LECTIONES IURIDICAE

RECENT CHALLENGES OF PUBLIC ADMINISTRATION 4

Papers Presented at the Conference of '4th Contemporary Issues of Public Administration'

10th December 2021

Pólay Elemér Alapítvány

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Lectiones Juridicae
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The background picture of the online conference.

Prepared at the University of Szeged
Faculty of Law and Political Sciences
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Head of Institute:
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Professor

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Preface

The global pandemic has reshaped our lives from one day to another. Among others, it has vanished our travelling plans, conferences and, in general cut off the personal relationship for a while and it took some time to get adjusted for the new circumstances of our everyday. On the other hand, it has opened new perspectives in academic contact by the usage of modern technology. Thousands of kilometres away but still together, that was the motif our the Contemporary Issues of Public Administration (CIPA) event on 10th December 2022.

The idea of having collegial gatherings to share some thoughts related to public administration used to be on our annual agenda which was a bit re-organised due to the global pandemic and its negative effects on the organisation of such events. Research work should not be *l'art pour l'art*; it is important to get to know each other's results, to explore the matching points, to introduce the new waves to the scientific profile of our institutes. Finally, it is also our mission to give students the possibility to set the frames for expanding their knowledge beyond obligatory teaching and show some actual challenges of public administration and recent developments in legal literature.

It is a pleasure to see that from CIPA to CIPA, a growing number of participants provide insight into different aspects of public administrative law and it is an honour to give a forum to exchange ideas and explore overlapping areas of interest and make new acquaintances and professional relationships. This time, the circumstances led us to organise our gathering in an online safe place, which allowed an even more colourful demonstration of the different aspects of public administration on the axis of our long-lasting Hungarian Polish cooperation with the University of Szczecin and the University of Łódź. The online nature of the conference allowed us to make a broader circle of participants and to involve all those PhD students who are interested in research topics related to the public administration of the state.

The present volume is a manifestation of our fourth gathering under the virtual roof of the University of Szeged along with the hardcore members of our international cooperation: *Krystyna Niziol* (Szczecin) and *Maria Karcz-Kaczmarek* (Łódź).

As the organiser and the main reviewer of the papers, I would like to express my gratitude to the participants for their valuable contributions, and all those participants who took part in the review procedure to each other to make the best of our manuscripts (in alphabetical order): *Maria Karcz-Kaczmarek, Krystyna Niziol, Michał Peno and Imola Schiffner*. Their devoted work has increased the scientific level of this volume and completes the spirit of the cooperation not just during the conference time but also in the formulation of the final version of the papers.

I wish to honour the support of the Head of the Institute, *Prof. Dr. Zsolt Szomora* and the person who has always patronized us since the first steps towards the birth of the CIPA events and the publication of their results, *Prof. Dr. Elemér Balogh*. Last but not least, *Ömer Doğukan Uslu* deserves all of our gratitude for helping our cooperation and the papers to get their final version.

Szeged, 30th January 2022

Dr. Erzsébet Csatlós, PhD
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Commemoration to the Centenary of the University of Szeged

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Eminent Scholars of Administrative Law at Szeged University Contribution to the Development of Administrative Law Dogmatism in the 20th Century

I. Introduction

The study is an attempt to outline the administrative science's developmental trajectory, the meaningful aspects of the administrative law dogmatism in the 19th and 20th centuries, in Hungary with a short, meaningful European perspective. In this context, the study discusses the academic work of two eminent public administrative law scholars of the University of Szeged, namely Elek *Boér*[1] (1872–1952) and János *Martonyi*[2] (1910–1981). The reason why their scientific work has been chosen is twofold. Their academic work periods were specific to both historical and ideological periods, to the development of administrative law. Elek Boér's scientific and educational career coincided with the period when the dogmatism of administrative law was in the initial stage. János Martonyi's creative period was an elementary ideological change, which had left its mark on the development of administrative law dogmatism and practice also, including the key elements of the method how to ensure the legality of the operation of public administration. The principle of legality in general and the institutional and competence questions of the establishment and the further development of public administrative litigation had a significant role in their scientific works, notwithstanding the fact, that they worked with the difference for more than half of a century, in contrasting different historical, political and ideological circumstances. It is worth highlighting that their educational-research work at the university is closely linked to the practice of public administration, thus Elek Boér also served as a judge, whilst János Martonyi started working in the Ministry of Religious and Public Education Affairs after his graduation. The short depiction of their scientific work provides the opportunity to identify the specific features that are decisive moments in the development of the Hungarian administrative law science. Analysis of their scientific work gives a way to conclude the development of certain legal instruments. It is also relevant to stress that Elek Boér's academic work reflected constant progress, while the national-socialist ideology and after the end of World War II, the socialist dogma remarkably influenced the work of János Martonyi. Designing the evolution of the science of public administration, these changes in the political-ideological relations may be referred.

In addition, there is also a simple personal reason for the choice. The University of Szeged celebrates its centenary in Szeged, and it is necessary to pay homage to the work of its great

[1] See more details: Siket, Judit: Boér Elek 1872–1952. *Acta Universitatis Szegediensis: Forum: acta juridica et politica*, (10) 1., 2020. 91–106.

[2] See details: Siket, Judit: Martonyi János 1910–1981. *Acta Universitatis Szegediensis: Forum: acta juridica et politica*, (10) 1., 2020. 477–491.

predecessors. Elek Boér was the first head of the public administrative law department of the faculty, and János Martonyi served as the head of the department for the longest time, for thirty-five years.[3]

II. Characteristic features of the administrative sciences' development in the 19th and 20th centuries

II.1. European aspects

The laconic synthesis of the European evolution of public administrative science theory is intended to highlight the effects of the Hungarian development process. In the 19th century, two main directions of the development of administrative sciences might be distinguished in Europe, on the one hand, the theory of public administration, more closely linked to political science and on the other hand the science of public administrative law. Nonetheless, this distinction is a very simplifying approach; hence the science of public administrative law, on its own, had come a long way, from the simple legal description to the establishment of the dogmatism of public administrative law. The subject of the research may constitute the description method for the development of public administration; this approach may present a bright picture, however, the before mentioned simplified description is not to be interpreted as a *differentia specifica*.[4]

European perspectives of the development of public administration science and the theory of administrative law should also be considered because foreign theories were imminent in the progress of the Hungarian theories also. The roots of the theory of public administration might be entrenched in the 18th century's Prussian sciences of police (*Policeywissenschaft, science de police*).[5] The dominant tendencies that prevailed in the development of European public administration science were both the French and German scientific theories. However, the German theory showed a different development trend, the legal dogmatism and public administration science were at least as significant as the French theory.[6]

II.2. Peculiarities of the Hungarian development

II.2.1. Specific elements of the late 19th and early 20th centuries and the work of Elek Boér in general

The development of the theory of public administration was sharply intertwined with the history of Hungarian statehood. During the examined period, in the 19th century and at the beginning

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[3] For biographical details of Elek Boér see more: Közigazgatási Eljárásjogi Klasszikusok http://www.keje.hu/kozigazgatasi-eljarasjogi-klasszikusok/boer-elek/ (11.01.2022.), Magyar Életrajzi Lexikon https://mek.oszk.hu/00300/00355/html/index.html (11.01.2022.), and for János Martonyi: Magyar Életrajzi Lexikon https://mek.oszk.hu/00300/00355/html/index.html (11.01.2022.), Szűcs István: A közigazgatási bíráskodás témájának magyar kutatója. In: Antalffy György et al (eds.): *Emlékkönyv Martonyi János egyetemi tanár oktatói működésének 40. és születésének 70. évfordulójára. Acta Juridica et Politica,* Tomus XXVII. Fasciculus, Szeged, 1980. 373–385.

[4] Jakab András: A közigazgatási jog tudománya és oktatása Magyarországon. In: Jakab András – Menyhárd Attila (eds): *A jog tudománya*. Budapest, 2015. 194–195.

[5] Koi Gyula: *A közigazgatás-tudományi nézetek fejlődése*. Nemzeti Közszolgálati és Tankönyv Kiadó Zrt., Budapest, 2014. 46.

[6] Koi, 2014. 77–78.

of the 20th century the Hungarian state was part of the Habsburg Empire and did not have an independent public administrative system, at least for most of the period. Consequently, the subject of public administration research was missing or was limited until the establishment of the independent state. The progress of public administrative law might be revealed in the 1840s years when textbooks and administrative law practice summaries were published. In that period, the subject matter of the theory of state administration and education of law was only organizational skills.[7]

The original stage of the theory of state administration's development was the final third of the 19th century. The initial steps were more difficult, for the reason, there was no separate administrative law, and a foundation both political and legal theories lacked.[8] The positivist descriptive legal works, and a bit later the dogmatic concepts analyses appeared only as a result of the broadened regulatory scope of administrative law. In 1883 the Administrative Financial Court[9] and then in 1896, the Royal Hungarian Administrative Court were also established,[10] and these statutory acts guaranteed the possibility of judicial review of administrative acts, by establishing the institutional ground of administrative litigation.

At millenial, the development of the theory of public administration became dominant. The main author of the theory of public administration, Lorenz *von Stein* remained only an isolated phenomenon in Hungary.[11] Győző *Concha*, the only prominent follower of von Stein is worth mentioning.[12] The scholars of the administrative law cognition aimed at editing handbooks. The public administrative law positivism was established as a so-called "*professorship science*". Special sectors of administrative law were the subjects of descriptive presentation. Because of the heterogeneity of public administrative law, the classificatory deliveries were dominant; the dogmatic approach of certain legal institutions' has been experienced deficiency.

In Hungary, the theoretical progress of administrative law is based on the public administrative law dogmatism of Otto *Mayer*.[13] The legal dogmatism separated from the substantive law had no importance, the positivism of public administrative law was dominant. Lions of this period in the field of administrative dogmatism were Móricz *Tomcsányi* (1878–1928) and István *Ereky* (1876–1921). Ferenc *Vasváry* (1872–1952), Viktor *Jászi* (1868–1915) and Elek *Boér* analysed dogmatic issues, exceeded the framework of legal positivism, describing the fundamental institutions of administrative law.[14]

Elek Boér committed to Otto Mayer's legal method in analysing the dogmatic questions, used legal and jurisprudential methods when describing the fundamental legal institutions of public administrative law. His research fields were the organizational and operational issues of local authorities[15] and administrative courts.[16] From the point of view of public administrative law

[7] Jakab, 2015. 194–195.

[8] Lőrincz Lajos et al.: *A közigazgatás kutatásának tudományos irányzatai*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1976. 386.

[9] Act XLIII of 1883 on the Financial Administrative Court.

[10] Act XXVI of 1896 on the Hungarian Royal Administrative Court.

[11] Koi, 2014. 86–96.

[12] Szamel Lajos: *A magyar közigazgatás-tudomány*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1977. 79.

[13] Lőrincz Lajos: *A közigazgatás-tudomány alapjai*. Rejtjel Kiadó, Budapest, 1997. 1–7.

[14] Szamel Lajos: A magyar államigazgatási jogtudomány útja és távlatai. *Jogtudományi Közlöny*, vol. XXX. 1975/3–4. 147.

[15] Boér Elek: *Törvényhatósági önkormányzatunk és közigazgatási bíróságunk hatáskörének kiterjesztése*. Magyar Jogászegyleti értekezések. 1908. február 282. sz. XXXVI. kötet. 6 füzet, Budapest, 1908. 1–46.

[16] Boér Elek: *A közigazgatási bíráskodás czéljáról, tárgyköréről és szervezetéről*. Grill Károly Könyvkiadóvállalata, Budapest, 1903. The revised and extended edition of this work was published in 1907.

dogmatism, the legal effect, legal force, administrative decisions, the interpretation of *res iudicata* in public administration deserve special attention in his work.[17] He defined the basic terms of public administrative law, identified the general context of administrative law institutions, based on the substantive law. Another outstanding point of his work is the theory of subjective rights, the legal protection of the citizen against the illegal activities of the administrative organs. The system of legal forums and the instruments of legal remedies was established in his works.

Regarding the dogmatic work of Elek Boér, his general conclusions arrived from the jurisprudence echoed in the case law by applying the specific law provisions.

II.2.2. Specialities of the development during the first half of the 20th century

The dogmatic approach in the field of public administration is also significant from that point of view because the study of administrative law might take its rightful status in the world of legal sciences.[18] As regards the development period before 1945, it should be emphasised that the elaboration of the dogmatic issues of public administration were the focus of research. Laying down the foundations of the administrative law concept, this process is closely linked to the establishment of administrative litigation.[19]

The separation of the theory of public administration and the science of administrative law was a crucial moment in the progress of administrative law science, apart from this milestone, in line with the process the *scientific management* approach was also established. The main representative of this movement, after whom it is named, was Zoltán *Magyary*. In his view, the administrative law approach was considered excessively one-sided, and in this regard declared that the research and scientific basis of public administration needed a comprehensive attitude. According to his assessment, the analysis based on legal sciences was not sufficient to scrutinize the public administration. In that regard, the scientific approach to public administration was necessary and essential to determine the effectiveness and efficiency of public administration.[20] To that end, he set up a unique institute, the *Magyary-School*. The main heritage of the School, especially after the work of Lajos Szamel, are (1) the rich thematic content of research, (2) an effort to reconcile theory and practice to streamline public administration, (3) the introduction of the empirical method into public administration research methods, (4) a wide range of international overview.[21] The beginnings of János Martonyi's scientific work may also be traced to the Magyary-School. In his early works, he paid particular attention to the attempts intended to reconstruct the institutions and operational methods of public administration in the first half of the 20th century.[22]

As regards the special features of the development of public administrative law science, after 1945 the tradition of the so-called Magyary-School had a deep impact. The socialist science of public administration followed because its main object was the effectiveness of public administration and aimed at implementing the measures of a unified central state power. The development of the dogmatism of public administrative law was interrupted,[23] the dogmatism approach replaced

[17] Boér Elek: *A közigazgatási intézkedések jogereje*. Grill Károly Könyvkiadóvállalata, Budapest, 1910.
[18] Szamel, 1975. 148.
[19] Szamel, 1977. 190.
[20] Szamel, 1975. 148.
[21] Szamel Lajos: A magyar közigazgatástudomány. In: Lőrinc Lajos et al. (eds.): A *közigazgatás kutatásának tudományos irányzatai*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1976.411–413., Szamel, 1977 193–195.
[22] Martonyi János: Közigazgatásunk reformja. *Hitel*, 1942/2. 100–115., Martonyi János: Új magyar közigazgatás felé. *Hitel*, 1943/6. 325–335.
[23] Jakab, 2015. 202.

the diversity of methods. From the end of World War II untill 1956, no monographs on public administration were published; only textbooks were produced for university education.[24] In 1957, the Code of the General Rules of Public Administrative Process was adopted, and as follows, the circumstances were re-established again for the study of public administration. However, it should be added, that the political, legal-political and ideological determinacy was strong and determinant, thus the importance of scientific management heavily increased,[25] because it was free from direct political influence.

The majority of his academic work focused on certain issues of the legality of public administration, administrative litigation and the theory of administrative procedural law in domestic and international comparison.

The efforts of the Hungarian public administration in the 1930s years included the development of administrative litigation also. His study on administrative litigation, which was published in 1932, was of paramount importance.[26] He classified administrative litigation and the new constitutionalism as public law adjudication. He determined the subjects of public law adjudication on one hand as an organizational issue, on the other hand as a competence issue, and finally as procedural issues.

His works on administrative litigation were products of different political, legal and ideological systems. The Hungarian Administrative Court (hereinafter: Administrative Court) was established in 1896, János Martonyi in his study for the 15th anniversary argued that the competence of the Court would have been increased and the operation would have been more effective. The socialist ideology influenced his point of view later, as a result of which he revised and reassessed his position on both the organisation and the issues of competence. Nevertheless, his writings on administrative litigation have had a major impact in Hungary. Some of the authors dealing with the subject have also taken his theses as a basis.

III. The common issue of greatest interest: the administrative litigation

The legality of the administrative decision-making process and administrative decisions was at the forefront of both authors' works. The fact that more than a quarter of a century elapsed between the two authors' works on administrative litigation is worthy of consideration and should be given special attention in the analysis.

III.1. The concept of administrative litigation in the work of Elek Boér

As a starting point, Elek *Boér* referred to the debate on the substance of administrative litigation that evolved in a time of the milennial, during the establishment of the Royal Administrative Court, in 1896. The main issue merged as an organizational and competence question originated from the acceptance of *subjective public rights*,[27] particularly the administrative litigation

[24] Jakab, 2015. 203., Szamel, 1975. 150.

[25] See more details: Szentpéteri István: *Az igazgatástudomány szervezéselméleti alapjai*. Budapest, Közgazdasági és Jogi Könyvkiadó, 1974.

[26] Martonyi János: *A közigazgatási bíráskodás és legújabbkori fejlődése*. Királyi Magyar Egyetemi Nyomda, Budapest, 1932.

[27] The meaning of subjective public rights following the definition of Boér, is a limited freedom of will ensured by the whole State from the view of the intended public purposes for the individuals. Boér, 1903. 40.

considered as competence of ordinary civil courts or public administrative bodies.[28] Concerning the determination of the purpose and function of the administrative litigation, Boér considered scrutinizing on the one hand the essence and content of subjective public rights and on the other hand the conceptions of the State function and the public administration.[29] He focused on the works of Otto *Bähr* and Rudolf *Gneist*. Summarizing the point of view of Bähr, Boér realized, that the definition of public law was not adequately specified and for this reason, the purpose of administrative litigation needed the civil law development approach. The subordination of the State to the administrative litigation might be only in the case of government power. He recognized that the public administration needed the subordination of the court rulings, and along with this, the individuals needed legal protection against the administrative bodies. The issue of judicial protection's organization might be treated as a matter of expediency, therefore the competence of subjective public rights protection could be transferred to the ordinary civil courts or special public administrative courts also.[30] As regards *Gneist's* views, those based on public law, he continuously followed the institutionalisation of the principle of *rule of law* issues in some European States, like England, Deutschland, France. He considered that the state organizations could mistakes and for that reason, legal control and the establishment of the legal protection system were indispensable, against the arbitrary or partial exercise of public power. Gneist clearly took a stand in favour of an independent administrative court, which had to adjudicate under an adversarial procedure.[31]

Subsequently, the concept of Boér on the administrative litigation, will be discussed in detail, including the purpose of the administrative litigation, its main content of it, and the establishment of the Administrative Court, in 1896.

The purpose of the administrative litigation could not be restricted to the individuals' right to legal protection, although the public administration as a whole should be subordinated to ensure its legality. However, the subordination could not confine the free operation of effective public administration.[32] Boér determined the substance of the administrative litigation based on the different features of civil law and the administrative litigation processes.[33] The public administrative facts were falling within the scope of administrative litigation. The French administrative litigation system was sharply criticised by Boér, as a result of the expansion of administrative litigation based on the division of powers to the detriment of civil law litigation. By contrast, he appreciated the English development of law, by his view of the subject of it, according to the infringement of individual public rights and interests, this system was the "widest and the most inclusive".[34]

Boér examined the competence of the Administrative Court both from the view of subjective rights protection and the legality of the operation of public administration. He declared, that the legislator considered as a principal the protection of individual rights, criticised that a lot of specific cases, like the use of discretional power left without judicial protection.[35] Characterizing the Administrative Court, the most important feature is that it had no lower courts and decided irrevocably on its competence, set by the statutory law.[36] By the perception of Boér, the

[28] Boér, 1903. 1–2.
[29] Boér, 1903. 40.
[30] Boér, 1903. 6–13.
[31] Boér, 1903. 14–19.
[32] Boér, 1903. 49–50.
[33] Boér, 1903. 54.
[34] Boér, 1903. 56–61.
[35] Boér, 1903. 66–68.
[36] Act XXVI of 1896 Art. 1.

