Leiden/Boston: Brill/Nijhoff, 2015, p. 205.
[66] Comp. *Polydor*, point 15.
[67] Comp. *Nazli*, point 59.

take repressive measures also in relation to its own nationals to justify their use to a third country national.

3.3. A summary on the free movements of workers

When applying public policy as well as public security exception, Member States are obliged to take into consideration personal conduct of the person concerned.

This obligation based on the wording of the Directive was interpreted by the CJEU in a varying manner. In the early case law the CJEU seemed to allow more discretion to Member States (*Van Duyn*); in later cases this early approach was revised. The CJEU refused general preventive measures (*Bonsignore*) and required that the measures must be justified by a genuine and sufficiently serious threat to fundamental interests of society (*Bouchereau*). The CJEU further curtailed MS's discretion by the principle that personal conduct will be sufficiently serious only if the Member State concerned adopts the same restricting measures against own nationals (*Adoui and Cornuaille*). The shift in the comprehension of Van Duyn principles was confirmed also in relation to external relations, namely European Agreements (*Jany*) and EU-Turkey Association Agreement (*Nazli*). The same interpretation will be applicable only after a due consideration of objectives of external agreements that actually might differ, in that case the discretion of Member States in public policy or security exceptions could be interpreted also in a different manner.

4. Freedom movement of EU citizens under Directive 2004/38

The personal conduct condition as it developed especially in the context of free movement of workers is applicable also in the context of currently valid Directive 2004/38 and this condition of 'individualisation' of the decision reappears importantly in the most recent cases on public security. This subchapter will present the structure of the current Directive 2004/38 and then focus on current case-law on the application of public security exception (*Tsakouridis, P.I.*).

4.1. Survey of the current rules in Directive 2004/38

The conditions under which EU citizens may benefit from the right of free movement and residence in other Member States are at present regulated by Directive 2004/38. It sets up conditions for stay and permanent stay of an EU citizen and his/her family members in another Member State. It is a consolidating Directive in relation to various previous legislative acts concerning free movement of persons in the EU. Among others this Directive also replaced the former Directive 64/221 and also incorporated in its text CJEU's case-law, including that which was considered above. Details on the interpretation and use of restrictions can be found in Chapter VI of the Directive, especially in art. 27-33.

The art. 27 establishes general principles, namely that Member States may restrict the freedom of movement and residence while these grounds may not be invoked to serve

economic ends (comp. *Campus Oil* and art. 36 TFEU[68]). Any measures must be proportionate and they must be based exclusively on the personal conduct of the individual concerned (comp. *Van Duyn* and especially *Adoui and Cornuaille*). Furthermore, previous criminal convictions in themselves cannot constitute grounds for taking such measures (comp. former Directive 64/221 and *Bonsignore* line of case-law). Personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and justifications based on general prevention are not acceptable (*Bonsignore* line of case-law). Furthermore, the article 27 sets up a cooperation between Member States that intend to use this exception (f.e. information on criminal records of the person concerned).

The art. 28 is another crucial provision that regulates protection against expulsion. Primarily, the host Member State deciding on expulsion must take into account how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. Second paragraph of art. 28 introduces an enhanced protection in relation to persons with the right of permanent residence. They may be expelled only on serious grounds of public policy or public security. Third paragraph attributes even a stronger protection to EU citizens who have resided in the host Member State for the previous ten years or who are

[68] Art. 36 TFEU prohibits that the exceptions would constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

minors, except if the expulsion is necessary for the best interests of the child.[69] They can be expelled only on imperative grounds of public security. The enhanced level of protection is attributed only to EU citizens, not their family members.

The art. 29 gives details on the public health restrictions; art. 30 to 33 then establish procedural guarantees in expulsion proceedings (notification of decisions, procedural safeguards, duration of exclusion orders and expulsion as a penalty or legal consequence).