Administrative Court was to be developed from an organizational aspect. A subcommittee of the Public Administrative Committee[37] could decide on administrative decisions in the case of judicial review. He emphasised the corporate nature of the subcommittee, where the self-government elements also could participate in the process of the judicial review, the "lay members" also would have been involved.[38]

It is also noteworthy, that Boér examined the issue of *res iudicata* in relation to administrative decisions, reflected in the public interest. He declared that the public interest was predominant, "against the public interest might not be invoked the *res iudicata* of the administrative decision". The public administration – intended for the realization of common goals and common interests – could not be limited by the *res iudicata*.[39] The issue of res iudicata is closely linked to administrative litigation and the principle of *rule of law*. The definite nature of administrative decisions and the *effet utile of rule of law* was doubtful, the legal remedy against the administrative decision was also questionable if the change of public interests overrode the administrative decisions. Boér denied, that the provision of public tasks and to serve the public interest could exclude the *res iudicata* in relation to the public administrative law relationship.[40]

III.2. The theory of administrative litigation in the work of János Martonyi

The efforts aimed the reform of Hungarian public administration in the 1930s years[41] still implicated the improvement of administrative litigation. The study of Martonyi on the "*[A] dministrative litigation and its development during modern history*",[42] published in 1932, received special attention. In this volume, Martonyi was in favour of the improvement of administrative litigation, considering it as the paramount importance of the legal institution in the operation of a constitutional state. He followed the liberal *rule of law* concept; judicial legal protection constituted one of the essential elements of the theory.[43]

The concept of the constitutional judiciary appeared as a relatively new institution in Hungary, Martonyi classified the administrative litigation and the constitutional judiciary as *public law judiciary*. The subject matters of this type of judiciary were organizational, competence and procedural issues.[44] It is established, that he used this classification in all his monographic works, therefore the ideological changes could be traced also.

As regards the organizational framework of administrative litigation he examined such bodies, which had powers to adjudicate these types of matters. Martonyi set up three different models, on the ground of his research, (1) a common system of the judicial power exercising, (2) empowerment of public administrative bodies in contentious administrative affairs, (3) the establishment of specialised administrative courts.[45] He concluded from the analysis of the three systems and from

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[37] Act VI of 1876 on the Public Administrative Committees.

[38] Boér, 1903. 77–79.

[39] Boér, 1910. 12.

[40] Boér, 1910. 49–51.

[41] Magyary Zoltán: *A magyar közigazgatás racionalizálása*. Budapest, Királyi Magyar Egyetemi Nyomda, 1930. 150–162., Csizmadia Andor: *A magyar közigazgatás fejlődése a XVIII. századtól a tanácsrendszer létrejöttéig*. Akadémiai Kiadó, Budapest, 1976. 403–423.

[42] Martonyi János: *A közigazgatási bíráskodás és legújabbkori fejlődése*. Királyi Magyar Egyetemi Nyomda, Budapest, 1932.

[43] Szamel Lajos: Magyary Zoltán és a közigazgatástudományi iskola. Állam és Igazgatás, 1974/4–5.308.

[44] Martonyi, 1932. 10.

[45] Martonyi, 1932. 14.

the result of the debates that preceded the establishment of the Administrative Court that the sample to be followed was the establishment of a specialised administrative court.[46] Concerning the court system, analysing the international judicial systems,[47] he concluded, that the establishment of lower courts was indispensable, at the seats of regional courts of appeal.[48] His attitude in relation to the personal issues of administrative courts was also remarkable in two ways. On the one hand, the appointment of the administrative judges would have been the competence of the head of the state, based on the proposal of the ministry, and on the other hand, the administrative court would have consisted half of professional judges and the other half of administrative officials.[49] In the course of determining the competencies of the administrative courts, he proposed the principle of a general definition of powers. The statutory act on the establishment of the Administrative Court regulated the competencies in an exhaustive list.[50]

Respecting the power of the annulment or alteration of administrative provisions or decisions, Martonyi declared, that the proper action against the general provisions of the public administration was the annulment power, hence in the case of the individual decision was the alteration.[51]

Concerning the peculiarities of the procedural rules applied by the administrative courts, Martonyi highlighted, that the administrative procedure and the civil procedure were similar, or identical in many aspects. This regulatory approach was not appropriate, did not take into account the specific public law features of administrative matters, from the point of view of Martonyi, therefore he suggested that the general reform of public administration would have been included specific procedural legislation for administrative litigation.[52] Finally, as regards the specificities of the administrative litigation procedure, he interpreted the effects of the judgment on the public administrative authorities. He pointed out that judgments of the administrative courts generally have legal effects on the parties (*inter partes*). Nevertheless, in his view, judgments of the administrative courts were also considered increasingly as a kind of precedent in the subsequent cases by the administrative authorities. The relationship between formal and substantive *res iudicata* was analysed in the context of the legal force of administrative court judgments. He referred to the exercise of discretionary power since the principle of *ne bis idem* could not be infringed in the case of repeated procedures. He concluded that in such cases the *real legal force* was uncontested. Emphasising the requirement of the public interest as the main point of administrative litigation, he also pointed out that the public interest could change at any time so that a kind of "*silent clausula rebus sic stantibus*" could prejudice consideration of the cases.[53]

In a publication, issued in 1939, Martonyi scrutinized the theoretical problems of the public administration's legality.[54] His work focused on the changes in the system of government that

[46] Martonyi, 1932. 16–20.

[47] He later discussed in separate studies the system of administrative adjudication in France, the situation of the Czechoslovak administrative litigation, the German imperial court system. See more details: Martonyi János: *A közigazgatási bíráskodás mai rendszere Franciaországban*. Jogászegyleti értekezések és egyéb tanulmányok. 1934:dec. [s.n.], Budapest, 1934., Martonyi János: A csehszlovák közigazgatási bíróság reformjának tervezete. *Közigazgatástudomány*, 1938/1. 48–56., Martonyi János: A német birodalmi közigazgatási bíróság megteremtése, *Közigazgatástudomány*, 1941/8. 304–308.

[48] Martonyi, 1932. 25.

[49] Martonyi, 1932. 28

[50] Act XXVI of 1896, Second Part, Art. 16–82.

[51] Martonyi, 1932. 46.

[52] Martonyi, 1932. 51.

[53] Martonyi, 1932. 60–64.

[54] Martonyi János: *A közigazgatás jogszerűsége a mai államban*. Dunántúl Pécsi Egyetemi Könyvkiadó és Nyomda Rt., Pécs, 1939.

occurred in the field of legal sciences and public law as a result of the emergence of "collective, social thought", whether in the form of "national or racial solidarity" or "class struggle". Assessing these new tendencies, he declared, that they led to the infringement of basic values of liberal rule of law, the division of powers and the individual's rights.[55] At that time, by the prevailing German view on state supremacy, the classical division of powers was not considered unalterable. Regrettably, he did not criticise the "innovative" point of view.

As regards the issue of administrative litigation, Martonyi found the most substantiated the Prussian special administrative court and procedural system from the aspect of legal dogmatism, based this point of view on the work of Rudolf Gneist. *Gneist* considered the administrative court at the highest level as the best organisational model for the resolution of administrative disputes. This administrative court would have been composed of persons with legal and practical administrative expertise. However, at a lower level, the administrative litigation as a competence would have transferred to "certain collegiate bodies of the administration in action", which would have been supplemented by 'lay members' also.[56] Although Martonyi referred to the partial adoption of Gneist's theory in Hungary, he also stressed that the aspect of administrative litigation would have primarily served the protection of individual subjective rights, alongside the protection of substantive law, had become superseded, at least in his view.[57] He devoted a specific chapter to the concepts of administrative litigation in authoritarian states. He discussed two concepts that prevailed in German national socialist literature. One of these concepts held that administrative litigation had lost its basis because the administrative litigation was contrary to the "*Führerprinzip*", and the other that administrative litigation would have been maintained in the "*Führerstaat*".[58] Summarising the changes to administrative litigation in authoritarian states, Martonyi concluded that the importance of the institution was recognised by all authoritarian states, with only "minor restrictions". The focus was moved from the protection of individual rights to the protection of substantive law. This meaningful change of the focus was 'broadly sympathetic to the objectivist view', in the context of the essence of the state as an actor, which was a central doctrine of the Magyary School. Martonyi did not criticise these changes in authoritarian states, did not decline the reduction of the individual rights protection level.[59]

After the Soviet invasion, administrative litigation was ceased, in 1949.[60] Subsequently, the issue of administrative litigation emerged anew only after the adoption of the Code of General Rules of State Administrative Procedure, in 1957.[61] An outstanding work of János Martonyi, following extensive international comparative research, was published in 1960.[62] The focus of his work was on issues of the legality of public administration. He carried out a general survey of the legal remedies available against administrative decisions and examined in detail the so-called other remedies designed to ensure the legality of administrative decisions. The role of the prosecutorial organisation as a guarantee of legality was broadly discussed. In particular, he took a broad international perspective in systematising the instruments of legal protection, examining the practice in the states of northern Europe, West Germany, the former socialist states (the Soviet Union, Poland, Czechoslovakia, Romania, Bulgaria, the German Democratic Republic). He also

[55] Martonyi, 1939. 10–20.
[56] Martonyi, 1939. 84–88.
[57] Martonyi, 1939. 100.
[58] Martonyi, 1939, 100–101.
[59] Martonyi 1939, 111–113.
[60] Act II of 1949 on the termination of the administrative litigation.
[61] Act IV of 1957 Code of General Rules of State Administrative Procedure.
[62] Martonyi János: *Államigazgatási határozatok bírói felülvizsgálata*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1960.

provided a substantial description of the regulatory systems of the People's Republic of China, the People's Republic of Albania, the Democratic People's Republic of Korea, the Mongolian People's Republic and the Democratic Republic of Vietnam.[63]

Analyzing the legal tools set in the Code of General Rules of State Administrative Procedure, Martonyi considered, that they were appropriate measures to redress the harm caused for individuals.[64] It is needed to stress, that the administrative courts were ceased, the competence for legal remedies was transferred to administrative bodies, and narrowly the organization of prosecutors[65] and the civil courts could exercise remedies.[66] Revising his own earlier point of view did not consider justifiable the establishment of the separate administrative court system, which would be independent of the ordinary courts. He stressed, "*[t]he correct conception of socialist state functions complies with... the unified judicial organisation system at all levels*."[67]

Reconsidering the earlier opinion also rejected the principle of a general definition of powers. Regarding the domestic legislation, he approved the solution whereby a statutory law, a decree-law or a decree of the Council of Ministers could also establish subject matters of competence open to judicial review.[68]

Examining the procedural rules, he declared that the civil courts might prepare the decision according to the rules of civil procedure in administrative litigation cases, but the fact that the other party to the proceedings was a public administrative authority led to differences in the procedure.[69]

IV. Concluding remarks

The works of Elek *Boér* and János *Martonyi* are significant contributions to the progress and enrichment of public administration law dogmatism. The value of their works is also remarkable from the point of view, that the theoretical research was closely linked to practical activity, especially in the case of Elek Boér, who reached direct experience from the positive law application as an administrative judge to his scientific research.

Regarding the scientific work of János *Martonyi*, the different political-ideological-social perceptions affected them to a considerable extent. The acceptance of the basic values of the liberal rule of law was the starting point for the development of the institution of administrative litigation, after that the national socialist influence was proved in his work. His views were subsequently influenced by socialist ideology, which led him to reject and reassess his position on both organisational and competence issues. However, despite these circumstances, his writings on administrative litigation shall be considered of high importance. Some of the authors working on the subject of administrative litigation have also taken his theories as a basis for their later works.[70]

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[63] Martonyi, 1960. 7–38.

[64] Martonyi, 1960. 52.

[65] Act IV of 1957. Art. 60–61. The prosecutor's caveat about the violation of law.

[66] Act IV of 1957. Art. 57. Sec (1). These provisions ensured the judicial review only in five cases the Code listed these cases.

[67] Martonyi, 1960. 71.

[68] Martonyi, 1960. 187–189.

[69] Martonyi, 1960. 199–201.

[70] See, Trócsányi László: *A közigazgatási bíráskodás egyes elméleti és gyakorlati kérdései*. MTA, Budapest, 1990. Patyi András: *Közigazgatási bíráskodásunk modelljei: Tanulmány a magyar közigazgatási bíráskodásról*. Logod Bt., Budapest, 2002.

The organisational system of administrative litigation is a vital question; the process is now also not completed. Learning the works of our great predecessors is guidance for scientific research to serve the work of decision-makers.

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LOCAL ASPECTS OF PUBLIC ADMINISTRATION

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The Legal Institution of Indignity in the Hungarian Public Administration and Europe

I. Introduction

The legal institution of indignity is not an unknown concept in the staff of the Hungarian public administration, yet it does not have the same meaning in the case of persons holding various positions or serving in the administrative apparatus. It has a different meaning for a local government representative and a civil servant or government official.

In the light of this, the organizational structure of the administration should be examined first, followed by the categories and composition of the staff of the administration in accordance with the rules applicable to them. Knowing all this, it is possible to take stock of the differences in the rules of indignity, the possible reasons for this, and to conclude whether it is appropriate to regulate differently for certain actors in the administration and whether it would be more appropriate to define a general concept of indignity.

II. The organizational structure of public administration: a mix of political and professional actors

In order to be able to place the staff of the public administration at the system level, it is important to understand the nature of the organizational system of the public administration itself. The concept of the organizational system of public administration is used in two senses. We distinguish between the system of administrative organization in the narrower sense, which includes the actual administrative bodies, and the system of administrative organization in the broadest sense, which includes all legal entities that perform administrative tasks. These are called para-administrative bodies in a foreign term. The latter includes public institutions, i.e. public bodies, public foundations and public institutions.[1] These bodies performing administrative tasks are subject to special rules whose analysis does not belong to the subject of current research as the study intends to further analyse the rules of indignity applicable to staff in the narrow sense of the administrative organisation.

More accurate determination of the subject of the examination is to delimit civil administration from the armed forces of the executive power. These include the Armed Forces, the Military National Security Service, the police, penitentiary institutions, professional disaster management agencies, the Civilian National Security Service, and the National Tax and Customs Administration.

[1] Patyi, András – Varga Zs., András: *Általános közigazgatási jog (az Alaptörvény rendszerében)*. Dialóg Campus Kiadó, Budapest, 2013. 257.

These are all armed bodies for the external protection of the state, although some armed bodies also carry out activities in the civil administration and these armed bodies are divided into an extensive system of organizations, within which a strict hierarchy reigns.[2]

The basis for the delimitation can best be established on the basis of the laws on the various armed bodies. What they have in common is that they perform special tasks with specific conditions of service under which they have special rights and obligations. These are legal relationships based on voluntary commitment, which require sacrifices: the risk to life and physical integrity and the tolerance of restrictions on fundamental rights. There are stricter conditions for the establishment of legal relations requiring unexpected loyalty and courageous settlement for Hungary. Another speciality is the use of various coercive devices and the carrying of weapons.[3]

It follows from the above that the study will continue to deal with the civil administration organization performing the classical authority tasks.

In civil administration in the narrower sense, two subsystems can be distinguished from each other: the public administration and the local government administration. Both spheres have political and professional actors (see tables no. 1 and 2.), the justification of which is that one of them performs purely professional functions, while the other person embodies the political will. Belonging to one of the two groups has serious consequences: they are subject to different rules of indignity and have different expectations of them. This distinction is also unjustified because, in the international area, the *Anti-Corruption Report* [4] states that the same rules must be applied to all civil servants, regardless of whether they are elected or appointed and the starting point for this would be the summary designation of the posts. Thus, there would be no question as to what level and extent of rules apply.[5]

Public administration	
Political actors	**Professional actors**
1. Senior political leader - Prime minister - Minister - State secretary	*1. Senior professional leader* - State secretary for administration - Deputy state secretary - Head of government headquarters and central office, and their deputy - Director-general of the government office
2. Political leader - Goverment commissioner	*2. Professional leader* - Director of the government office - District clerk - Deputy district clerk - Head of general department - Head of department
3. Political adviser	*3. In the case of the maintenance of government institutions, they are government officials, government administrators*
4. Senior political adviser	*4. Civil servants of special status bodies*
5. Head of Cabinet	
6. Commissioner	

1. table: Staff of public administration. See Act CXXV of 2018 on government administration, Act CXCIX of 2011 on public servants, Act CVII of 2019 on bodies with special legal status and the status of their employees.

[2] Fazekas, Marianna: *Közigazgatási jog Általános rész I.* ELTE Eötvös Kiadó Kft, Budapest. 2015. 83–84.

[3] See: Act XXXIV of 1994 on the Police, Act XLII of 2015 on the conditions of employment of professional staff of law enforcement agencies, Act CCV of 2012 on the status of soldiers, Act CXXX of 2020 on the the status of the staff of the National Tax and Customs Administration.

[4] EU Anti-corruption Report, Report from the Commission to the Council and the European Parliament, COM(2014) 38 final, 03/02/2014. [EU Anti-corruption Report] 2.

[5] EU Anti-corruption Report (2014), 9.

Local Government administration	
Political actors	Professional actors
1. Mayor	1. Notary
2. Senior mayor	2. Mayor's Office of civil servants, public service administrators
3. Local government representative	3. Senior government adviser

2. table: Staff of local government administration. See Act CXCIX of 2011 on public servants and Act CLXXXIX of 2011 on local governments in Hungary.

III. Rules of indignity for the actors of the public administration

In the following, the study will examine the regulation of indignity for the actors of the public administration and then the local government administration, although it shall be noted that there is no uniform definition because there are different criteria in both spheres. Indignity itself as a term means not deserving something, not worthy of something. It also means an action or behaviour that is not worthy, not befitting someone or something.[6] In contrast, the word dignity means that someone or something is worthy of someone or something. Moreover, it also means someone appropriate to someone's person, profession or belief.[7]

III.1. Professional actors in public administration

The status of professional actors in the public administration is regulated by the *Act CXXV of 2018 on government administration* (hereinafter: Kit.), the *Act CXCIX of 2011 on public servants* (hereinafter: Kttv.) and the *Act CVII of 2019 on bodies with special legal status and the status of their employees* (hereinafter: Küt.). It should be emphasized that the provisions of the Kttv. shall apply to the legal relationship between government service and government case manager government official of the government administration bodies or some of its elements, if the Kit. itself provides so, or the Kit. establishes the absence of its effect in respect of the legal relationship or some of its elements.[8]

The Kit. considers the government service legal relationship as a starting point for professional actors, and its system of rules is ordered to be fully applied to government officials and, with certain exceptions, to a senior professional leader[9] and professional leader.[10] The Küt. itself has its own scope: it applies to independent regulatory bodies and autonomous public administration bodies, as well as to civil servants employed by them.[11]

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[6] A "méltatlan" szó jelentése. A magyar nyelv értelmező szótára. https://www.arcanum.com/hu/online-kiadvanyok/Lexikonok-a-magyar-nyelv-ertelmezo-szotara-1BE8B/m-3C77D/meltatlan-3F201/ (05.01.2022.)

[7] A "méltó" szó jelentése. A magyar nyelv értelmező szótára. https://www.arcanum.com/hu/online-kiadvanyok/Lexikonok-a-magyar-nyelv-ertelmezo-szotara-1BE8B/m-3C77D/melto-3F20C/ (05.01.2022.)

[8] Article 1 (2) of Act CXCIX of 2011 on public servants [hereinafter: Kttv.].

[9] Article 223 of Act CXXV of 2018 on government administration [hereinafter: Kit.].

[10] Kit. Article 250/A.

[11] Article 1 (3) of Act CVII of 2019 on bodies with special legal status and the status of their employees [hereinafter: Küt.].

Concerning the professional actors of the public administration, the Kttv. knows the legal institution of indignity as a reason for terminating office, as a mandatory case of dismissal. Government officials become unworthy of their position if they engage in any conduct, either in connection with their work or in breach of duties arising from their legal relationship, or outside their workplace, which is capable of seriously undermining the prestige of their post the reputation of the employer or the confidence in good public administration and therefore the employer cannot be expected to maintain the legal relationship.[12]

In contrast, the Kit. and Küt. does not know indignity, the two laws name a legal institution like this: unworthiness. The justification of the Kit. states that unworthiness is introduced instead of an excuse based on indignity.[13] Officials shall be rendered unworthy if they engage in any conduct outside their working hours, which is capable of seriously damaging the reputation or confidence of the employing government administration, or they do not perform their duties with the professional commitment, and for this reason, it is not expected to maintain their legal relationship.[14] This concept can be related to the concept of indignity since both have common conceptual elements, which are the following.

Certification of specified conduct is a general requirement of conduct in all three laws: officials must act in accordance with the priority of the public service, taking into account the need to maintain trust in good administration.[15] The Küt. and Kttv. also state that the officials may not engage in conduct outside their working hours, which is directly and effectively liable to misjudge their employer, jeopardize their position, the employer's reputation, trust in the public administration and the purpose of the public service.[16]

According to an *employer's reputation*, the requirement demands a common opinion about someone or something, in this case in a good sense.[17]

The requirement for *good administration* is set up in the Charter of Fundamental Rights of the European Union[18], which declares the right to good administration, according to this, everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time.[19] In 2007, the Committee of Ministers of the Council of Europe adopted a Recommendation on Good Governance[20], which sets out its principles, expectations for administrative decisions and rules on legal redress. However, the wording of the recommendation has not become binding, but has had an impact on Member States' legislation.[21]

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[12] Kttv. Article 63 (2) a), Article 64, Article 64/A.

[13] The justification of the final drafter for Act CVII of 2019 on bodies with special legal status and the status of their employees.

[14] Küt. Article 39 (18) and Kit. Article 109 (2).

[15] Kttv. Article 9 (1), Küt. Article 9 (1), Kit. Article 66 (1).

[16] Kttv. Article 10 (2), Küt. Article 10 (2).

[17] A "hírnév" szó jelentése. A magyar nyelv értelmező szótára. http://mek.oszk.hu/adatbazis/magyar-nyelv-ertelmezo-szotara/kereses.php?kereses=h%C3%ADrn%C3%A9v. (05.01.2022.)

[18] Charter of Fundamental Rights of the European Union. HL C 326., 2012.10.26., 391–407. [Charter]

[19] Charter Article 41 (1).

[20] Takács, Péter – Szegedi, László – Mónus, Ildikó – Grósz, Tamás – Balogh, Gergely: A jó közigazgatás. Az Európa Tanács Miniszteri Bizottsága CM/Rec(2007)7. számú ajánlásának magyar szövege. [jogi dokumentum fordítása]. *Pro Publico Bono. Állam- és Közigazgatástudományi Szemle*, Vol. 1. No.1. 2011. 97–104.

[21] See: Balázs, István: A jó közigazgatás követelményei, 2014. Konferencia (Előadás) In: *Magyar Jogászszövetség konferencia*. http://real.mtak.hu/11110/ (05.01.2022.) 2–4.

By *trust*, according to the literature, we mean *the individual expectation that the object of trust (person or institution) will behave in the given or expected way in a given situation*. [22] There the different radius of trust[23], with interpersonal trust and general trust playing a role in this examination.

Interpersonal trust means that we place more trust in the people closest to us[24], and in the case of *general trust*, personal bonding does not play a role. There is no particular element here, it rests on basic cohesive belonging based on social integration.[25] *Interpersonal trust* is affected by various factors, such as social culture. These affect the level of trust in a community. It should be emphasized that trust is partly related to its impression related to its specific subject matter, and in addition to the above, it is also affected by the behaviour of the object of trust, which is important for institutional trust.[26] Based on this, we can conclude that the interactions of officials affect the trust of clients, and the power they represent as an institution is present in our daily lives, so the client contact with them is partly shaped by the characteristics of their procedure and their experience. Trust is needed because, in the absence of this, they are unable to co-operate with clients, as the procedure of the specialist affects the judgment of clients about administration.[27]

However, universal trust is also needed because, if we built solely on particular trust, relationships can become informal, reducing transparency and accountability.[28] It can be stated that trust between people and towards institutions is essential in societies governed by law. If it falters, possibly lost, then it also threatens democracy itself, as a result of which political processes are initiated that lead to the demise of democracy.[29]

Comparing the concepts of indignity and unworthiness and their conceptual elements, it can be concluded that it is unreasonable to give two different names to a legal institution serving the same purpose. Nor has the legislature justified the introduction of indignity, but it does not seem appropriate, given that indignity, as will be presented later, also appears in the municipal subsystem, although with a completely different meaning. Moreover, indignity as an expression is more closely related to the nature of the office.

III.2. Political actors in the public administration

The other sphere of public administration is those in political service, who include the senior political leader, the political leader, the political adviser, the senior political adviser, head of a cabinet.[30] On the borderline between the two legal relations is the legal relationship of the Commissioner, which – in my opinion – is also one of the political actors, to which the Kit. does not define the requirements to be highlighted from the point of view of the subject.[31]

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[22] Boda, Zsolt (szerk.): *Bizalom és közpolitika. Jobban működnek-e az intézmények, ha bíznak bennük?* Argumentum–MTA TK Politikatudományi Intézet, Budapest, 2015. 10.

[23] Boda. 2015. 10.

[24] Boda. 2015. 10.

[25] Grünhut, Zoltán – Bodor, Ákos: „Megbízhatsz bennem, hisz' ismersz!" Kistelepülési polgármesterek az informalitások hálójában. *Új Magyar Közigazgatás*, Vol. 12. No. 2. 2019. 15.

[26] Boda. 2015. 11.

[27] Boda. 2015. 11.

[28] For more information see: Grünhut–Bodor. 2019. 1.

[29] Tóth, Gábor Attila: Bizalom és bizalmatlanság egyensúlya az alkotmányos struktúrákban. *Közjogi Szemle*, Vol. 5. No. 2. 2012. 10.

[30] Kit. Article 3 (2).

[31] Kit. Article 3 (1) b).

Regarding the political actors of the state administration, the law highlights that the legal relationship of senior political leaders (including the Prime Minister, Ministers and Secretaries of State) if the Fundamental Law of Hungary or the Kit does not provide for anything else, the rules applicable to government officials shall apply. Nevertheless, political leaders are not covered by, among other things, the exemption based on unworthiness.[32]

Political leaders, who are government commissioners, are subject to the rules on government services and government officials, with the exception of the provisions on termination of employment and professional ethics.[33]

The political service regulations of advisers are also subject to the rules of government service, with certain exceptions, but they can already be dismissed due to unworthiness.[34]

It can be seen that, with certain exceptions, the rules on the termination and removal of their legal relations do not apply to political actors in the public administration. This means that due to unworthiness, there is no way to remove a political actor from office.

This departure from the professional sphere is unjustified because of the Kit. that states in its preamble that this law was enacted to regulate the employment of high-level government officials serving the nation to create a modern and efficient system of government administration. This high standard can also mean efficiency and high expertise, but it is accompanied by the high standard that the average citizen expects from the apparatus of public administration, regardless of the sphere in which it is located. All the more so, as there are stricter rules of Conduct for professional actors, those in the political sphere are still more interested. can't they be expected to meet a higher standard? It should be emphasized that even the private sector also defines a general behavioural requirement against workers in *Act I of 2012 on Labor Code*: during the employment relationship, the employee may not engage in any conduct that would jeopardize the legitimate economic interests of his employer, nor may he engage in any conduct outside his working hours that endangers the good repute of his employer. In light of this, political actors can be expected to behave in a manner that is consistent with trust in good administration, both inside and outside the workplace.[35] In light of this, senior political leaders and political leaders are also expected to behave with trust in good administration, both inside and outside the workplace.

IV. Rules of indignity for actors of local government administration

IV.1. Professional actors of local government administration

According to the provisions of the Kttv., the professional sphere of the local government administration includes the notary, the civil servant of the mayor's office of the representative body and the senior government adviser.[36] Dignity is used for them in the same sense as a ground for dismissal, as explained in the special part of the public administration, as the rules applicable to government officials apply mutatis mutandis to civil servants.[37]

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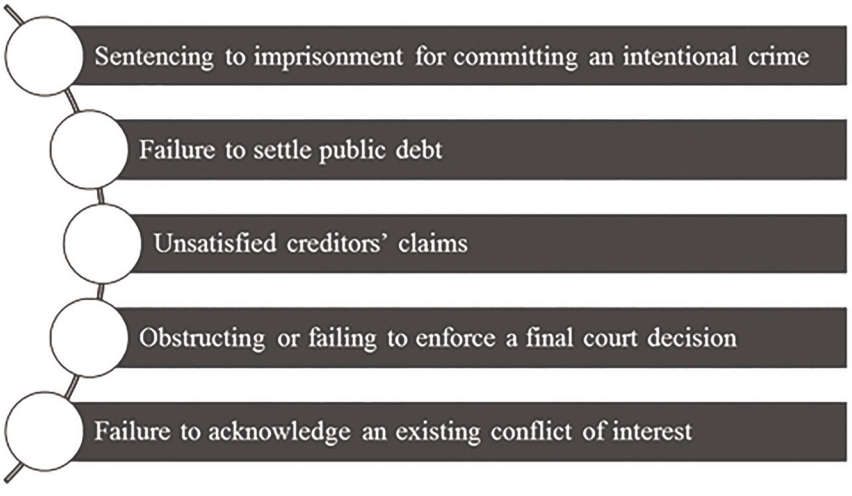
[32] Kit. Article 181.
[33] Kit. Article 206.
[34] Kit. Article 214 (5).
[35] Article 8 (1)–(2) of Act I of 2012 on Labor Code.
[36] Kttv. Article 1.
[37] Kttv. Article 231 (1).

IV.2. Political actors in the local government administration

As shown in the figure, the political actors in local government administration are mayors, deputy mayors, and local government representatives. The highest legal source for the legal status of all three of them is the Fundamental Law of Hungary, which lays the foundation for the regulation of local governments.[38] The laws are on the second level of the hierarchy of sources of law, the current local government law named the *Act CLXXXIX of 2011 on local governments in Hungary* (hereinafter: Mötv.), *the Act L of 2010 on the election of local government representatives and mayors* (hereinafter: Övjt.) and the *Act XXXVI of 2013 on the electoral procedure* (hereinafter: Ve.).

A new element in the law is the criterion of the "*dignity required for the performance*"[39] of the mandate, i.e. the legal institution of indignity, which entered into force before the 2014 elections took place. The new rules of indignity are equally to be applied to the mayors as well as to municipal representatives apply.[40]

Dignity as a concept is "*the judgment of the value of a community, small or large, against one person or an entire body. An important requirement for the local government representative is the certification of socially expected, dignified behaviour, therefore the local government representative may also become unworthy of this position. There may be several measures of indignity as a subjective value judgment, and their weight may be extremely different, so it cannot be determined objectively.*"[41] The law exhaustively lists the causes of indignity, which are shown in the figure below.



3. table: The causes of indignity. From: Mötv. Article 38 (1).

[38] Article 31–35 of Fundamental Law of Hungary.

[39] Farkasné Gasparics, Emese: Magyarország helyi önkormányzatairól szóló törvény születéstörténete és jelene. *COMITATUS*, Vol. 28. No. 229. 2018. 25.

[40] Mötv. Article 72 (4).

[41] Balázs, István – Balogh, Zsolt Péter – Barabás, Gergely – Danka, Ferenc – Fazekas ,János – Fazekas, Marianna – F. Rozsnyai, Krisztina – Fürcht, Pál – Hoffman, István – Hoffmanné Németh, Ildikó – Kecső, Gábor – Szalai, Éva: *A Magyarország helyi önkormányzatairól szóló törvény magyarázata*. HVG–ORAC, Budapest, 2016. 167.

IV.3. The explanation of the reasons for indignity – Sentencing to imprisonment for committing an intentional crime

The concept of public trust is based on the indignity of a custodial sentence imposed for the commission of an intentional criminal offence. This definition contains conjunctive elements, so in the event of a negligent crime, it is not possible to establish uncertainty but in the case of mixed guilt. It is also a condition for a legitimate loss of imprisonment taken by the court. This provision shall also apply if the representative is sentenced to a suspended custodial sentence.[42]

IV.4. Failure to settle a public debt

Who plays a significant role in the functioning of the local government does not belong to the public because it becomes unworthy of trust.[43] The concept of public debt is defined in *Act CL of 2017 on the system of taxation* (hereinafter: Art.). Public debt is:

- a payment obligation prescribed by law to cover the tasks to be performed from the budgets of the general government subsystems, the establishment, control and recovery of which falls within the competence of a court or administrative body,
- the statutory obligation to pay for the operation of the public body provided that it has not been voluntarily fulfilled when it falls due,
- aid and contributions wrongly used or misused by the budget of the general government subsystems, the payment of which is ordered by the competent body and is not made by the debtor within the prescribed time limit and for which the public tax and customs authority, at the request of the body, the budget also exercises the right to withhold aid in respect of these debts.[44]

The law also deals with the tax-free taxpayer database, which is a register published on the website of the state tax authority – in Hungary, it is the *Nemzeti Adó- és Vámhivatal*, – (NAV) – which contains the name, title and tax number of the taxpayer and keeps records of the taxpayers who meet the following conditions on the last day of the month preceding the publication:

- has no net debt or public debt registered with the state tax and customs authority,
- the taxpayer has declared that he/she has fully fulfilled the obligation to declare and pay the due payment;
- no bankruptcy, liquidation, compulsory cancellation or liquidation proceedings have been initiated against him;
- if there is a case of group value-added tax, that group value-added tax is not subject to value-added tax;
- if there is a case of group corporate taxpayer, this group corporate taxpayer has no corporate tax debt;
- you have no overdue debts as a taxpayer.[45]

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[42] Balázs et al 2016, 167–168.

[43] Fábián, Adrián: *Kommentár a Magyarország helyi önkormányzatairól szóló 2011. évi CLXXXIX. törvényhez (archív)*. Wolters Kluwer Netjogár. 113.

[44] Article 7 point 34. of the Act CL of 2017 on the system of taxation [hereinafter: Art.]

[45] Mötv. Article 261 (1).

Local government representatives must apply for inclusion in this database within thirty days of being elected. They must certify before the last day of the month following the month in which they have been recruited that they have been recruited.[46] This is done by requesting the admission of the representative electronically via a so-called *KOMA-form*[47], for which an Ügyfélkapu[48] is required.

The form is available on the website of the NAV and is submitted by ÁNYK (general form filling program). The representative can confirm the entrant's application with an eBEV[49] acceptance receipt returned by the system. If the application has been received until the last day of that month, it will enter the database at the earliest day of the next month if it meets the conditions.[50] If, after the recruitment of a representative, the tax authority finds that it does not meet the conditions for recruitment, it shall send a written notice to that effect to the Board of Representatives and the Government Office.[51]

The certificate of admission must be submitted to the Committee on Conflicts of Interest[52] within the time limit laid down by law, in case of failure to do so, by setting a deadline, the commission shall request the representative to comply.[53]

If the omission is not remedied, the committee shall conduct the unfairness procedure, informing the representative board.

The Mötv. does not specify exactly the occurrence of the public therefore it can be interpreted to cover all financial issues that happened even before the election of the local representative. It will be indign if the public debt is legally present during its term of office and the obligation to pay is notified but fails to comply with it within sixty days, except in the two cases provided for by law.[54] Under the notice, the request for payment of public debt must be understood, as the committee conducting the procedure of indignity must examine whether the notification has been made in order to conduct the procedure. If all the conditions set out in the Mötv. are not met, a representative cannot be prosecuted.[55]

IV.5. Unsatisfied creditors' claims

The *Act V of 2013 on the Civil Code* contains provisions on companies in the Third Book. It regulates the cases where the manager, officer or owner of a liquidated company is liable for outstanding debts after the liquidated economic debts. In such cases, these persons acted in bad

[46] Mötv. Article 38 (4).

[47] Összevont nyomtatvány a köztartozásmentes adózói adatbázissal kapcsolatos ügyek intézéséhez. Nemzeti Adó- és Vámhivatal. Nyomtatványkitöltő programok. Kérelmek. https://www.nav.gov.hu/nav/letoltesek/nyomtatvanykitolto_programok/nyomtatvanykitolto_programok_nav/kerelmek/koma.html (05.01.2021.)

[48] Ügyfélkapu is the government's electronic identification system that provides users with one-time access to e-government and service providers.

[49] On the eBEV Portal, you can view all messages sent by NAV (acceptance / rejection receipts, notifications, notices, etc.), download copies of received documents, and perform various queries.

[50] Önkormányzati Tudástár- az Önkormányzati Hírlevél 2015. évi 2. különszáma. http://www.kosz.hu/upload/content/H%C3%ADrlev%C3%A9l/%C3%96nk_%20H%C3%ADrlev_2015_%C3%A9vi_6_sz%C3%A1m_Tud%C3%A1st%C3%A1r.pdf (05.01.2021.) 29.

[51] Mötv. Article 38 (4).

[52] This is an organ of the representative body.

[53] Önkormányzati Tudástár (2015) 33.

[54] Önkormányzati Tudástár (2015) 34.

[55] Önkormányzati Tudástár (2015) 34.

faith, and a final judicial decision establishing this may shake the trust placed in them, because they did not act in accordance with the rules of good financial management, so their indignity can also be established.[56]

IV.6. Obstructing or failing to enforce a final court decision

The reason for the enactment of this ground of indignity is that a representative who engages in obstructive or reprehensible negligent conduct is not law-abiding. It objects to the observance of binding decisions taken by the public authorities in the performance of its unworthy position.[57]

IV.7. Failure to acknowledge an existing conflict of interest

This reason for indignity means that a representative is subject to a conflict of interes This rule intertwines the two grounds for termination: conflict of interest and indignity, and clarifies the legal consequences of a representative's silence if there is a cause of conflict of interest.t which he does not report to the representative body.

If any of the reasons for the injustice explained above are present, the representative body shall conduct the injustice proceedings and, if the representative is found to be unworthy, shall lose his or her mandate.[58]

Based on the above-mentioned facts, it can be concluded that, for the political actors of local government administration, indignity has a completely different meaning than in the case of professional actors. The Kttv. emphasizes the proper conduct of a civil servant, which must be interpreted more broadly than those laid down in the Mötv. The Kttv. operates with an abstract concept, while Mötv. lists cases that ignore those that severely undermine public confidence. On the other hand, if we consider municipalities to be the "extended arms of state power," both members and mayors should meet at least such behavioural criteria.