Whereas the Directive consolidated principles which were mostly elaborated in previous analysis, controversial developments appeared in recent case-law. This concerns especially the rights of residence and protection against expulsion based on public security in relation to long-term residents. As was indicated above, in that regard the Directive 2004/38 in its art. 28 introduces an enhanced protection and distinguishes two situations. While according to the second paragraph long-term residents can be expelled on **serious grounds** of public policy or public security (art. 28, para 2), according to the third paragraph, EU citizens with more than 10 years residence can be expelled only on **imperative grounds** of public security (art. 28 para 3). The distinction between second and third paragraph may be summarised in the following way:

- personal scope: second paragraph concerns all residents, both an EU citizens and their family members; enhanced protection in the third paragraph

[69] Here the Directive refers to United Nations Convention on the Rights of the Child of 20 November 1989.

can be benefited only by an EU citizen (not his/her family members)

- grounds for expulsion: under second paragraph decisions of Member States must be based on both public policy or public security; third paragraph refers only to public security
- gravity of breach: the second paragraph requires that Member States will show serious grounds; third paragraph refers to imperative grounds.

Thus, it is obvious that the protection against expulsion under the third paragraph is much stronger in comparison to the second paragraph, both as far concerns the personal scope, limitation of number of grounds for expulsion and gravity of grounds for expulsion. Some of these issues were subject to interpretation in recent case-law that brings a degree of confusion as far as the rationale of previous case-law is concerned. This is true especially in two recent cases *Tsakouridis* and *P.I.* that compromised the concept of public security as well as the distinction between serious and imperative grounds in the second and third paragraph of art. 28 of the Directive.

4.2. *Tsakouridis*: a broad reading of public security exception

Case ***Tsakouridis***[70] concerned a Greek national who was born in Germany (1978), obtained there a secondary school leaving certificate (1996) and finally got an unlimited residence permit in Germany (since 2001). Mr. Tsakouridis partially worked in Greece, partially in Germany. He had a

[70] C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, ECLI:EU:C:2010:708.

criminal record (among others for compulsion and intentional assault). In 2007 he was arrested for criminal offences in connection with dealing in narcotics as part of an organised group, namely illegal dealing in substantial quantities of narcotics as part of an organised group. He was sentenced to more than six years' imprisonment and should be expelled from Germany. As he was a resident for period exceeding 10 years, the condition of imperative grounds of public security became operative. Under the German rules if an imprisonment crossed the threshold of 5 years, measures were justified by imperative grounds of public security.[71]

The CJEU analysed whether the activities could be covered by the concept of imperative grounds of public security. It emphasized that the concept of imperative grounds of public security is considerably stricter than that of serious grounds. Imperative grounds condition requires that the threat must be of a particularly high degree of seriousness.[72]

The CJEU confirmed the concept of public security as it developed in the case-law. Namely it covers both internal and its external security (with reference f.e. to *Albore*) and it can include threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (with reference f.e. *Campus Oil, Werner, Albore).*[73] In relation to dealing

[71] Comp. ibid, point 11-13.
[72] Comp. ibid, point 41.
[73] See ibid, points 43-44.

with narcotics as part of an organised group the CJEU emphasized the devastating effects of these crimes and concluded that it could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.[74]

The CJEU then made it clear that it is necessary to take into consideration a personal conduct of the person concerned as it is required in art. 27 para 2 of Directive 2004/38. Namely it stated that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures; CJEU refused the general preventive measures. It also required to respect principle of proportionality with a regard to the length of residence of the EU citizen in the host Member State and in particular to the serious negative consequences that such a measure may have for Union citizens who have become genuinely integrated into the host Member State.[75]

According to the CJEU it is necessary to find a balance between exceptional nature of public security and actual personal conduct of the person concerned. The assessment should be done at the time when the expulsion is ordered. It should take into account possible penalties and the sentences imposed, the degree of involvement in the criminal activity, the risk of reoffending (with reference to *Bouchereau*), the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated.[76] The national court must take into account also

[74] See ibid, point 47.
[75] See ibid, point 48-49.
[76] See ibid, point 50.

fundamental rights such as right to family life.[77] Proportionality of the measure must be assessed based on '*the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State'*. A very good justification is required especially in relation to a person who have spent all his childhood and youth in the host Member State.[78] It was left up to the national court to apply these principles in relation to Mr. Tsakouridis.