Based on these, it can be concluded that in the professional sphere of local government administration, the institution of unworthiness is also rubber-based, while the regulation of unworthiness of representatives based on public trust is exhaustively listed and not organized around the element of trust, but mostly by another body. The reason for the difference is, as follows, that one has a political function and the other a professional function. In the case of civil servants, the state makes sure that they are good and loyal to their leader and maintain confidence in the public administration. The question may arise who cares about local government representatives. If the quasi-principal of the representative is considered to be the electorate, they should be given a similarly rule-based say in conduct that is incompatible with the office of a representative. Currently, they only have the opportunity to come to terms with the fact that they can be replaced in the next election, drawing the lesson that the representative has not lived up to expectations.[59]

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[56] Balázs et al 2016, 170.

[57] Balázs et al 2016, 170.

[58] Mötv. Article 38 (3)–(5).

[59] For more information see the dissentiing opinion of Béla Pokol constitutional court judge ont he declaration of a principled opinion related to the dissolution of the representative body operating unconstitutional, Constitutional Court Decision 18/2013. (VII.3.), ABH2013, 758.

V. Conclusions

The results so far show that there is no uniform standard for the regulatory environment of indignity for different actors of public administration, even though all fill positions of trust. Government officials and civil servants must maintain public trust in administration while they perform their jobs, especially the political actors and local government representatives, who get their mandate by local election. The electorate of the local community casts their vote for those they trust. As a result of the fact that both administrative actors must meet the requirements of trust, public trust and the public interest, the regulations applicable to them should be standardized, and the same requirements should apply to those holding positions in the political and professional arena.

If this were to happen, the concept of indignity could also be uniformly defined, incorporating the key elements of the legal provisions presented earlier.

As an experiment, the concept of indignity could be defined for the whole administration by combining the conceptual elements that have been explained in detail earlier (public trust, dignity, different behavioural requirements, etc.) with the principles of professional ethics that are binding on members of the profession area.

As a result, we can give a definition that has the following elements:

- Administrative officials, including political and professional actors in public administration and local government administration,
- being unworthy of trust to hold the office if,
- do their duties by ignoring the public interest,
- provides breach of trust in good public administration,
- does not comply with the principles of professional ethics applicable to him (these, however, should also be uniform in both spheres), or
- engages in conduct in his spare time which is capable of seriously undermining trust in good administration.

With this concept, the same system of indignity would be achieved, which is the most important step in eliminating regulatory differences between political and professional actors in the public administration.

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CULTURAL ASPECTS OF PUBLIC ADMINISTRATION

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The Diversity of Local Government Legal Instruments for the Protection of Monuments

I. Introduction

The activity of public authorities should aim at effective protection, conservation, and preservation of the cultural heritage. Monuments are an important part of such heritage. The local government, in particular the basic unit, which is a commune, is actively involved in the implementation of this task. The legislator provided a wide and varied catalogue of legal self-government instruments in order to take care of monuments. A fundamental role is played by legal instruments related to the shaping of spatial policy. These kinds of instruments have different legal statuses. The possibilities of their practical application also varied. Thanks to these factors commune activities may be flexible. Instruments permitted by law allow the introduction of generally applicable prohibitions and orders regarding the protection of monuments. They also allow to the introduction of protective provisions as part of individual administrative proceedings in the field of spatial development. The issue of the protection of cultural heritage and the protection of monuments have a universal character. These matters are taken into consideration at the international level e.g., in UNESCO and EU acts, as well as in national law. Actions relating to cultural heritage are of great importance for culture, society and economy, tourism and even politics. Dealing with heritage should be thoughtful and responsible, taking into account contemporary needs and opportunities, but also the rights of future generations to the cultural resource, which we are currently managing. Therefore, activities regarding monuments should not be just a result of individual circumstances and conditions but should follow the principles, rules and programs adopted by law in cooperation with professionals.[1]

This article aims to highlight the importance of local government in the field of monument protection. According to the principle of decentralization of power and the principle of subsidiarity, local government communities should play a leading role in the performance of public tasks. Instruments for the protection of monuments are significantly diversified in terms of their legal nature and the scope of their application. The legal significance is played mainly by instruments related to spatial planning and development. Unfortunately, the legal analysis carried out in this article set out in this article indicates that regulations are not complete and therefore do not guarantee full protection of all immovable monuments.

The starting point for further considerations should be a presentation of basic concepts, which are the notion of local self-government unit and a notion of a monument. According to legal

[1] Szmygin, Bogusław: *Vademecum Konserwatora Zabytków. Międzynarodowe Normy Ochrony Dziedzictwa Kultury*. Polski Komitet Narodowy ICOMOS, Warszawa, 2015. 7.

doctrine,[2] the local self-government unit is a public corporation (an association) of residents of a given territory (territorial community) that performs public tasks based on decentralization. This means the performing of public tasks is relatively independent under the supervision of the state. Units of local self-government shall possess a legal personality. They shall have rights of ownership and other property rights. The self-governing nature of units of local self-government shall be protected by the administrative courts. It should be stressed, that local government is a form of decentralization of public power.

Currently in Poland, since 1999, three local government units are functioning. These are the following: commune (*gmina*) the basic unit of local government, *powiat* (local government unit) and regional government unit (*samorząd województwa*). According to the principle of subsidiarity, the fundamental role is played by commune (*gmina*), which shall commonly participate in the exercise of public power. The commune shall perform all tasks of local government not reserved to other units of local government This statement applies also to the protection of monuments as a public task. The other basic notion is "monument". This notion is a category of a wider concept of cultural goods or products of culture. These notions appear simultaneously in Polish law. Article 6 of The Constitution of The Republic of Poland[3] mentions products of culture. According to article 6, Poland shall provide conditions for the people's equal access to the products of culture, which are the source of the Nation's identity, continuity, and development.

The notion of 'monument' has statutory grounds in Poland. According to the legal definition contained in the Act on the protection of monuments and the care of monuments of 23rd July 2003[4], a monument shall be understood as: immovable or movable goods, their parts, or groups, being the work of a human beings or related to their activity and being a testimony of a bygone era or events, whose preservation is in the social interest due to their historical, artistic, or scientific value. The mentioned Act distinguishes three categories of monuments: immovable monuments, movable monuments and archaeological monuments (a type of immovable monument). The legislator listed an example of movable and immovable monuments. The legal definition has a qualitative character.[5] From the legal point of view, the value of a thing is more important than how old it is. The objective value of a thing implies the need of protecting it for the sake of the public interest. Based on this criterion, old things may be considered monuments within the meaning of the law.[6] The act does not require, that a monument has to be written in the official government register of monuments.[7] The decisive factor is the material significance of movable or immovable goods for culture. A product of culture must have an objective cultural value that justifies its protection and preservation for future generations. Such opinion was expressed in the judgment of the Supreme Administrative Court of 17th July 2012.[8] It specified, that decision to write in goods in the register of monuments has declaratory character, in the sense, that it states the historicity of a given object, i.e., the fact that object is a monument in the material

[2] Olejniczak-Szałowska, Ewa: *Samorząd terytorialny*. In: Duniewska, Zofia – Jaworska-Debska, Barbara – Kasinski, Michał – Olejniczak-Szałowska, Ewa, – Stahl, Małgorzata (eds): *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*. Edition 7, Wolters Kluwer Polska, Warszawa 2019. 420–425.

[3] Journal of Law 1997, no. 78, item 483.

[4] Journal of Law 2021, item 710.

[5] Cherka, Maksymilian – Antoniak, Patrycja – Elżanowski, Filip – Wasowski, Krzysztof: *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*. Lex, Warszawa, 2010.

[6] Zeidler, Kamil: *Zabytki. Prawo i praktyka*. Wolters Kluwer, Gdańsk-Warszawa, 2017. 130.

[7] Kotulski, Mariusz: Problematyka ochrony zabytków w planowaniu przestrzennym. *Administracja*, No. 2. 2011. 17–22.

[8] Act signature: II OSK 752/11, http://orzeczenia.nsa.gov.pl (10.01.2022.)

sense. So, an item not written in the register could be a monument as well. In practice, however, the entry in the official register and the attribute of being so-called "*a registered monument*" has fundamental importance. For example, it is difficult to enforce liability for the destruction of an object that has not been written in the register of monuments. It is also complicated to take authoritative decisions about objects not written in the register because there is no clear legal basis for such activity.

II. The genesis of the protection of monuments as a task of local government

The protection of monuments was directly envisaged as a task of the basic unit of local government (commune) in The Republic of Poland in 2003. The systemic transformation dated from 1990, which was expressed, inter alia, by reactivation of local government, was initially characterized by the pursuit of getting rich quickly, often at the expense of historic immovable monuments. At that time, the idea of monuments and the protection of their surroundings did not play a major role in a sphere of spatial development. Such a situation had a negative impact on the previously state-owned manor and palace complexes with adjacent parks and gardens.[9]

Communalization of nationwide (state) property for the benefit of municipalities, carried out under the provisions of the Act of 10 May 1990[10], in many cases had a negative impact on the state of preservation of monuments. On a large scale, historical properties were unreasonably and – sometimes even in violation of the provisions of law – divided. Therefore, some immovable monuments were destroyed or partially lost their historical character due to fragmentation. Privatization of monuments for the benefit of private subjects was also a frequent practice. Legal supervision over an immovable monument remaining in the hands of several owners (public and private) after the legal division of the historic property was often illusory. Moreover, at that time, provisions of the Act on property management of 21st August 1997[11] did not provide adequate protection of monuments. It is worth notice, that until 17th of November 2003, sailing, exchanging, donating or perpetual usufructing of real estates written in the register of monuments, required the consent of the provincial conservator of monuments only in relation to real estates owned by the State Treasury.

Concerning real estate owned by a local government unit, the law required only obtaining an opinion of the provincial conservator of monuments. The negative opinion of the conservator did not deprive the community of the possibility of acting in the spatial sphere.[12] Due to the non-binding nature of the opinion and the lack of judicial control of ownership transformations, it can be stated, that the scope of independence of local government units regarding the disposal of the property written in the register was then excessive. Therefore, the inclusion of monuments protection into the catalogue of local self-government tasks by Act of 23rd July 2003[13] should be assessed fully positive.

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[9] Pruszyński, Jan: Dziedzictwo kultury Polski. Jego straty i ochrona prawna. *Zakamycze*, Vol. 2. 2001. 374–377; Sługocki, Janusz: Europejski system ochrony dziedzictwa kulturowego a ochrona dziedzictwa narodowego w Polsce (wybrane zagadnienia). In: Sługocki, Janusz (ed): *Dziesięć lat polskich doświadczeń w Unii Europejskiej. Problemy prawno administracyjne, vol. 1.,* Presscom, Wrocław 2014. 583–594.

[10] Journal of Law 1990, no. 32, item 191.

[11] Journal of Law 2021, item1899.

[12] Stańko, Mateusz: Zakres przestrzenny ochrony zabytków a ochrona uprawnień właścicielskich. *Rejent*, No. 10. 2002. 98.

[13] Jurnal of Law 2003, No 162, item 1568.

Currently, we are observing the development of local government instruments of protection of monuments. It is the implementation of the Polish Constitution obligation, which aims to ensure the safeguard of the national heritage and is in line with the principle of sustainable development. In 2021 intensive legislative works were taken in Poland to thoroughly change the regulations concerning the protection of monuments. The planned amendment will apply to the competencies of the local self-government. After public consultations in September 2021, the government bill was submitted to the Parliament, but it has not been passed yet.

III. The monument's protection authorities

According to the Act on the protection of monuments of 23rd July 2003 the monuments protection authorities belong exclusively to the government administration structure. This structure consists of the minister responsible for culture and national heritage protection, on behalf of which tasks are performed by the General Conservator of Monuments and the voivode, on behalf of which – on the other hand – tasks are performed by voivodship conservator of monuments. Local government units may, however, perform the same tasks belonging to the governmental administration (voivodes). The legal basis for performing these tasks is the conclusion of an administrative agreement between the voivode and the local self-government units or its unions (union of communes, union of powiat's, powiats-commune union). Interestingly, the Act does not provide the possibility of concluding agreements between the voivode and the voivodeship self-government.

At the regional level priority is given to territorial governmental administration. The content of such governmental – local agreement may include handling certain matters related to the protection of monuments, including the issuing of administrative decisions. However, the government administration cannot delegate to the local self-government one of the most important of its competencies, i.e., to make entries in the register of monuments. If an agreement between the government and local government is concluded, a municipal monument conservator is appointed. Then municipal conservator performs all tasks related to the protection of cultural heritage in the local units.

IV. The diversity of local government instruments

The catalogue of instruments connected to the protection of cultural heritage, especially monuments, is extensive and varied. Statutory forms of monument protection (instruments *sensu stricto*) and other legal instruments related to monuments (instruments *sensu largo*) belong to this catalogue. These instruments could be classified according to different kinds of criteria. Local government instruments are applied only to immovable monuments. All instruments are permitted by law but may relate to various types of cultural goods, some of them can be used only to so-called registered monuments. Some instruments have an authoritative (imperative) character and may become the legal ground for imposing orders and bans. Other instruments are a kind of organizational and social public activities.

Local government instruments of monuments protection can be delimited due to the following criteria: 1) legal nature of the instruments, 2) legal force (binding force) of the instruments, 3)

type of public activity. Due to their legal nature, these instruments shall be distinguished into statutory forms of monuments protection and *quasi-forms* of monuments protection.

The statutory catalogue of monuments protection forms is included in Act on the protection of monuments and the care of monuments (2003). It has a closed character (*numerus clausus*). Statutory forms apply both to movable and immovable monuments. Actions may be taken by governmental and local authorities. Forms available to the local government apply only to immovable monuments. *Quasi*-forms of monuments protection are performing similar functions to statutory forms, but from a legal point of view, they are not official forms of monuments protection, so they cannot be the basis of imperative actions. Legal force (binding force) allows dividing these instruments into universally binding forms, forms of an internal character and forms issued as part of the administrative procedure. Through universally binding forms may be established *erga omnes* provisions, which apply to everyone in a given territory. These forms are related mainly to space management. A fundamental role in this category is played by the local spatial development plan. Whereas instruments with internal character are binding only the organs of public administration (the organ of local government units or governmental bodies) mainly during the creation process of a spatial development plan. Some examples for this category are local government programs of the monument's protection, a study of the conditions and directions of spatial development in a commune and municipal register of monuments. The establishment of monuments protection may also be a mandatory element of administrative decisions issued in the field of spatial development. In this case, the provisions of the administrative decision shall be binding only for the investor in the investment procedure.

Referring to the criterion of type of public activity there could be indicated financial instruments (subsidies or grants for co-financing conservation, restoration or construction works applies only to monuments written in the register), law-making activity (normative acts), application of the law (administrative act) and *ad hoc* activities concerning the protection of the monuments. The financial support from public authorities in the form of subsidies or grants for co-financing conservation, restoration or construction works is applied only to monuments written in the register. *Ad hoc* instruments are used in a threat of destruction or damage of immovable monuments. *Starosta* (chairman of the powiat board) may issue a decision of temporary seizure (temporary occupation) of the immovable monument until the threat is removed. Such possibility is applied only to registered monuments. If there is no possible way to remove such a threat, an immovable monument may be expropriated by the *starosta* for the benefit of the State Treasury or the benefit of the basic local government unit (commune). This administrative decision transfers the ownership of the immovable monument. The purpose of expropriation is to protect the cultural heritage and appropriate compensation is required. This instrument cannot be abused by local authorities and could be applied only to registered monuments.

V. Statutory forms belonging to the local government

Under article 7 of the Act on the protection of monuments of 23rd July 2003, these forms include: 1) establishing a cultural park, 2) establishing the protection of monuments in the local spatial development plan, 3) establishing the protection of monuments in administrative acts (administrative decisions) issued in the field of spatial development. It is worth emphasizing that all statutory self-government instrument forms are related to spatial development policy and all of them could be implemented at the basic level of local self-government (commune).

These legal forms are providing a wide range of possibilities for the protection of material heritage. Each of them refers to immovable monuments written in the register and the spatial surroundings of such so-called registered monuments. Moreover, these statutory forms shall also apply to other immovable monuments included in the municipal register of monuments. Although the scope of protection for this type of monument is narrower than the protection of so-called registered monuments. In case of monuments are not written in the register but included only in the municipal register, there is no possibility to protect their surroundings. It gives the impression that the legal regulation in this area is insufficient.

The main purpose of creating a cultural park is to protect the cultural landscape and to preserve landscaped areas with immovable monuments which are characteristic of the local building and settlement tradition. A self-government cultural park may be established by a resolution of the commune council. The opinion of the conservator of monuments is obligatory. If factual reasons justify the creation of a cultural park exceeding the boundaries of one commune, it may be created and managed under-community park. A local spatial development plan is obligatory for the area of the park. The procedure for establishing a cultural park provides elements of social participation in the form of the possibility of submitting applications, comments, and requests by residents. Effectiveness and efficiency of the implementation of statutory aims are guaranteed by the possibility of establishing prohibitions and restrictions. They may concern, inter alia: 1) carrying out construction works and industrial, agricultural, breeding, commercial or service activities; 2) changes in the use of immovable monuments; 3) placing boards, inscriptions, advertisements and other signs not related to the protection of the cultural park, except for road signs and signs related to the protection of public order and safety; 4) waste storage or warehousing; 5) rules and conditions for the location of small architecture objects.

The above-mentioned catalogue of prohibitions and restrictions has a closed nature, although some generic restrictions are very broadly defined.[14] If the result of the resolution on the cultural park is a restriction in property using – at the request of the party – the competent *starosta* shall determine, by the way of an administrative decision, the amount of compensation. What is interesting, such a decision could not be appealed to a higher administrative instance. A party dissatisfied with the compensation may, within 30 days from the date of decision delivery, bring the case to civil court. Referral to the court is also allowed if a compensation decision wouldn't be issued within 3 months from the submission of the request by the party. To conclude, the cultural park is not only a tourist institution, but a form of monument protection through which the commune effectively contributes to the preservation of local identity and material cultural heritage.

From the legal point of view, a fundamental role is played by the local spatial development (management) plan. In the literature, it has been noticed that planning activity is a relatively new and complex mode of operation of the public administration. Therefore, it is not easy to classify unequivocally. There are interrelationships between law and planning, where law helps in planning by legitimizing the planning process and making it binding. On the other hand, planning helps law by helping to rationalize and systematize created provisions and prevent legal chaos.[15] The local spatial development (management) plan is adopted by a resolution of the commune council in a very complex and multi-stage procedure. In the spatial development (management) plan there may be introduced conservation protection zone, in which restrictions, prohibitions and orders aimed at the protection of the monuments located in this area are in force.

[14] Stanik-Filipowska, Katarzyna: Ochrona krajobrazu kulturowego na gruncie polskiego prawa ochrony zabytków. *Studia Iuridica Lublinensia*, No. 11. 2008. 235.

[15] Zimmermann, Jan: *Aksjomaty prawa administracyjnego*. Lex, Warszawa 2013. 172–175.