In *Tsakouridis* the CJEU confirmed that organised drug related crimes can endanger public security and the long term residents may be expulsed on imperative grounds of public security even after more than 10 years of their residence in the host Member State. There were considerable critical responses to these conclusions. Very briefly at this moment one problem is how to delineate the concept of public policy and public security and the requirement of 'seriousness' and 'imperativeness' of the activities if the person concerned. The critical argument is that these distinctions were blurred by *Tsakouridis*. The CJEU adopted a broad reading of imperative grounds of public security and allowed Member States to cover in this concept also domestic criminal law offences which otherwise might be conceived as part of only public policy grounds and, thus, not applicable to a person covered in para

[77] Art. 7 of the EU Charter of Fundamental Rights and art. 8 of the European Convention for the Protection of Human Rights.
[78] See *Tsakouridis*, point 53.

3 of art. 28.[79] Consequently, when establishing imperative grounds of public security the main attention should be paid to the degree of seriousness more than to the existence of a special security threat.[80] The CJEU, thus, left much space for the discretion of Member States in formulation of their concepts of public policy and public security and made the expulsion of long-term residents easier.

The arguments on confusing the distinction between public policy and security are well substantiated. Still, one should not overlook that the definition of public security formulated in previous case-law is broad and includes both internal and external security. *Prima facie* one cannot exclude that activities of organised drug cartels might in some cases become a danger even for internal security of a state. Whether it will be true in individual case must be decided by national courts. The CJEU stressed the necessity of a well-done proportionality test which requires to weigh out between public security grounds and the actual personal conduct of the individual. It also gave more detailed instructions to national courts what to take into consideration when deciding on the expulsion. In that regard in principle the decision in *Tsakouridis* might be acceptable. However, public security issues were under a further scrutiny in *P.I.* which brought more uncertainty in the concept of imperative grounds of public security.

[79] Comp. D, Kostakopoulou-Dochery, N. Ferreira, op.cit. p. 173.
[80] Comp. ibid, p. 174.

4.3. Case P.I.: confirmation of Tsakouridis principles

The question in ***P.I.***[81] – a case decided two years after *Tsakouridis* – was whether the conclusions in *Tsakouridis* would be confirmed and, thereby, also the new trend in the case-law.

The case *P.I.* concerned an Italian national who had long lived in Germany (since 1987). He was sentenced to imprisonment for more than seven years for sexual assault, sexual coercion and rape of a minor. The victim was his former partner's daughter who was 8 years old when the offences commenced. According to the national court it could not be excluded that he would commit the crimes again; consequently, the court decided about his expulsion. The key question was whether this expulsion based on his extremely serious criminal offences could be covered by imperative grounds of public security.[82]

When interpreting the imperative character of public security, the CJEU took into consideration several factors. It referred to art. 83 para 1 TFEU according to which sexual exploitation of children is considered to be a particularly serious crime with cross-border dimension. This article gives EU power to legislate in these areas. Correspondingly the CJEU referred to EU legislation, namely Directive 2011/93.[83] According to this Directive sexual abuse and sexual exploitation of children is considered to be a serious

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[81] *C-348/09 P. I. v Oberbürgermeisterin der Stadt Remscheid*, ECLI:EU:C:2012:300.
[82] Comp. ibid, points 15-17.
[83] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1-14.

violation of fundamental rights.[84] The Directive then sets up minimum terms of imprisonment in case of sexual crimes against children; an aggravating circumstance is if the crime is committed by a member of the family.

The CJEU finally concluded that Member States may regard criminal offences enumerated in art. 83 para 1 '*as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security''*.[85] The condition is that as the '*manner in which such offences were committed discloses particularly serious characteristics*'.[86] The final decision was again up to the referring court.

First of all, it is clear that *P.I.* elaborates on the CJEU's approach in *Tsakouridis* and pushes it much further. In *Tsakouridis* the CJEU made it clear that imperative grounds of public security in general include also the calm and physical security of the population as a whole or a large part of it. Imperative grounds of public security may also include dealing with narcotics as part of an organised group.[87] In *P.I.* it made it clear that not only drug related organised crime but also sexual abuse of children may be included into this category.

Importantly *P.I.* made a further clarification what crimes may be perceived as an imperative ground to public security.

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[84] It also makes a referral to the United Nations Convention on the Rights of the Child of 20 November 1989 and the Charter of Fundamental Rights of the European Union. Comp. *P.I.*, points 26-27.
[85] *P.I.*, point 28.
[86] Ibid.
[87] Comp. *Tsakouridis*, point 47.

Crimes enumerated in art. 83 para 2 comprise terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. This list might be extended by a unanimous decision of the Council, with a consent of the European parliament.

First, no doubt that nature and effects on individual of this kind of crime is abhorrent and unjustifiable, but the question remains whether these crimes affect public security, that is a disruption calm and physical security of a part or whole population. This is important when delimiting public policy and public security. Whereas public policy may include various illegal activities including criminal or administrative offences,[88] public security grounds should include a particularly serious criminal conduct going beyond individual harm caused to victims.[89] In seems that the activities of Mr. P.I. were with limited effect with no other persons involved. The question is whether the punishment for these criminal acts is not properly and sufficiently covered by criminal law sanctions including a long-term imprisonment and foreseeably a medical treatment in case of deviation and whether additional exclusion of the long-term resident from the society of the host Member State is justifiable. In other words whether it would not be adequate and – with regard to the integration of the long-term resident – sufficient to impose the same

[88] See in this regard case-law quoted at M. Besters, M. Macenaite, Securing the EU Public Order: Between an Economic and Political Europe, 14 German L.J. 2075, 2090 (2013), p. 2078.
[89] Comp. Opinion of Advocate general Bot in *P.I.*, ECLI:EU:C:2012:123, point 38.

sanctions which would be taken against one's own nationals.

Second, the problem is also the referral to art. 83 TFEU. The article actually says that the enumerated crimes are particularly serious and have a cross-bordered dimension. It is no way evident that by this article Member States intended to define crimes the commitment of which would equal to breach of imperative grounds of public security. One could discuss about the serious or imperative character of these crimes as well as whether they affect (only) public policy or public security. This is not clear at all from the article itself. It seems more that this article 'just' gives to the EU a competence for a common action with helps to fight more effectively against these crimes with cross-border dimension in a synchronised/harmonised way.

The extent of public security exception is definitely rather general and vague and according to the CJEU it will depend on Member States what in their territory and in their security law will be regarded as a threat to public security. However, it seems that the reading, if not in *Tsakouridis* then for sure in *P.I.*, is very broad and seemingly going out of what was meant by its inclusion in the Directive. Some commentators even suggest a particularly narrow reading of paragraph 3 of art. 28 of the Directive with a referral to its historic context. The Directive was negotiated just after the terrorist attacks in September 2001 in the USA. Consequently, a better reading would be to permit only terrorism as a ground under art. 28 para 3. Definitely this very strict reading of the Directive is imaginable and strongly in favour of the free movement and common citizenship principles; still, it would be two narrow and not

reflecting the wording of the Directive. If Member States would like to limit it just to this ground, they could simply put it in the Directive. By not doing it they presumed that other issues might be also covered by imperative grounds. One could envisage various other situations when Member States might want to use it except terrorism;[90] however, the requirement that the activities are harmful to part or whole society should be met in individual cases.

A strong criticism of both *Tsakouridis* and *P.I.* judgments is also based on the idea that it goes against the long-term developments in the area of free movement and EU citizenship. Even before the introduction of EU citizenship the tendency was to interpret the market freedoms broadly and exceptions therefrom narrowly. After some time of hesitation following the introduction of EU citizenship by Maastricht Treaty the CJEU put great emphasis on the concept of EU citizenship as a universal/fundamental status of migrant EU citizens.[91] The case-law favoured very strongly the principle of non-discrimination also in domains that were quite sensitive for Member States. This appeared in various cases concerning financial and social benefits, the right of residence, including family members caring of an EU citizen, even in situations without cross-border element,[92] and surprisingly also the acquisition or loss of

[90] The opposite might then lead to broad definitions of terrorism in national legal orders.

[91] *C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, reflected also in indent 3 of the Preamble of Directive 2004/38.

[92] See f.e. N. Reich, S. Harbacevica, Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice With Regard to Free Movement of Persons, Common Market Law Review 40, 2003, p. 615–638. In case on the status of family members caring for an EU (non-moving) citizen see especially much discussed case C-34/09 *Gerardo Ruiz Zambrano v Office national de*

Member States citizenship.[93] The rationale behind a restrictive reading of exceptions could be described as an effort to increasingly equalise a free moving EU citizen to nationals of the host Member State. This was even more evident especially in relation to long-term residents. This pro-integrationist approach is actually supported by the construction of the Directive 2004/38 which is based on the gradually increasing rights of EU citizens based on the length of stay; the strongest protection being afforded to EU citizens residing in a host Member States over 10 years with the expulsion allowed only on very exceptional grounds of public security.