According to the judgment of the Supreme Administrative Court on 1st March, 2018[16] protection arrangements in the local spatial plan cannot be arbitrary. That power shall not be abused. Establishing the monuments protection zones should be assessed through the prism of constitutional principles, such as: the principle of the rule of the law (democratic state), the principle of the proportionality and acting based on, and within the limits of, the law. Establishing the protection zone should also comply with provisions that regulate a given field. Established by the municipal council restrictions, prohibitions and orders may limit the rights and freedoms, e.g., the property right or freedom of economic activity. It should be stressed that such an action, imposes an obligation on local government to evaluate introduced regulations in the light of the principles of proportionality, adequacy, and public interest. In case of restriction for using property rights due to such prohibitions and restrictions, the law provides various types of compensations for the actual losses incurred (*damnum emergency*).

The common court is competent to pursue compensation claims. The commune could also offer a replacement property or repurchase of property by the commune. Under the Act on spatial planning and development of 23rd March 2003[17], provisions of local spatial development (management) plan are generally binding (*erga omnes*). Polish legislators opted for a normative nature of the local spatial plan. A local spatial development (management) plan as an act of local law, under Article 87. 2 of the Polish Constitution, is the source of universally binding law in a given area.[18] The mentioned plan could be the legal basis for authoritative decisions in the field of conservation supervision and decisions issued in the investment and construction process. The local spatial development plan is considering the protection of immovable monuments written in the register and their surroundings, the protection of other immovable monuments included in the municipal register of monuments and the protection of cultural parks. The mentioned plan may be adopted by a resolution of the commune council in a long-term and complex procedure, which provides interaction of various administrative bodies, as well as elements of social participation in the form of the possibility of submitting applications, comments, and requests by residents. Detailed issues of the procedure and principles of adopting a local plan are regulated by the Act of 27 March 2003 on planning and spatial development. The systemic weakness, which has many negative consequences, is the voluntary character of adopting such local plans. Due to this fact, these plans are not enacted in many communities and therefore do not provide factual and effective monuments protection.

Statistical data[19] indicates that at the end of 2017 local spatial development plans cover only 30.5% of the state area in Poland. Over 6% of communes do not have any local plan for their area. In addition, as much as 40% of the plans are in force based on the repealed law. Due to this, consideration should be given to the issue of increasing the statutory scope of the obligation to adopt local plans. Such legislative decisions should be requiring careful thought. Since March 2010 the protection of monuments is a compulsory element of the administrative decision adopted in the spatial sphere. There are decisions on public purpose investment and the decisions on development conditions. These individual acts are issued in the absence of a local spatial plan, so very often such documents are the only possibility of monuments protection in the spatial

[16] Act signature II OSK 3148/17, http://orzeczenia.nsa.gov.pl (10.01.2022.)

[17] Journal of Law 2021, item 741.

[18] Jaworowicz-Rudolf, Agnieszka: Charakter prawny miejscowego planu zagospodarowania przestrzennego. In: Korzeniowski, Piotr – Wieczorek, Iwona (eds): *Wybrane zagadnienia modelu prawnego władztwa planistycznego gminy*. Wydawnictwo Narodowego Instytutu Samorządu Terytorialnego, Łódź, 2018.

[19] Wojtowicz, Wojciech: *Analiza stanu i uwarunkowań prac planistycznych w gminach w 2017 roku*. http://urbnews.pl/analiza-stanu-i-uwarunkowan-prac-planistycznych-w-gminach-w-2017-roku/ (20.11.2021.)

sphere. In practice, therefore, they are playing a fundamental role in shaping spatial development in communities. These administrative acts are issued by the executive body of the commune. Inclusion in 2010 to the statutory catalogue of forms of monuments protection the so-called planning decisions, should be assessed fully positive.

VI. Not statutory forms of monuments protection

The applicable law provides instruments that, although formally are not forms of monument protection, fit into the idea of the broadly understood protection of material cultural heritage. These instruments include e.g., communal register of monuments, self-governmental programs on caring of monuments, and study of conditions and directions of spatial development in a commune. Self-governmental programs and studies have an internal nature and cannot be treated as an independent basis for administrative decisions. The studies and programs are acts of spatial policy applicable to the self-government units. Adoption of self-governmental programs on caring for monuments is obligatory. Such programs are adopted for 4 years.

The communal register of monuments has an internal character. The head of the commune (mayor) keeps the communal register of monuments in the form of a set of address cards of immovable monuments from the commune territory. The communal register of monuments is the basis for the preparation of programs on caring of monuments by voivodships, powiats and communes. In 2017 temporary protection was introduced into Polish law and this solution should be assessed positively. Following the law, from the date of initiation of the procedure for writing a monument in the register until the date on which the decision, in this case, becomes into force, it is forbidden to carry out conservation, restoration, construction works and other activities, which could lead to infringement of the monument. This prohibition also applies to construction works covered by a building permit or notification, as well as activities specified in another decision allowing them to be carried out. Provisions on temporary protection do not apply to monuments serving national defence and security. Following the judicial decision[20], the protection of a given monument during the proceedings for its entry results from the law itself. Public authorities should, however, ensure that proper actions are actually taken.

VII. Conclusion

The protection of immovable monuments is playing an important role in over 30 years of activity of local self-government in Poland. This issue is socially and legally important. Striving to preserve valuable goods for future generations is part of the implementation of the principle of intergenerational solidarity and the principle of sustainable development.[21] These activities undertaken by communes in the sphere of spatial planning and development have fundamental importance. The local intermediate unit (*powiat*) is taking action in case of emergencies threatening the integrity of monuments. Communities may use local spatial development plans, establish conservation protection zones, where restrictions, prohibitions and orders are in force under the provisions of this plan. This kind of imperious interference to the rights and obligations of

[20] Judgment of the Regional Administrative Court in Rzeszów of 8th September 2021, Act signature II SAB/Rz 39/21, http://orzeczenia.nsa.gov.pl (10.12.2022.)

[21] Korzeniowski, Piotr: Zrównoważony rozwój. In: Sthal, Małgorzata – Jaworska-Debska, Barbara (eds): *Encyklopedia samorządu terytorialnego dla każdego. Part.1: Ustrój*. Diffin, Warszawa, 2010. 304.

persons with legal title to the property may not be excessive or bear the features of arbitrariness. Actions taken by municipalities (and other local government units) should be well-thought-out and aim at preserving the historic matter, as well as preventing threats that may cause damage to immovable monuments. Local government units should protect not only monuments written in the register (and their surroundings) but also historical properties, which are monuments in a material sense. The preservation of "*monuments of culture*" is justified by their historical, aesthetic, artistic or scientific-cognitive value. In the future, these objects may be written into the official register of monuments and therefore, their preservation in an undeteriorated condition is justified.

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The Act on spatial planning and development of 23rd March 2003, Journal of Law 2021, item 741.

The Act on the protection of monuments and the care of monuments of 23rd July 2003, Journal of Law 2021, item 710.

Migration and Security Aspects of Public Administration

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New Residence Schemes in the European Union after the Brexit

I. Introduction

On 31 January 2020, the UK left the European Union on the basis of conditions agreed in the Withdrawal Agreement.[1] *The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (the Withdrawal Agreement or the Agreement), setting out the terms of the UK's withdrawal from the EU, was signed by the Parties on 24 January 2020. The Agreement was then ratified on 30 January 2020 and came into force on 31 January, the day the UK left the European Union.

When the UK left the EU several million citizens of other Member States lived in the UK, and probably around a million UK citizens lived elsewhere in the EU.

What happened to their rights when they suddenly ceased to be living in the EU or to be a Union citizen? This was one of the three 'divorce' issues that were addressed in the first phase of Brexit negotiations.

II. Citizen's rights in the Withdrawal Agreement

The Agreement contains a range of provisions concerning the post-Brexit UK-EU relationship, including about citizens' rights in Part Two.[2]

"The Citizen's Right" part of the Withdrawal Agreement gives these people continuity of many of the rights they enjoyed in EU law, both parties guarantee the citizens and family members of the other party the preservation of the rights they have before the Brexit.

Withdrawal Agreement determines a period until the end of the *transitional period*, (until 31 December 2020), when both parties to the Withdrawal Agreement fully apply the EU law, and UK citizens could still enjoy free movement rights to the EU27, and vice versa.[3]

The 'Citizens Rights' provisions of the Withdrawal Agreement will be applied after the end of the transition period.

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[1] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community2019/C 384 I/01 XT/21054/2019/INIT OJ C 384I , 12.11.2019, 1–177.

[2] The citizens' rights section of the Withdrawal Agreement, Part Two, Title II., Rights and obligations, Chapter 1. Rights related to residence, residence documents, Article 13–23.

[3] Withdrawal Agreement, Article 126.

The provisions of the Agreement guarantee equal treatment rights with the nationals of that State for the related citizens and their family members.[4] Nevertheless, according to the Withdrawal Agreement in a period from 1 January 2021, there will be restrictions in free movement of persons (workers) between the UK and the EU, but the residence and labour rights, as well as social security rights that were established before the end of the transitional period, are preserved.

II.1. Key points in the Withdrawal Agreement

The citizens' rights section of the Withdrawal Agreement (Part Two) sets out the framework for British/EU citizens' continued legal residence in an EU state/the UK.

The first point to note is that citizens' rights are reciprocal: they will cover both EU27 citizens in the UK and UK citizens in the EU27.[5]

The provisions of the agreement do not cover all of their citizens, but only those who have "exercised free movement rights by the specified date".[6] The personal scope of the agreement will be those who reside legally on the territory by Brexit Day and their family members, who are defined by the EU citizens' Directive.[7] Especially those who are workers or self-employed; or have sufficient resources and sickness insurance, (a retired person or a student)are close family members of another person who meets these conditions; or have already acquired the right of permanent residence.[8]

The Withdrawal Agreement also protects the family members that are granted rights under EU law (current spouses and registered partners, parents, grandparents, children, grandchildren and a person in an existing durable relationship), who do not yet live in the same host state as the Union citizen or the UK national, to join them in the future.

Nevertheless, the rules on family reunion rights are more limited, will only apply where the family relationship existed before the end of the transition period, or the family member was legally resident in the same State then.[9] If the citizens commit a criminal offence after the end of the transition period, national rules on expulsions will apply.[10]

Children will be protected by the Withdrawal Agreement, wherever they are born before or after the United Kingdom's withdrawal, or whether they are born inside or outside the host state where the EU citizen or the UK national resides. The only exception is if they are born after the United Kingdom's withdrawal and for which a parent not covered by the Withdrawal Agreement has sole custody under the applicable family law.[11]

Some categories of people currently covered by EU law (such as UK citizens returning to the UK with non-EU family members, or UK children in the sole care of one non-EU

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4 Withdrawal Agreement, Article 23.
5 Withdrawal Agreement, Preambulum.
6 Withdrawal Agreement, Preambulum and Article 10.
7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, 77–123, Article 2(2).
8 Withdrawal Agreement, Preambulum, Article 10.
9 Withdrawal Agreement, Article 10,e.
10 Withdrawal Agreement, Article 20(2).
11 Withdrawal Agreement, Article 24.

parent) will not be covered by the Withdrawal Agreement, so their position will be up to UK/EU27 law.[12]

Nevertheless, the Withdrawal Agreement retains all the rights of UK citizens and their family members arising from it even after the end of the transitional period, until the end of their lives, provided that they continue to meet the conditions set out in the Withdrawal Agreement, see Article 39 of the Withdrawal Agreement.

II.2. What remains? – Free movement rights in the Withdrawal Agreement

The Withdrawal Agreement included provision for a transition period, whereby free movement of people would continue from 1 February to 31 December 2020. From the end of that period, the free movement of people between the UK and EU Member States ceased.[13] So, the Withdrawal Agreement ends free movement between the UK and EU and between the Member States for UK citizens in the EU27.

UK citizen lawfully resident in one EU Member State, even if he or she has been granted permanent residence in that Member State, is not entitled under the Withdrawal Agreement to move to another EU Member State after 2020.UK citizens after the transition period only retain these rights with respect to the Member State in which they already lived or worked. It is required to fulfil certain conditions if they want to move to another EU Member State.[14]

British citizens are eligible for visa-free travel to the Schengen area for short stays (90 days in any 180 days). This means they can travel throughout the Schengen States for up to 90 days in any 180-day period. Visas for visits exceeding that period, or for other purposes (e.g. work or study) would depend on Member States' national provisions.[15]

The EU intends to introduce a *European Travel Information and Authorisation System* (ETIAS) from late 2022. This means that visitors from the UK will have to get authorisation (an ETIAS visa waiver) to visit the Schengen area.[16] The ETIAS visa waiver will last for three years or until the holder's passport expires. The ETIAS-waiver will be for visits for periods of up to 90 days. Visits for longer periods (e.g. for work or study) will require a separate visa.[17]

The *UK-EU Trade and Cooperation Agreement* (TCA) includes some commitments to facilitate travel for certain specified purposes. It provides arrangements for short-term business visitors; business visitors for establishment purposes; intra-corporate transferees; contractual service suppliers; and independent professionals.[18] The TCA also provides for a continuation of

[12] Peers,Steve: The Brexit Withdrawal Agreement: Overview and First Observations. *EU Law Analysis. Expert insight into EU law developments*. Thursday, 22 November 2018. http://eulawanalysis.blogspot.com/2018/11/the-brexit-withdrawal-agreement.html (31.01.2022.)

[13] Withdrawal Agreement, Article 13(1).

[14] Withdrawal Agreement, Article 14 (1).

[15] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement,PE/50/2018/REV/1,OJ L 303, 28.11.2018, 39–58.

[16] This is similar to the ESTA system for travel to the USA, where visitors pay a one-off fee for a travel authorisation which lasts for a set period of time.

[17] Gower, Melanie – Jozepa, Ilse – Fella, Stefano: After Brexit: Visiting, working, and living in the EU. *Briefing Paper*, Number 9157, 5 March 2021.,10. https://researchbriefings.files.parliament.uk/documents/CBP-9157/CBP-9157.pdf (01.31.2022.)

[18] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ,OJ L 149, 30.4.2021,

necessary health care cover for British visitors to the EU, similar to previous EHIC arrangements.[19] But various reservations and exemptions apply. National immigration regulations, rules on work permits and employment regulations of the respective EU Member State must be observed. As a result, from 1 January 2021, UK business travellers are subject to the different regulatory regimes of each Member State. Likewise, EU business travellers are subject to the visa requirements specified in the UK's immigration rules.[20]

UK nationals and their family members (whether UK or TCNs) who arrive in the EU Member States *after 1 January 2021* do not fall under the Withdrawal Agreement. Instead, they are subject to the regular national immigration rules applicable to any TCN. UK nationals will have to follow the same procedures as any other TCN, they are no longer entitled to long-term residency, work, retirement, education or sponsoring of family members.[21]

II.3. Residence rights after Brexit

The Withdrawal Agreement provides for the following principle concerning rights of residence: Until 31 December 2020, the end of the transition period, rights of residence will be treated as if the United Kingdom were still an EU Member State.[22] Thus, during this period, there will be no change with regard to the rights of residence of UK nationals and their family members or their right to work in EU27. But once the transition period ends, individuals who took advantage of free movement before that date will occupy a unique position in the Member State of residence under the Withdrawal Agreement.

Article 15 of the Withdrawal Agreement confirms that EU/UK nationals and their family members acquire rights of *permanent residence* after accumulating five years continuous lawful residence in accordance with EU law, or the period specified in Directive 2004/38/EC (the 'Citizens' Directive), before or after the end of the transition period.

Article 16 Withdrawal Agreement allows those who have not yet resided in their host state for five years to acquire permanent residence under Article 15 when they meet those requirements.

So from 1 January 2021, persons who were entitled to live or work in one of the EU Member States until that date and who also exercised that right will have the same residence rights as they had before the withdrawal.[23]

The conditions for lawful residence are determined in the Withdrawal Agreement.[24] Generally, individuals meet these conditions if they are in one of the following categories by the end of the transition period:

– are workers or self-employed;

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[19] *Gower–Jozepa–Fella*, 2021.

[20] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, 10–2539,142.cikk

[21] Acosta, Diego: After Brexit: Could bilateral agreements facilitate the free movement of persons? *Discussion Paper, European Migration And Diversity Programme*, 7 September 2021, https://www.epc.eu/content/PDF/2021/Post-Brexit_agreements_DP.pdf. 6 (01.31.2022.)

[22] Withdrawal Agreement, Preambulum

[23] Withdrawal Agreement, Article 13(4).

[24] Withdrawal Agreement, Article 15(1).

– are not workers or self-employed, but have sufficient resources and comprehensive sickness insurance, for example, a retired person or a student;
– are close family members of another person who meets these conditions; or
– have already acquired the right of permanent residence.[25]

UK citizens who have not moved to a Member State before the end of the transition, will not be eligible for permanent residence under the Withdrawal Agreement, they will be considered third-country nationals and are under national immigration rules.[26] Unless otherwise negotiated, after the transitional period UK nationals and their family members have access to short-term stays of up to 90 days in any 180-day period, the European Union has adopted a regulation under which UK nationals will be exempt from the visa requirement if EU citizens are also exempted from the visa requirement in the United Kingdom.[27]

Residence rights under Article 13 of the Agreement apply to only one Member State. Therefore, it is not possible to apply for residence rights in one Member State on the basis of residence rights in another Member State.[28]

Article 18(1) of the Agreement allows the Member States and the UK to require citizens of the other party to the Agreement and their family members residing in its territory who wish to continue to reside there, to apply for a *new settled status* under the Agreement. By contrast, paragraph 4 of this Article allows citizens of both parties to require the host State to issue a certification document, which manifests this status. UK required all EU citizens to apply for settled status after Brexit.

III. Application process for a new residence status

The application process for post-Brexit residence permits (*Article 50 residence permits*) or *residence registration* options for UK nationals residing in the EU Member States before December 31. 2020, and their non-EU national family members, varies considerably between the EU Member States.

The Withdrawal Agreement offers Member States two possibilities, two different ways to require UK citizens to obtain permanent residence.

The 27 EU Member States may decide whether they require EU/UK citizens to apply for their new residency status (known as a *constitutive* system), or simply register (known as a *declaratory* system).[29]

Those member states have a declaratory residence system, where residence status is given directly to those in the scope of the Withdrawal Agreement by operation of the law and is not dependent upon completing administrative procedures. Those eligible for status have the right to receive a residence document confirming this and there may be an obligation under national law to register for a residence document, which evidences the status. [30]

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[25] Withdrawal Agreement, Article 10.
[26] Following of the Withdrawal Agreement, Article 10.
[27] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement,PE/50/2018/REV/1,OJ L 303, 28.11.2018, 39–58.
[28] Withdrawal Agreement, Article 14.
[29] House of Lords European Affairs Committee: Citizens' Rights, 1st Report of Session 2021–22. 23 July 2021. https://publications.parliament.uk/pa/ld5802/ldselect/ldeuaff/46/46.pdf, 9. (01.31.2022.)
[30] House of Lords, 2021.9.

The constitutive system means, that those in the scope of the Withdrawal Agreement only gain a residence status if they submit an application for a new residence status and the application is granted by the host state. Individuals who fail to apply by the deadline for applications will lose the protections afforded by the Withdrawal Agreement to their residence rights.[31]

The first group of thirteen countries are operating a *constitutive* system and setting deadlines. This means that UK citizens need to formally apply for their new permanent residence status – much as EU citizens need to apply here and are required to issue a document certifying this status.[32]

Article 18(1) of the Withdrawal Agreement sets out the criteria for the issuance of residence documents under a constitutive system. Article 18(1)(e) states: "The host State shall ensure that any administrative procedures for applications are smooth, transparent and simple and that any unnecessary administrative burdens are avoided."

The process typically requires the submission of documents such as one's passport and evidence of legal residence before the end of the transition period.[33] They will hold called a *Withdrawal Agreement residence permit,*[34] the document that represents their legal right to reside in the Member States.

The application procedure cannot be onerous or costly. States should also give individuals a minimum of 6 months after transition to make such an application.[35] So the deadline set by the Withdrawal Agreement for applications was 30 June 2021, to allow a six month *grace period* following the end of the transition period.[36]

The following EU Member States have adopted a stringent constitutive approach, meaning late applicants risk losing their status: France, Latvia, Malta, Luxembourg, Austria, Belgium, Denmark, Finland, France, Hungary, Netherland, Romania, Slovenia and Sweden. (32% of UK citizens)[37]

Ten countries are offering longer grace periods until either 30 September, 1 October or 31 December 2021. Failure to apply by the deadline will lead to an individual losing their right to reside in that country.[38]

The three countries which operated the 30 June deadline are France, Latvia, and Malta. The Netherlands and Luxembourg were originally operating to that deadline but extended it to 1 October and 31 December respectively.[39]

France, for example, had a deadline for applying of 30 June 2021, but UK nationals are only required to hold a residence permit from 1 October 2021. France will also allow late applications if applicants can give a reason for why they are submitting late.[40]

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[31] House of Lords, 2021.9.

[32] Foreign commonwealth development office: Specialised Committee on Citizens' Rights: third joint report on the implementation of residence rights under Part 2 of the Withdrawal Agreement, Published 28 May 2021, https://www.gov.uk/government/publications/residence-rights-implementation-of-the-withdrawal-agreement-part-2-citizens-rights-third-joint-report-april-2021/specialised-committee-on-citizens-rights-third-joint-report-on-the-implementation-of-residence-rights-under-part-2-of-the-withdrawal-agreement (01.31.2022.)

[33] Reland, Joël: UK citizens in the EU: what you need to know. *UK in a changing Europe, The authoritative source for independent research on UK-EU relations*, 27 Apr 2021. https://ukandeu.ac.uk/explainers/uk-citizens-in-the-eu-what-you-need-to-know/ (01.31.2022.)

[34] European Commission: Information about national residence schemes for each EU country. https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en (01.31.2022.)

[35] Reland, 2021.

[36] Reland, 2021.

[37] House of Lords, 2021.10.

[38] Reland, 2021.

[39] House of Lords, 2021.9.

[40] Reland, 2021.

The second group of fourteen countries – including Spain, Germany, Cyprus, Portugal and Italy – are operating a *declaratory system*.[41] Under this system, individuals who were legally resident in the country before the end of the transition period are automatically entitled to a new residence status. They do not lose their residency status if they miss the application deadline.

UK citizens may register for a residence card as proof of that status.

So there isn't registration obligation and issue, but if citizens request the host State has to issue a certification document, a residence document expressly identifying them as beneficiaries of the Agreement under Article 18(4).[42] (68% of UK citizens)[43] the Member States could require that individuals relying on free movement rights register and provide evidence that they have a job or sufficient means to support themselves. Those who already have a documented form of permanent residence will get the new national status free of charge, subject only to a security and criminality check, and verification of identity and residence.

Under declaratory systems, in some cases, there are deadlines for UK citizens to register their new residence status (for example 30 June 2021 in Slovakia). However missing the deadline can result only in a fine, and not in the loss of the rights which an individual has under the Withdrawal Agreement.

States with larger resident populations of UK citizens (including Spain, Germany and Italy) have generally the declaratory system, although there are exceptions to this rule, such as France and the Netherlands.[44] The precise requirements and processes vary country by country. For example, in Poland, there is no obligation for UK citizens to obtain a new residence status or document. In Spain, UK nationals can use existing residence documents until they expire, at which point they will need to obtain a new kind. British citizens in Germany without the necessary residence document are expected to notify the authorities by 30 June 2021.[45]

In practice, however, many UK nationals will still need a new residence document to access their rights. That means they will have to submit an application proving they were residents before 31 December 2020, albeit without the risk of losing one's rights permanently if an application deadline is missed.

While EU guidance says that under constitutive systems "failure to apply in time may lead to a loss of any entitlement under the Withdrawal Agreement"[46] in practice will depend on how individual countries operating constitutive systems choose to enforce their rules, including any appeal systems. The so-called *late application policy*[47] *allows making* an application for settled status after the deadline. Those individuals who make a late application must have a "good reason" for

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41 House of Lords, 2021,9.

42 Index questions for UK nationals and their family members residing in Spain, Ministerio de Política Territorial y Function Pública, 2021.3. https://www.mptfp.gob.es/dam/es/portal/delegaciones_gobierno/delegaciones/catalunya/servicios/extranjeria/guia_tramites/GUIA_BREXIT_ENG.pdf.pdf (31.01.2022.)

43 House of Lords, 2021.9.

44 UK Parliament: Implementing the Withdrawal Agreement: citizens' rights contents, 20 October 2020. https://publications.parliament.uk/pa/cm5801/cmselect/cmexeu/849/84905.htm (01.31.2022.)

45 Reland, 2021.

46 European Commission: Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020, 24 January 2020, Brussels. https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_104. (01.31.2022.)

47 European Commission: Information about national residence schemes for each EU country. https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en (01.31.2022.)

applying late to the scheme. If an individual does not have a good reason, then the late application will be refused.[48]

The examination by the Member State immigration authorities shall be carried out on a case-by-case basis and will be made upon an assessment of all the relevant circumstances and reasons for not respecting the deadline. This assessment will be done flexibly and pragmatically.[49]

In both constitutive and declaratory systems, UK nationals have a right to appeal if their application for a permanent residence status is rejected. They maintain their right to the residence until a final decision is made on their appeal unless they are considered a threat to public security.[50]

The European Commission will monitor the application of citizens' rights provisions in the EU to make sure they are consistent with the EU's treaties – of which the European Court of Justice is the ultimate arbiter.[51]

IV. The EU Settlement Scheme in the UK

The UK is implementing the citizens' rights provisions of the Withdrawal Agreement through the EU Settlement Scheme (EUSS). The EUSS is a *constitutive* system. This means individuals must successfully apply to the EUSS to have the protections set out in the Agreement.

With the deadline of 30 June 2021 could the EU citizens in the UK apply to the EU Settlement Scheme (EUSS), under which they are permitted to stay in the UK after the Brexit.[52] This is a national, separate legal scheme in the UK, the legal requirements of the EUSS are set out in full in Appendix EU of the Immigration Rules.[53]

The general closing date for making applications is over, the Home Office will only consider late applications in certain circumstances.

To get this status, "the EU citizen must have been resident in the UK before a specified date", only those EEA citizens are entitled who were residents in the UK before 1 January 2021, and who could demonstrate this was able to make an application under the EU Settlement Scheme.[54]

The so-called *settled* and *pre-settled* status[55] enables EEA citizens and their family members to continue to live, work and study in the UK. They will have the same access as they currently do to healthcare, pensions and other benefits in the UK too.

EU citizens and any of their non-EU family members who arrived before 31 December 2020, and have been continuously resident in the UK for five years by the time of their application, will be eligible for *settled status* enabling them to stay indefinitely. (officially called I*ndefinite Leave to Remain* (ILR).[56]

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[48] European Londoners Hub: Late applications to the EU Settlement Scheme, 15 December 2021. https://www.london.gov.uk/what-we-do/communities/european-londoners-hub/late-applications-eu-settlement-scheme (01.31.2022.)

[49] European Commission: Information about national residence schemes for each EU country. https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en (31.01.2022.)

[50] Reland, 2021.

[51] European Commission, 2020.

[52] Home Office: Immigration Rules, 25 February 2016., https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu (01.31.2022.)

[53] Home Office, 2016.

[54] Immigration Rules,2016,EU2.EU11, EU12.

[55] House of Lords, 2021.17.

[56] Immigration Rules, 2016, EU11.

EU Citizens, who not yet have been continuously resident here for five years by the time of their application, will be eligible for temporary status to remain resident in the UK until they have accumulated five years. The so-called *pre-settled status* allows them to stay until they have reached the five-year stay.[57] They can then also apply for settled status.

Those who have settled status/ILR can apply to naturalise as British citizens after demonstrating that they have been free from immigration restrictions for 12 months.[58]

Family members, any *family dependants* of a qualifying EU citizen in the UK before Brexit will be able to apply for settled status after five years, irrespective of the specified date.[59]

The EUSS checks three basic requirements: identity, UK residence, and *suitability*.[60] The suitability requirement covers matters such as criminal conduct or false information provided during an application.[61] There will be an exclusion for those who are serious or persistent criminals and those whom we consider a threat to the UK.

A curiosity that they will no longer require evidence that economically inactive EU citizens have previously held "comprehensive sickness insurance" to be considered continuously resident'.[62]

The settled EU citizens will continue to have access to the same UK benefits on the same basis before the Brexit. If they later get settled status, they will have access to benefits on the same terms as comparable UK residents. These rights and access will implicitly not be offered to those who arrive after the specified date.[63]

Those EU citizens who arrive after the specified date will be allowed to remain in the UK for at least a temporary period and may become eligible to settle permanently, depending on their circumstances – but this group should not expect guaranteed settled status.[64]

In the case of EU citizens (and their family members) who, as of 31 December 2020, had not met the criteria to be granted the right to reside in the United Kingdom, the *Trade and Cooperation Agreement* between the EU and the United Kingdom forms the basis for access to the labour market, healthcare provision, education and benefits, and for family reunion rights.[65] From 1 January 2021, anyone wishing to take up residence in the United Kingdom, e.g. to work, study or join their family, generally has to apply for a visa in advance. Set criteria have to be met for a visa to be granted. Family members arriving after Brexit will be subject to the same immigration rules, which are for EU citizens who arrive after the specified date.[66]

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[57] Immigration Rules, 2016, EU14.

[58] The EU Settlement Scheme: EU Settled and Pre-Settled Status, 2021. https://www.carterthomas.co.uk/our-work-uk-immigration/personal-immigration/eea-nationals-family/eu-settled-and-pre-settled-status-scheme/ (01.31.2022.)

[59] Immigration Rules, 2016, EU 12,14A.

[60] Immigration Rules, 2016, EU15.

[61] House of Lords, 2021.17,56. According to Home Office statistics, of the 55,590 applications refused in the period to 31 March 2021, more than 99% were refused on eligibility grounds and fewer than 1% were refused on suitability grounds. In https://publications.parliament.uk/pa/cm5801/cmselect/cmexeu/849/84905.htm, 17. (01.31.2022.)

[62] Peers, Steve: The Brexit talks: opening positions on the status of UK and EU citizens. *EU Law Analysis. Expert insight into EU law developments*, 30 June 2017. http://eulawanalysis.blogspot.com/search?q=Eu+settled (01.31.2022.)

[63] Peers, 2017.

[64] Peers, 2017.

[65] Gower–Jozepa–Fella, 2021.

[66] Peers, 2017.

V. A better offer for UK citizens – The EU Long Term Residence

EU Directive long-term residence for non-EU citizens could be relevant for some UK citizens living in an EU Member State after Brexit. This Directive[67] establishes the rights and conditions for granting the *long-term resident status* of third-country nationals who meet several conditions. Persons with this status are entitled to equal treatment as nationals in a range of areas in the Member States. The most important regulation: granted a conditional right to free movement within the EU and allows non-EU citizens to move between the Member States.[68]

The basic rule is that third-country nationals (UK nationals) are entitled to such status after residing "legally and continuously for five years in the territory of the Member State concerned" before they apply for status.[69]

Long-term resident status shall be denied on grounds of insufficient resources or lack of sickness insurance.[70] Member States may require applicants to fulfil integration conditions, or refuse to grant status on grounds of public policy or public security.[71]

The Directive also sets out detailed rules on the procedure for acquisition and withdrawal of long-term residence status. According to the CJEU, a third-country national does not obtain LTR status automatically but has to apply for it.[72]

The long-term residence status entitles its holders to equal treatment with nationals in several areas: employment and self-employment; education and vocational training; recognition of diplomas; social security, social assistance, and social protection 'as defined in national law'; tax benefits; access to goods and services; freedom of association; and free access to the territory.[73]

The most important; this status grants a conditional right to free movement within the EU. A long-term resident shall acquire the right to reside in the territory of an MS other than the one which granted him the long-term residence status, for a period exceeding three months.[74]

There are several restrictions compared to EU free movement law: the Member States can impose labour market tests limiting movement on economic grounds, or an overall quota on the numbers of third-country nationals.[75]

The right of residence can be exercised if the long-term resident is pursuing an economic activity or a non-economic activity, but the "second" Member State can insist on several conditions.

Long-term residents can bring with family members as defined by the EU's family reunion Directive[76], but the second Member State retains the option to decide whether to admit other family members.[77] Sickness insurance and sufficient resources tests can apply.[78] Admission of

[67] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44–53)

[68] Schiffner, Imola: Denizenship-A New Fundamental Status in The EU? *Marmara Journal of European Studies*, Vol. 26, No. 2. 2018. 69–82. https://avrupa.marmara.edu.tr/dosya/avrupa/mjes%20arsiv/vol%2026-2/3_Schiffner.pdf (01.31.2022.)

[69] Council Directive 2003/109/EC, Article 4(1).

[70] Council Directive 2003/109/EC, Article 5(1)b.

[71] Council Directive 2003/109/EC, Article 5(2).

[72] C-40/11 *Yoshikazu Iida kontra Stadt Ulm*, 2012. november 8., EU:C:2012:691.

[73] Council Directive 2003/109/EC, Article 11.

[74] Council Directive 2003/109/EC, Article 14(1).

[75] Council Directive 2003/109/EC, Article 14(3).

[76] Council Directive 2003/86/EC,22 September 2003 on the right to family reunification,OJ L 251,3.10.2003, 12.(which is more restrictive than the family reunion rules in EU free movement law)

[77] Council Directive 2003/109/EC, Article 15.

[78] Council Directive 2003/109/EC, Article 15(2) b.

long-term residents and their family members can also be refused not only on grounds of public policy and public security but also on public health.[79]

There are also parallel national laws on securing long-term residence for non-EU citizens, which might be more appealing in practice for UK citizens, particular if it's easier to apply under those laws. Nevertheless, it includes limited and stricter provisions on movement to the other Member States. (Not the same as the EU free movement rights but are better than nothing at all.)[80]

The EU rules will be more relevant to those UK citizens who would want to move to another Member State in future, even if there are stricter conditions of doing so as compared to EU free movement law. On the whole, this Directive facilitates the security of residence, equal treatment, and free movement of third-country nationals and so of UK nationals, more than the new settled status provided for.

VI. Conclusion

Brexit. A small word with a potentially big consequence: the end of free movement and residence for UK citizens in the EU Member States. This could have significant consequences for UK citizens who have built their lives in the EU and are now experiencing uncertainty regarding their ability to continue those lives as before. Nevertheless, the Withdrawal Agreement tries to safeguard the right to stay and continue their current activities for over 3 million EU citizens in the United Kingdom, and over 1 million UK nationals in EU countries.

The citizen's right provisions of the Agreement grant a new residence status for the UK citizens and family members.

In relation to the systems operating in the EU Member States to allow UK citizens to access their rights, the picture is currently mixed. There are two systems for UK citizens to have permanent residence, the so-called constitutive system and the declaratory system.

The application deadlines passed in most EU Member States. While the data shows that some EU countries are progressing well with their applications from UK citizens, there are problems in others, including ongoing tensions over the implementation of the system and with communications to UK residents about how those systems work.

Some UK citizens in the EU are more at risk of losing their rights than others, particularly those in vulnerable groups such as the elderly and digitally challenged.

Member States may create or maintain national systems that are more favourable than the rules in Chapter II, but the acquisition of status under such more favourable rules will not confer the right of residence in the other Member States. The so-called EU LTR status will be more appealing for any UK citizen who contemplates moving to another Member State.

Overall, therefore, under the new, post-Brexit rules, thousands of individuals will be affected by, for example, much stricter family reunion rules and the lack of paths for labour mobility, and it would create a dilemma for a UK citizen living in one of Member States in practice. So the mobility and residency of UK citizens have to be part of the ongoing negotiations on future relations between the UK and the EU.

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[79] Council Directive 2003/109/EC, Article 18.

[80] Peers, 2018., Schiffner, 2018.

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National Security and its Implication on Expulsion Decisions in Hungary during the Pandemic

I. Introduction

National security is a core value for all States at all times, however, the global pandemic has turmoiled it just as it had done for almost all aspects of life. Shutting down of borders and pandemic measures from curfews to serious restrictions to the freedom of movement of persons were ordered to protect national health and security. Pandemic has, pandemics have a range of negative social, economic and political consequences and it is generally considered a threat to national security.[1] Besides these obvious consequences, the presence of national security issues in an administrative authority procedure has serious procedural law guarantee concerns: the dichotomy of State security and individual procedural rights. It is especially visible in expulsion cases of third-country nationals. According to a recent comparative study of 2021, it is not only a Hungarian but also a Polish and Cyprian practice.[2]

The present article is based on the study[3] of national security-related expulsion cases of 2020 and the first part of 2021 before the Hungarian Constitutional Court as the competent organ to review constitutional complaints in case of the alleged unconstitutional nature of court decisions; the Curia judgments as of the final and binding decision in case of an appeal against significantly problematic lower court decisions and the Metropolitan Court judgments as reviews of expulsion decisions of immigration authorities.[4] Ironically, during the highest waves of the pandemic, the core of the cases was not the health-related problem but procedural ones. In the following lines, the paper will explore States rights and obligations in the question of who to welcome in their territories and what are the acknowledged means of expulsing an alien; and later the Hungarian practice is shown during 2020–21 in the view of national security concerns and the identified legal challenges.

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[1] Oshewolo, Segun – Nwozor, Agaptus: COVID-19: Projecting the National Security Dimensions of Pandemics. *Strategic Analysis*, Vol. 44. No. 3. 2020. 269–275.

[2] Matevžič, Gruša – Białas, Jacek – Charalambidou, Nicoletta – Barcza-Szabó, Zita: *The Right to Know. Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*. Hungarian Helsinki Committee, 2021. https://helsinki.hu/en/wp-content/uploads/sites/2/2021/03/Advocacy-Report-Right-To-Know.pdf (05.01.2022.)

[3] The study is to be published in Niziol, Krystyna – Maksymowicz-Mróz, Natalia – Peno, Michael (eds): *Covid-19 Pandemic. The Response of the State of Central Europa. Legal, Sociological and Economic Aspects*. PIE Lang, 2022.

[4] The above-mentioned Constitutional Court decisions and the judicial decisions are available for the public in an anonymized version [see: Alkotmánybíróság. Ügykereső. https://www.alkotmanybirosag.hu/ugykereso and Bírósági Határozatok Gyűjteménye https://birosag.hu/birosagi-hatarozatok-gyujtemenye] Administrative authority decisions are not public.