The decisions in *Tsakouridis* and even more evidently in *P.I.* then seem to go against both previous trends in case-law as well as the 'spirit' of secondary legislation. As was noted above in *P.I.*, the effect of criminal acts concerned on part or whole of the society could be hardly perceived. Thus, no surprise that this approach was criticised and evaluated as a blind line of case-law which is doomed to be abandoned. Similar as what happened to *Van Duyn* or others cases.[94] According to some scholars it supports the notion of otherness,[95] namely that EU nationals who are long-term residents still differ from own nationals and may be

l'emploi (ONEm), ECLI:EU:C:2011:124, confirmed in C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277. For a very fine analysis of all ground-breaking three cases (*Rottmann*, *Zambrano*, *McCarthy*) see f.e K. Lenaerts, 'Civis europaeus sum': from the cross-border link to the status of citizen of the Union, Online Journal on free movement of workers within the European Union, No 3, 2011, p. 6-17.

[93] C-135/08 *Rottmann*, [2010] ECR I-1449.

[94] See D, Kochenov, B. Pirker, Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. V Oberburgermeisterin der Stadt Remscheid, 19 Colum. J. Eur. L. 369, 390 (2013), p. 373.

[95] See ibid, p. 372.

excluded from the society by deportation. The approach of the CJEU accepts that long-term residents are not accepted as full members of the host Member States' society. This approach is understandable: it is based on a clear vision of fully integrated (potentially federal) EU where the EU citizenship will really become an outspread over national disparities in relation to person's rights,[96] at least after some (considerable) time of stay in a host Member States. For this understanding of the EU integration and conception of free movement rules decisions in *Tsakouridis* and *P.I.* seem disappointing and against the previous trends in CJEU's concept of EU citizenship.

Still, admittedly the evaluation of *P.I.* may be viewed also from a different perspective. First, although the CJEU has many times repeated that Member States may themselves establish what is part of public security grounds based on their national needs, Member States' choices were restrictively scrutinised by the CJEU. Decisions in *Tsakouridis* and especially *P.I.* seem to take more receptive approach to interest of Member States, potentially with the possibility to include in their public security definition all crimes enumerated in art. 83 TFEU. Still, it must be emphasised that when applying public security grounds in individual cases Member States are not absolutely free and conditions for their use persist. Namely they are still bound by the requirement to base its decisions on the personal conduct of the individual and to properly evaluate the level of integration in the host Member State as is set up in art. 28

[96] In this regard we might recall the arguments of AG Cosmas in *Albore* case who accepted at the stage of integration at that time that a discriminatory treatment based on nationality might be accepted.

para 1 of the Directive 2004/38 and its interpretation in the case-law.

Interestingly, some scholars read these cases as a shift from equal rights speak to the actual evaluation of existing integration for the migrant EU citizen. They refuse to overvalue the conceptual consequences of these cases to EU citizenship.[97] In this respect it is noteworthy that AG Bot in his opinion, while rejecting to evaluate crimes committed by Mr. P.I. as imperative ground of public security, came to the conclusion that Mr. P.I. was not actually sufficiently integrated and could not benefit from the enhanced protection under 3 para of art. 28.[98] Let us recall that according to the Directive national court should consider not only how long the individual concerned has resided on its territory, but also his/her age, state of health, family and economic situation, social and cultural integration into that State and the extent of his/her links with the country of origin.[99] An increasing emphasis on the requirement of proper integration in the host Member States may well be acceptable as it would put more emphasis not only on the criminal acts concerned but also the real status or links of the person in the society of the host Member State.

Maybe one positive aspect may be added. The new line of case-law shows more alert of the social and political developments in Member States in relation to the EU integration. The immigration not only from third countries

[97] Comp. D., Thym, The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens, Common market Law Review, 52: 17-20, 2015, p. 37-38.
[98] Opinion of Advocate General Bot delivered on 6 March 2012 in case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheidpoint*, ECLI:EU:C:2012:300, point 49.
[99] See, *P.I.*, point 32.

but also from other Member States is an increasingly sensitive issue and an expulsion of the foreigner even after 10 years residence might seem as an adequate response to extremely noxious deeds committed in the local community. The EU law does not in principle obstruct it; or in other words it leaves the decision to the national level, namely to national courts. This may be also grasped as an increased trust in the system of national values and needs (including the notion of public security) which are evaluated and applied by national judiciary.

5. Final conclusions

It was shown that the notion of public security developed across market freedoms and the CJEU regularly cross-refers to case-law from various areas of EU law including in external relations. It was reiterated similarly in other areas not covered in this chapter, for example in relation to the Directive on admission of students from third countries,[100] in the context of prohibition of sex discrimination in national military forces[101] or EU asylum law.[102] It might be

[100] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ 2004 L 375, p. 12. See case C-544/15 *Sahar Fahimian v Bundesrepublik Deutschland*, ECLI:EU:C:2017:255

[101] Directive 76/207. See especially cases C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence, ECLI:EU:C:1999:523* or C-186/01 *Alexander Dory v Bundesrepublik Deutschland*, ECLI:EU:C:2003:146.

[102] See art. 24 of Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12–23 and a recent case C-373/13 *H. T. v Land Baden-Württemberg*, ECLI:EU:C:2015:413, point 78; art. 7 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348,

added that the use of public security exception was also covered in a separate secondary legislation adopted several years ago also in relation to transfers of defence products in the EU.[103]

An important principle repeated the case-law is that the public policy and public security concepts should preserve values of individual Member States. These values and their weight are not static and can differ in various periods. In principle the CJEU seems to accept it and developed a general definition leaving it for Member States to give it life in individual cases. Nevertheless, the CJEU was also ready to closely examine national practise with an emphasis put on the idea of undisturbed internal market and later integration of all free moving EU citizens without economic status. This approach conceived the potential restrictions by Member States to a necessary minimum, with a strong emphasis on the principle of non-discrimination. Any national measures must step over a very high threshold of necessity or proportionality principles.

Yet, in recent decisions the CJEU seemed to give more space to include into public security exception also criminal acts whose effect on security of the whole or at least part of the population is uncertain. These tendencies set up in *Tsakouridis* and *P.I.*, interestingly both cases being decided

24.12.2008, p. 98–107 and a recent case C 601/15 PPU *J. N. v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2016:84, points 66-67.

[103] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security; and amending Directives 2004/17/EC and 2004/18/EC, O.J. 2009, L 216/76. for a detailed analysis see M. Trybus, L. R. Butler, The internal market and national security: Transposition, impact and reform of the EU directive on intra-community transfers of defence products, Common Market Law Review 54: 403–442, 2017.

by the Grand Chamber of the CJEU, were also reflected in the subsequent case-law, with an emphasis put on real integration of the person concerned in the host Member State.[104] The CJEU was strongly criticized by part of academia for this line of case-law and interprets it as a step back and misinterpretation of the term imperative grounds of public security.

On the other hand, this approach also seem to put more emphasis not on values of the society rather than on the institutions of Member States and also on rather underdeveloped obligations linked to EU citizenship.[105] Thus it leaves more discretion to Member States to reflect these aspects in the process of expulsion. It might be added that a more cautious approach in migration issues can also be traced in other decisions, creating more limits for rights of migrant EU citizens.[106]

The time will show whether this case-law will really set up a new trend in the CJEU approach to EU citizenship and migration or whether it will be silently left to oblivion.

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[104] See in relation to third country nationals – family Members of EU citizens, f.e. C-378/12 *Nnamdi Onuekwere v. Secretary of State for the Home Department*, Judgment of the European Court of Justice (Second Chamber) of 16 January 2014, EU:C:2014:13. For a commentary see f.e S. Coutts: Union citizenship as probationary citizenship: Onuekwere, Common Market Law Review 52: 531–546, 2015.

[105] Comp. L. Azoulai, S. Coutts, Restricting Union citizens' residence rights on grounds of public security.
Where Union citizenship and the AFSJ meet: P.I., Common Market Law Review 50: 553–570, 2013., p 544 and 569.

[106] This concerns f.e. rights to social benefits; in that regard see f.e. H. Verschueren, Preventing 'Benefit Tourism' in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano? Common Market Law Review 52: 363–390, 2015.

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