II. Do States have legal obligations towards unwanted foreigners on their territory?

II.1. The nature of *national security* as a legal fact in brief

Threats to national security may vary in character and be unanticipated or difficult to define in advance,[5] and States are recognized to have a relatively large measure of discretion when evaluating threats to national security and when deciding how to combat these.[6] Meantime, State authorities and intelligence communities no longer have 'the last word' when invoking national security and using intelligence data in their actions and decisions: their practice shall meet their international and EU law obligations. According to the European Council requirements expressed in the legal practice enshrined in the case-law of the European Court of Human Rights (ECtHR), the requirement of foreseeability in substantive law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds.[7] The basic standard when assessing national security information is the so-called "*in accordance with the law*" *test*, consolidated by both the ECtHR and the CJEU. This test requires national law to meet several essential quality requirements: the law must thus be adequately accessible, clear and foreseeable.[8]

The pandemic has caused serious challenges for States and many of them including Hungary declared a *state of emergency*.[9] Meantime, it shall be noted that a foreigner's qualification of being a threat to national security or public order, and those kinds of threats to national security that give rise to the declaration of *public emergency* with all its consequences as putting aside the ordinary legal order, has no overlapping scope of application. Overall, the threat that gives rise to the declaration of the state of emergency is of a larger volume than that kind of threat that may give rise to the expulsion of a foreigner. Meantime, the qualification of a foreigner's presence on

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[5] *C.G. and others v. Bulgaria*, App. no. 1365/07, ECtHR, 24 July 2008. 40.

[6] *National security and European case-law*. Research Division, Council of Europe, European Court of Human Rights, Strasbourg, 2013. 2. In 2014 a study was made on the conceptual features of national security in selected EU Member States and it pointed out that it would be very difficult to propose a common EU definition of national security given that Member States use different terminology such as "state interests", "state privilege" or "secret défense" in French. Instead, participants considered that it would be wiser to propose a definition of what national 'should not be'. For instance, national security should never be invoked when a criminal act has been committed. Bigo, Didier – Carrera, Sergio – Hernanz, Nicholas – Scherrer, Amandine: *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges. Study for the LIBE Committee*. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs Justice, Freedom and Security. PE 509.991. Brussels, 2014. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf (17.11.2021.) 85.

[7] *Ljatifi v. the former Yugoslav Republic of Macedonia*, App. no. 19017/16, ECtHR, 17 May 2018. 35–53.

[8] Bigo et al. 2014. 45–46.

[9] Of the 17 Member States with a constitutional emergency clause suitable to respond to a pandemic, only 10 chose to activate it in the first wave of the pandemic (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain), although often in combination with other arrangements. Seven Member States (Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia) chose not to declare a state of emergency. States of emergency were initially declared between 11 and 19 March and lifted between 13 May and 24 June 2020. Crego, Maria Diaz – Kotanidis, Silvia: *States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic*. EPRS | European Parliamentary Research Service, 2020. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf (17.11.2021.) I.; see an overview of constitutional/statutory framework of the containment measures at the national (not regional) level during the first wave of the pandemic at 11–14.

the territory of a State can be qualified as a threat to national security independently from the actual situation of the State, whether it is a state of emergency or not.

At the same time, being in a state of emergency when the national security concerns are extremely high, States not just only tend to act in a more precautious way when security issues arise but if the nature of problems leads to the introduction of an extraordinary legal order, States are empowered to put aside or restrict the prevailing human rights including certain procedural guarantees. It is acknowledged by the *European Convention on Human Rights* (ECHR, Article 15), the *International Covenant on Civil and Political Rights* (Article 4) and also by the *American Convention on Human Rights* (Article 27), so eventually, a general standard is seen,[10] however, all derogations shall be formulated and applied under strict limitations.[11] It includes the guarantee of those human rights that are not subject to derogation and as the Venice Commission also found, the rights to a fair trial and effective legal remedies, as enshrined in Articles 6 and 13 of the ECHR, continue to apply during a state of emergency.[12]

Apart from the dichotomy of ordinary functioning and the state of emergency, a common feature of national security-related documents is that they fall under special legislation such as enhanced data protection rules including *classification*. As national security can be invoked to determine the classification of information and make evidence as *state secrets* in proceedings, the fundamental rights and rule of law compliance may give an impression to be in danger. Therefore, the legal instruments in the frames of procedural guarantees have a crucial role in avoiding arbitrary decisions. Applicants who are deemed to pose a threat to national security by the national authorities do not receive any reasoning (or the reasoning is insufficient) because of the classified documents on why and how they threat national security, and then they are not in a position to submit arguments to contest its findings.

The following subchapter briefly explores them in the view of individual rights, especially foreigners.

II.2. National security implication as a ground for expulsion

According to the *European Court of Human Rights* (ECHtR), expulsion is an autonomous concept that is independent of any definition contained in domestic legislation and, except for extradition, any measure compelling the alien's departure from the territory where (s)he was lawfully resident,

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[10] See and compare the parties to these conventions: Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, 213 UNTS 221. https://treaties.un.org/pages/showDetails.aspx?objid=0800000028014a40b (17.11.2021.); International Covenant on Civil and Political Rights New York, 16 December 1966, 999 UNTS 171. https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (17.11.2021.); American Convention on Human Rights. San José, 22 November 1978, 1144 UNTS 123. https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1 (17.11.2021.)

[11] Schreuer, Christoph: Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights. *Yale Journal of World Public Order*, Vol. 9. No. 1. 1982. 116.; https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e (17.11.2021.)

[12] European Commission for Democracy Through Law (Venice Commission), Interim Report on the Measures Taken in the EUMember States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law And Fundamental Rights Adopted by the Venice Commission at its 124th online Plenary Session (8–9 October 2020.) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e (17.11.2021.) 21. point 77.

constitutes 'expulsion'.[13] This definition coincides with the EU concept of expulsion as a process of a third-country national going back whether in voluntary compliance with an obligation to return, or enforced.[14] Concerning expulsion based on being a threat to national security is a general clause against all non-nationals, but EU citizens and their family members enjoy a wider range of protection against the discretion of the State, while ordinary third-country nationals are in a less favourable situation when national security concerns emerge.[15] Several categories of third-country nationals can be distinguished according to the extent of EU law protection,[16] but even in the case of the least protected group, despite the wider discretionary powers of the State, automatic decision-making is prohibited and decisions are bound by the principle of proportionality. Member States also must ensure the right to effective judicial protection as included in Article 47 of the EU Charter of Fundamental Rights, also concerning immigration decisions where national authorities have wide discretionary powers.[17]

Although (Member) States have discretionary power to decide whether to expel an alien but based on human rights approach, this power must be (a) exercised in such a way as not to infringe the *human rights* (under the ECHR) of the person concerned;[18] and (b) practised after examining *personal circumstances* of an alien and, consequently, enabling them to put forward their arguments against the measure taken by the relevant authority;[19] and (c) taken by the competent authority following the *provisions of substantive law and with the relevant procedural rules*".[20]

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[13] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights. Procedural safeguards relating to expulsion of aliens. First edition – 30 April 2021. Council of Europe/European Court of Human Rights, Strasbourg. https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_7_ENG.pdf (17.11.2021.) [ECtHR Guide] 8.

[14] 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, 24.12.2008. 98–107. Article 3.3.

[15] There is a distinction: the r*eal and actual threat* v. the *potential threat* to public security. In case of EU citizens and family members, the threat to the public security be based on personal conduct and it must be a genuine, present and serious one to be qualified enough reason for expulsion. For a third country national, the potential threat to the public security is enough and although it must be due to a personal conduct, there are several factors that the authority shall deliberate before the decision is taken. There is a difference on the procedural guarantees and the requirements for the judicial review. See, C-165/14, *Alfredo Rendón Marín v Administración del Estado*, paragraph 84; and of 13 September 2016, EU:C:2016:675. 56.; 84–86. cf. C-544/15, *Sahar Fahimian v Bundesrepublik Deutschland*, CJEU 4 April 2017, ECLI:EU:C:2017:255. 50. See also, Stehlík, Václav: Discretion of Member States vis-à-vis Public Security: Unveiling the Labyrinth of EU Migration Rules. *International and Comparative Law Review*, Vol. 17. No. 2. 2017. 137–138.

[16] As categorised by Boeles et al., the first group consists of third-country nationals covered by Article 27(2) Citizens Directive, or by an EU legal instrument on the basis of which the CJEU has applied this provision by analogy. The second group consists of third-country nationals covered by the Family Reunification Directive. The third group consists of third-country nationals who apply for a visa or are covered by the Schengen Borders Code. Boeles, Pieter – Brouwer, Evelien – Groenendijk, Kees – Hilbrink, Eva – Hutten, Willem: *Public Policy Restrictions in EU Free Movement and Migration Law. General Principles and Guidelines*. Meijers Committee, Amsterdam, 2021. https://www.commissie-meijers.nl/wp-content/uploads/2021/10/meijers_committee_-_public_order_in_eu_migration_law.pdf (17.11.2021.) 33.

[17] Boeles et al. 2021. 57.

[18] *Bolat v. Russia*, App. no. 14139/03, ECtHR 5 October 2006. 81, and *Nowak v. Ukraine*, App. no. 60846/10, ECtHR 31 March 2011, 81.; *cf*. Art. 1. of Directive 2008/115/EC which declares that the Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, *in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations*. [emphasise added by author]

[19] See, ECtHR Guide 2021. 5.

[20] *Bolat v. Russia*, supra, 81.

This latter includes, inter alia, that the expulsion is regulated and exercised with sufficient minimum safeguards against arbitrary action by the authorities.[21] On procedural grounds, it means, according to Article 1 of *Protocol No. 7 to the ECHR*, that the alien concerned must be able to *submit reasons against* his expulsion; to have his case *reviewed*, and to be *represented* for these purposes before the competent authority or a person or persons designated by that authority. These are cumulative conditions of a rightful procedure of expulsion.[22]

EU has a common immigration and asylum policy that frames measures against aliens and the procedural guarantees coincide with the requirements of the ECtHR. Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a *fair and transparent procedure*. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that *consideration should go beyond the mere fact of an illegal stay*.[23] Decisions shall be issued in writing and *give reasons in fact and law* as well as information about available legal remedies. However, the information on reasons may be limited where national law allows for the right to information to be restricted, in particular, to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences. Meanwhile, Member States shall provide, upon request, a written or oral translation of the main elements of decisions including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.[24] The third-country national concerned shall be afforded an *effective remedy* to appeal against or seek review of decisions, where the authority or body shall have the power to review decisions including the possibility of temporarily suspending their enforcement unless a temporary suspension is already applicable under national legislation. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.[25]

III. The Hungarian practice of national security-related expulsion

During the examined period of 2020 and the first half of 2021, the cases can be divided into two main groups: (a) classical cases of before immigration authority and (b) cases that emerged upon the police proposal to expel foreigners based on ongoing criminal proceedings for (alleged) breach of pandemic control measures.

III.1. Cases of the immigration authority

According to the legislation in force, when the immigration (and also the asylum) authority decides upon the presence of a foreigner in Hungary, it shall consult either the *Agency for Constitutional Protection* or the *Counter-Terrorism Centre*. These are special authorities to investigate the risk posed by the presence of the foreigner, their professional statement is binding upon the immigration

[21] *Ahmed v. Romania*, App. no. 34621/03, 13 July 2010. 53–55.

[22] Schabas, William A.: *The European Convention on Human Rights. A Commentary*. Oxford University Press, Oxford, 2017. 1130–1131.

[23] Directive 2008/115/EC, preamble (6).

[24] Directive 2008/115/EC, Article 12.1–3.

[25] Directive 2008/115/EC, Article 13.

authority when it decides whether to issue permits to stay or to expel a foreigner.[26] The *Police* can also be involved as such as investigating authority during the procedure.[27]

III.1.1. Rules of aliening policy in case of threat of national security

(a) Procedure of the first instance

According to Article 5 point g) of Act CXXV of 1995 on national security services, it is primarily the task of the *Agency for Constitutional Protections* to pursue the inspection of aliens, and to formulate a position whether the alien threats the *public order, public and national security* of Hungary. If so, the alien is a *persona non grata*; such documentation of its activity is classified[28] and can be consulted by special authorisation granted by the classifier upon request.[29] Disclosure and abuse of classified documents is otherwise a crime.[30] The access permit is the manifestation of the right to information self-determination, so if it is denied, it shall be is subject to legal remedy.[31] This legal remedy shall go beyond formal examination and ensure a substantive examination of the justification as expressed in 2004 by the Constitutional Court.[32] Neither the immigration authority nor the trial court is in a position to decide to reveal the classified information; the permission to get access is subject to a separate and independent procedure opened before the classifier. The court may examine the file to ensure the effective legal protection of the foreigner and shall verify that the information contained therein is a sufficient reason for the action of the immigration authority. The court may not review the data and conclusions of the national security audit, it may only decide whether the contents of the *proposal are sufficiently supported* by the data.[33]

For that reason, the court ensures legal protection by inspecting the file containing classified information and verifying whether the opinion of the *Agency for Constitutional Protections* proved the existence of a risk to national security. However, because of the classified nature of the documents, to court is not entitled to disclose to the foreigner the classified information or to check its adequacy and it is not entitled to override it in substance. The judicial review is limited to verifying the existence of an opinion of the *Agency for Constitutional Protections*

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[26] According to Gov. Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals [Executive Decree] Article 97, in proceedings for the issue or withdrawal of the interim permanent residence permits, national permanent residence permits and EC permanent residence permits of third-country nationals, in order to determine as to whether the residence of a third-country national is considered a threat to the national security of Hungary, the Government shall appoint the *Agency for Constitutional Protections* and the *Counter-Terrorism Centre* to function as the competent authority in the first instance, and the minister in charge of supervising the national security services in the second instance. As Article 165, the Government shall appoint the *Agency for Constitutional Protections* and the *Counter-Terrorism Centre* to function as the competent authority in proceedings for the recognition of stateless status.

[27] According to Executive Decree Article 97/A, in proceedings for the issue or withdrawal of the interim permanent residence permits, national permanent residence permits and EC permanent residence permits of third-country nationals, in order to determine as to whether the residence of a third-country national is considered to constitute a threat to the public security of Hungary, the Government shall appoint the relevant county police headquarters to function as the competent authority in the first instance, and the National Police Headquarters in the second instance.

[28] Act CLV of 2009 on the protection of classified data [Act CLV of 2009] Article 5. § (1) c).

[29] Act CLV of 2009, Article 11 (1).

[30] *Cf.* Act C of 2012 on the Criminal Code, Article 265.

[31] See the Supreme Court statement: Kúria Kfv.I.37.381/2017/6., repeated in Kfv.II.37.983/2020/10.

[32] CC Decision 12/2004. (IV. 7.) ABH 2004. 225.

[33] Kúria Kfv.VI.37.640/2018/9., Kfv.III.37.039/2013/6.; and 15.K.701.318/2020/18. esp. [15]

and a finding of a risk to national security as a fact. The judicial practice is unequivocal that the sovereignty of the State gives national security a priority over the right to information of the alien and it is the prerogative of the *Agency for Constitutional Protections* to examine and evaluate the facts related to it. Therefore, the court is not entitled to reconsider the Agency's statements and has no competence to review the classified information either, it is merely entitled to ascertain whether the information contained in the classified documents supported the proposal of the Agency and its conclusions, or not.[34]

(b) Legal remedy against the factuality of an expulsion decision

As expressed in the *ZZ case* of 2013 by the CJEU if the parties to the procedure an opportunity cannot have to examine the facts and documents on which decisions concerning them are based, and on which they are therefore unable to state their views, their right to an effective legal remedy is infringed.[35]

The court's examination may include whether the formal and substantive requirements have been fully complied with during the procedure: that is, (a) the classification and restrictions on the communication were imposed only because of a procedure specified by law, and (b) whether the restriction is necessary and proportionate to the aim pursued by the restriction.[36]

Following the legal interpretation of the Constitutional Court established in 2014, in deciding whether to classify data in the public or public interest, the classifier shall consider not only the public interest in the classification but also the public interest in disclosing the data to be classified and may decide on the classification only if the purpose of the classification is proportionate to the public interest in the classified information.[37]

According to the Act on classified data, the classification aims to protect the following category of public interest of Hungary: sovereignty, territorial integrity; constitutional order; defence, national security, law enforcement and crime prevention activities; justice, central financial, economic activity; foreign or international relations; and the insurance the smooth operation of a public body free from unauthorized external influences.[38] Data can only be protected by the classification (1) if the protection covers any of the above-mentioned public interest, (2) if the maladministration[39] of the data damages the protected public interest which could be avoided by classification; and (3) it is necessary to limit the disclosure of the data and their disclosure to authorized persons for a specified period. Data can only be protected with classification if all these legal conditions are met and only for the most necessary time.[40]

The Act on classified data provides for the usage of the test of *necessity and proportionality* when the right to information self-determination is restricted.[41] The control over the classification is ensured by the judicial review by also applying the same test. The court examines the existence of the above-mentioned conditions and for that end, the court has accession to the classified

[34] Kúria Kfv.II.37.983/2020/10. [16].
[35] C-300/11, *ZZ v Secretary of State for the Home Department*, CJEU 4 June 2013, ECLI:EU:C:2013:363. 56.
[36] Kúria I.Kfv.37.468/2021/7/II. [30].
[37] See, CC Decision 29/2014. (IX. 30.) ABH 2014. 1297–1315.
[38] Act CLV of 2009, Article 5 (1).
[39] Maladministration is done by the disclosure, unauthorized acquisition, modification or use of the data, making it available to an unauthorized person and making it inaccessible to the person entitled to it. Act CLV of 2009, Article 5. (2) b).
[40] Act CLV of 2009, Article 5 (2)–(3).
[41] Act CLV of 2009, Article 2 (1).

information.[42] Although the judicial decision shall not reveal any of the classified information, it must include a justification showing the causal link between the disclosure of the data and the public interest protected by the classification.[43] The *right to a fair procedure* is thus ensured by allowing the court to a substantial review of the claim but not revealing the classified information.[44]

The *protected public interest* can be embodied in several ways, its classic case is when it applies to a specific person, but sometimes it protects the technique, method, and direction of the procedure itself. When the authority or the court carries out the *necessity-proportionality test*, only these can be considered and cannot include the personal circumstances of the claimant's claim. In the statement of reasons for its decision, it cannot even indicate whether they were involved. Consequently, the reasons for a decision and judgment may not go beyond a reference to the legal text, an indication of the public interest to be protected based on which the access request is refused and disclosure, unauthorized acquisition, modification or use of the data by unauthorized persons, and whether making it inaccessible to the person entitled to it is detrimental to the public interest which may be protected by the classification.[45] At least the detailed explanation on the accessibility of classified information is significantly different from the one-sentence reasoning in the *Iranian cases (see below)* with a reference to the obligatory nature of police recommendation that makes the expulsion legally based.

The reasoning of the immigration authority decision may not include the description of the data and specific conclusions contained in the classified document, however, as it follows from the second sentence of Section 11 (2) of the Act on classified data, *the reasoning must contain an explanation* which shows the *causal connection* of the knowledge of the data with the damage to the public interest protected by the classification.[46] The restriction on the publicity of the data thus stays in conformity with the effective judicial review as the court may study the classified data and can compare the claims of the alien and the reasons of classification in the particular case to verify the deliberation on the restriction of publicity.[47]

The request of the alien to study the reason why (s)he is a threat to national security may be then refused and the court has the power to review only the causation between the refusal and the national interest to be protected. The review checks whether the formal and substantive requirements have fully complied with the course of the proceeding of classification and the classification is well-grounded or not.[48] This interpretation of grounding conforms with the EU requirements of effective legal remedy expressed in Article 47 of the Charter and also in the judicial practice. If the judicial review is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken concerning him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and to put the latter fully in a position in which it may review the lawfulness of

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[42] Act CLV of 2009, Article 11 (3).
[43] Act CLV of 2009, Article 11 (2) cf. Kúria I.Kfv.37.086/2021/9 [27].
[44] Kúria I.Kfv.37.086/2021/9 [28].
[45] CC Decision 29/2014. (IX. 30.) ABH 2014. 1309–1310. [57], [61], [63] and Kúria I.Kfv.37.468/2021/7/II. [31]; Kúria I.Kfv.37.086/2021/9 [25].
[46] Kúria I.Kfv.37.468/2021/7/II. [32].
[47] Kúria I.Kfv.37.468/2021/7/II [32]–[33].
[48] Kúria I.Kfv.37.086/2021/9 [24]; Metropolitan Court (Fővárosi Törvényszék)15.K.701.318/2020/18. [16].

the national decision in question.[49] If in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.[50] The relevant Hungarian law is in harmony with these requirements,[51] however, many claims reveal that foreigners have general problems with the independent nature of the procedure of access to classified documents. It seems to be a procedure is in vain[52] or the circumstances make it impossible to open it,[53] or simply the explanation of the courts' argumentation concerning the availability of the classified information by the Act CLV of 2009 when the reasons of being categorised as a threat to national security are claimed for legal remedy,[54] suggests that probably the administrative procedure did not pay (enough) attention to inform the foreigner on this aspect of the procedure.

Therefore, the right to information self-determination and the right to know the reasons for an administrative decision is subordinated to the national interest of the state to its security and also fulfils the requirements of effective legal remedy,[55] at least formally.[56] A case with the same core issue is pending before the Court of Justice of the European Union.[57]

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[49] C-300/11, supra, 53–54; Joined Cases C-372/09 and C-373/09 *Peñarroja Fa*, CJEU 17 March 2011, ECLI:EU:C:2011:156. 63. and C-430/10 *Hristo Gaydarov v Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti*, CJEU 17 November, 2011ECLI:EU:C:2011:749. 41; C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, CJEU 15 October 1987, ECLI:EU:C:1987:442. 15. and Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, CJEU 3 September 2008. ECLI:EU:C:2008:461. 337.

[50] C300/11, *supra*, 57.; see also Rák-Fekete, Edina: A tisztességes hatósági ügyintézéshez való jog érvényesülése a gyakorlatban. *Közjogi Szemle*, Vol. 13. No. 3. 2020. 96.

[51] *Cf. Muhammad and Muhammad v. Romania*, Appl. no. 80982/12, ECtHR 15 October 2020, 44–45.

[52] Metropolitan Court 49.K.703.152/2021/8 [7]. See also: Kfv.I.37.127/2021/10.; Kfv.I. 37.468/2021/7. According to the information received through Hungarian Helsinki Committee Freedom of Information requests to the Counter-Terrorism Office and the Constitutional Protection Office on 8 October 2020 and 4–5 August 2021, none of the access requests submitted to the agencies were granted in 2019, 2020 and first half of 2021. National Security Grounds for Exclusion from International Protection as a Carte Blanche: Hungarian asylum provisions not compliant with EU law Information Update by the Hungarian Helsinki Committee 20 December 2021. https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/Info-Note_national-security_exclusion_FINAL.docx.pdf (05.01.2022.) 1. footnote 5.

[53] The procedure does not allow representation, it shall be claimed in person. See, Kúria Kfv.II.37.075/2021/9. [16].

[54] See the following Metropolitan Court cases for example: 49.K.703.152/2021/8.; 16.K.702.875/2021; 15.K.701.241/2020/27.; 15.K.701.318/2020/18.; 13.K.701.350/2021/7.; 16.K.702.875/2021.; 16.K.707.269/2020/18.; 9.K.707.924/2020/10. Kúria cases: Kfv.II.37.064/2021/9.; Kfv.II.37.075/2021/9.; Kfv.I. 37.086/2021/9.; Kfv.I.37.127/2021/10.; Kfv.II.37.862/2020/11.; Kfv.II.37.863/2020/15.; 37.533/2020/9.; Kfv. 38.329/2018/10.

[55] *Cf.* C-362/14, *Maximillian Schrems v Data Protection Commissioner*, CJEU 6 October 2015. ECLI:EU:C:2015:650. 95.; Gutman, Kathleen: The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come? *German Law Journal*, Vol. 20. No. 6. 2019. 893–894. https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-right-to-an-effective-remedy-and-to-a-fair-trial-in-the-caselaw-of-the-court-of-justice-of-the-european-union-the-best-is-yet-to-come/B52CC437EF039A8A478C901B29A51C59 (17.11.2021.)

[56] In this context, compare the development of the legal framework: Kerekes, Zsuzsa: State of play – az információszabadság Magyarországon 2015 őszén. *Infokommunikáció és jog*, Vol. 12. No. 64. 2015. 140–141.

[57] The request for a preliminary ruling from the Fővárosi Törvényszék (Metropolitan Court) refers to the application of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for

(c) (Un)contestability of the qualification as a threat to national security?

The court has no jurisdiction over the qualification of the data; however, it may request the review by the *National Data Protection and Freedom of Information Authority* (National Data Protection Authority), which is entitled to pursue an authority procedure to review the legality of classification of the data if it is probable that the classification of the classified information concerned is unlawful. At the request of *the National Data Protection Authority*, the classifier must provide detailed reasons for the classification of the data in writing.[58]

The Act on the right of informational self-determination and on freedom of information ensures the legal contestability of the classification by the *administrative proceedings for the control of secret (titokfelügyeleti hatósági eljárás)*[59] Even upon judicial request or the case of notification, the procedure of the National Data Protection Authority is *ex offitio*.

In the administrative proceedings for the control of secrets, the classifier is construed as the client and the witness, the expert and the holder of the evidence may be questioned in the process of ascertaining the relevant facts of the case even if (s)he was not released from the obligation of confidentiality relating to classified national security information.[60] The length of the procedure is set for ninety days.[61]

The National Data Protection Authority (a) may order the classifier to modify the level of secrecy or declassify the information or (b) may establish that the classifier acted in compliance with the regulations on the classification of national security information.[62] The decision may be challenged by the classifier within sixty days from the time of delivery and the claim for review. The legal remedy claim has a suspensive effect on the decision of the National Data Protection Authority.[63]

granting and withdrawing international protection (Asylum Procedure Directive) in view of Article 47 of the Charter of Fundamental Rights of the European Union. The question is where the exception for reasons of national security referred to in Article 23(1) of the directive applies, the Member State authority that has adopted a decision to refuse or withdraw international protection based on a reason of national security and the national security authority that has determined that the reason is confidential must ensure that it is guaranteed that in all circumstances the applicant, a refugee or a foreign national beneficiary of subsidiary protection status, or that person's legal representative, is entitled to have access to at least the essence of the confidential or classified information or data underpinning the decision based on that reason and to make use of that information or those data in proceedings relating to the decision, where the responsible authority alleges that their disclosure would conflict with the reason of national security? If the answer is in the affirmative, what precisely should be understood by the 'essence' of the confidential reasons on which that decision is based, for the purposes of applying Article 23(1)(b) of the Asylum Procedure Directive in the light of Articles 41 and 47 of the Charter? C-159/21 *Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary) lodged on 11 March 2021 – GM v Országos Idegenrendészeti Főigazgatóság and Others*. Case in progress, see: https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-159/21&jur=C (17.11.2021.)

58 Act CLV of 2009, Article 6 (8).

59 Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information [Act CXII of 2011] Article 62.

60 Act CXII of 2011, Article 62 (4)–(5).

61 Act CXII of 2011, Article 62 (6).

62 Act CXII of 2011, Article 63 (1).

63 If the classifier did not seek legal action in the court of law within sixty days following the date of delivery of the resolution, the information classified at the national level shall be considered declassified on the sixty-first day following the date of delivery of the resolution, or the level or term of classification shall be modified in accordance with the resolution. The court shall hear and determine the action in closed session and the presiding judge must have security clearance accorded under the Act on National Security Agencies. Persons other than the judge, the plaintiff and the defendant shall be allowed access to the said classified information only if they have personal security clearance according to the security classification level of the information in question. Act CXII of 2011. Article 63 (2)–(7).

The Constitutional Court in its guiding decision of 2014 call attention to the *administrative proceedings for the control of secret* as a legal tool to contest the legality of classification, however, in the ordinary legal practice expressed in the available and examined case law, the mentioning of this possibility hardly emerges in the reasonings.[64]

III.2. The police proposal during its investigation in a criminal proceeding

In more than a dozen constitutional complaints, the scenario was the same: ongoing criminal procedure, expulsion based on being a threat to national security within a couple of days, then a few months later, the closure of the criminal procedure without conviction and the withdrawal of the ban on entry. All of the expelled foreigners were Iranian citizens who had been studying in Hungary for years.[65]

Legal practice acknowledges an ongoing criminal proceedings enough factual basis for the qualification of an alien's presence in the country as a threat to national security.[66] Therefore, it may give rise to the ordering of expulsion. However, the procedural steps leading to the expulsion in the above-mentioned cases raised concerns of another reason. The immigration authority ordered the expulsion upon the recommendation of the police made during the procedure. The expulsion and the ban on entry to the country were ordered, however, a couple of months later, all the criminal proceedings were closed without conviction and the ban on entry was abolished.

The police recommendation and its determinant nature on the expulsion decisions was a core element of the legal remedy and also in the constitutional complaint. Considering the procedural role of the police, the legislator has introduced the possibility to propose to the immigration authority 2010 but before 1st January 2018,[67] the proposal of the investigating authority was indeed a recommendation and not a binding order. Currently, the *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals* [Act on TCN] expressly states that the competent immigration authority shall not derogate from the proposal;[68] it is not entitled to override it, neither the necessity of expulsion nor the recommended time of the ban on re-entry.[69]

The immigration authority proceeds *ex officio*, whereas another authority gave an 'obligatory order' to open and pursue the procedure to expel the foreigners.[70] Besides, the immigration authority decision did not contain any information on the factuality of the case; it simply invoked the legal provisions that supported the procedure, namely Article 43 (3) of the Act on TCN that empowers the police to recommend the expulsion which binds the proceeding immigration authority. Thus,

[64] Metropolitan Court 106.K.700.322/2019/15.; 106.K.700.049/2019/7.; 106.K.700.046/2019/7.

[65] See press news on the cases: Another 13 Iranian students expelled from Hungary and the EU for violating quarantine rules. March 16 2020 https://abouthungary.hu/news-in-brief/coronavirus-update-another-13-iranian-students-expelled-from-hungary-and-the-eu-for-violating-quarantine-rules (17.11.2021.) *cf.* Iranian Students Expelled from Hungary During Epidemic Likely to be Let Back in. by Péter Cseresnyés 2020.07.17. https://hungarytoday.hu/iranian-students-expelled-hungary-epidemic-let-back/ (17.11.2021.)

[66] CC Order 3171/2020. (V. 21.) ABH 2020. 898–900.; 899. [9]; CC Order 3093/2020. (IV. 23.) ABH 2020, 543–547; 544. [5]; [7]; CC Order 3417/2020. (XI. 26.) ABH 2020, 2363–2365; 2364 [10]; CC Order 3416/2020. (XI. 26.) ABH 2020, 2360–2362; 2361. [9].

[67] It was Article 38 of the *Act CXLIII of 2017 on amending certain acts related to migration* inserted the provision into the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

[68] Act II of 2007, Article 43 (3); KGD2019.105.

[69] Act II of 2007 Article 43 (3); legislative motifs to Act CXLIII of 2017, Article 38.

[70] Commentary on Act CXL on the General Rules of Administrative Proceedings and Services, Article. 104. para. 1. [accessed from National Legal Database]

the authority decision was called a non-personalised, 'template decision' and during the hearing, no information was shared on the proceedings.[71] In other constitutional complaints, the lack of substantial judicial supervision was highlighted among other reasons. They argued the factuality and the causality between the behaviour and its qualification and stated that these elements of the procedure were not reviewed by the court therefore the legal remedy was not effective,[72] while at the same time others even expressly denied committing the behaviour they were accused with.[73]

It is a *sui generis* legal phenomenon in the Hungarian legal practice: the proposal maker authority (police) does the fact-finding, the evaluation of the facts and the deliberation and thus *de facto* the decision-making, while the competent proceeding authority ensures the *de iure* format of decision-making when it orders the expulsion. In the present cases, the full documentation (the detailed matter of facts, and the reasoning of the argumentation that led to the final consequences of expulsion) of this kind of cooperation does not appear in the proceeding authority's decision. Here, the mere legal provision of the Act on TCN that makes the police recommendation an order for the immigration authority to impose the expulsion and the ban on entry in its decision was the reasoning. The court that reviewed these decisions found such a solution correct; the court stated that the provision of the Act on TCN is cogens, therefore no further (factual) reasoning is needed.[74] However, on the other hand, the legal practice is clear: the lack of proper factual and legal grounding of an authority decision is a serious breach of procedural law that makes the decision unsuitable for a substantive review, therefore it shall be annulled.[75] This ambiguity leads to further questions related to the nature of police recommendation and the role of the police as a procedural actor which is beyond the scope of this study. In the Iranian student cases of expulsion, no information occurred on the possible classified nature of any data related to the police documents. Moreover, the only available Metropolitan Court judgment in one of the Iranian cases, there is an acknowledged reference that claims that during the hearing, the police made the evidence available for the foreigner[76] which also supports that assumption that these cases, the factual reasoning embodied in the police documents was not of classified nature.

The qualification of data is the targeted result of a procedure,[77] and the classification of the data (a document that contains it) is a result of it; so, the documents of the police in connection

[71] CC Order 3045/2021. (II. 19.) ABH 2021. 342–343.[8]–[9]; CC Order 3046/2021. (II. 19.) ABH 2021. 345–346. [8]–[9]; CC Order 3047/2021. (II. 19.) ABH 2021. 348–349. [8]–[9], CC Order 3048/2021. (II. 19.) ABH 2021. 351–352. [8]–[9], CC Order 3049/2021. (II. 19.) ABH 2021. 354–355. [8]–[9], CC Order 3050/2021. (II. 19.) ABH 2021. 357–358. [8]–[9].

[72] See esp. CC Order 3487/2020. (XII. 22.) ABH 2020. 2738. [11]; CC Order 3486/2020. (XII. 22.) ABH 2020, 2734–2735. [3]; [12]–[13]; CC Order 3485/2020. (XII. 22.) ABH 2020. 2730. [12]; CC Order 3492/2020. (XII. 22.) ABH 2020. 2753 [7]; CC Order 3493/2020. (XII. 22.) ABH 2020. 2756. [7]; CC Order 3490/2020. (XII. 22.) ABH 2020. 2747. [7]; CC Order 3489/2020. (XII. 22.) ABH 2020. 2744 [7]; CC Order 3488/2020. (XII. 22.) ABH 2020. 2741 [7].

[73] CC Order 3487/2020. (XII. 22.) ABH 2020. 2737. [3]

[74] CC Order 3487/2020. (XII. 22.) ABH 2020. 2738. [6]; CC Order 3488/2020. (XII. 22.) ABH 2020. 2741. [4]; CC Order 3489/2020. (XII. 22.) ABH 2020. 2744. [4]; CC Order 3490/2020. (XII. 22.) ABH 2020. 2744 [4]; CC Order 3491/2020. (XII. 22.) ABH 2020. 2750 [4]; CC Order 3492/2020. (XII. 22.) ABH 2020. 2753. [4].; CC Order 3493/2020. (XII. 22.) ABH 2020. 2756. [4].

[75] Csatlós, Erzsébet: Remarks on the Reasoning: The Morals of a Hungarian Expulsion Decision in Times of Pandemic. *Central European Public Administration Review*, Vol. 19. No. 1. 2021. 185–186.

[76] Metropolitan Court 15.K.701.176/2020/4. None of the Metropolitan Court judgments of the Iranian students are available in the database at the time of writing of this paper, the cited judgment was handled by the Hungarian Helsinki Committee.

[77] It is monitored by the National Security Authority. Juhász, Zsolt – Virányi, Gergely – Hegedűs, Tamás – Visztra, Tímea: A Nemzetbiztonsági Szakszolgálat hatósági feladatai. *Nemzetbiztonsági Szemle*, Vol. 8. No. 1. 2020. 145.

with the investigation and the evidence is not *de iure* classified. Even if the data to be classified engenders by the same authority that is entitled to decide upon the qualification, the classification shall be grounded, and the classified nature of the data and the level of classification shall be visible on the document that contains such information.[78] No later than the commencement of the first procedural act affecting him/her, the person under criminal procedure shall be duly informed of his/her rights and shall be warned of his obligations including the data management rules of classified data.[79]

IV. Concluding remarks

In a strict sense, none of the publicly available expulsion cases of 2020 and the first half of 2021 was related to the pandemic or health issues therefore the interesting features echoed in the examined cases show the general picture of expulsion practice when national security concerns prevail. The legal guarantees connecting to the factual and legal grounding of both administrative and judicial decisions as well as their relationship with the effective judicial review emerged in a surprisingly high number of the examined cases. The rule of law requirements and also the relevant international and even Hungarian legal practice is on the same side of the argumentation that supports the unlawful nature of the practice seen in the Iranian Student's case: the immigration authority decision should have incorporated the factual elements of the police initiation and ensure proper reasoning to the court could have endured an effective review. If it is missing, according to the laws in force, the court should have declared the nullity of the authority resolution for serious procedural law violation (lack of proper factual grounding and legal reasoning).

In cases where the debate focused on the nature of classified information, the same problem arose: the (apparent) lack of reasoning. As the legal norm ensure the necessary tool for having the possibility to gain access to classified documents, however, the experiences taken from the cases examined, the information on its availability may be questioned. Unfortunately, the authority decisions are not available to get further to the source of the problem, although, as a general conclusion stemming from the studied cases, the reason for expulsion seems to be indisputable and shadowy under the cover of national security. In the view of the foreigner, such a situation is, however, confronting with the right to *effective* legal remedy and makes the whole procedure from the beginning until the end of the judicial phase a formal one. The authority's obligation to give information on the procedural rights and obligations should be given a stronger role that may lead to a comprehensible and deeper understanding of the foreseeable reasons and the process of expulsion, irrespective of the global pandemic. However, deeper analysis on the discretion of the State related to national security implications and the transparency of the procedure including the right to effective legal remedy is beyond the scope of the present paper.

[78] Act CLV of 2009, Article 6.

[79] Gov. Decree 100/2018. (VI. 8.) on the detailed rules of investigation and preparatory procedure, Article 42 (4) h).

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Securitization on EU Level

I. Introduction

Through this article, the main aim will be the observation of securitization at the European Union (EU). This study's direction is to be theoretical and discover further explanations of the securitization process while answering the question of how securitization can exist on the EU Level. The 21st century has introduced the world to globalisation with the advancements as well as the new diverse threats (also evolved old ones) to the society: immigration, terrorism, and new security issues. This research aims to recognise the complicated, diverse reality of broad political domains by evaluating the intensity of security framing in EU legislation on immigration and other security concerns.

All the issues and threats might be globalized in our times, but we cannot expect the solutions to be unified. Our example is the European Union with its 27 Member States but how far their unity goes? The question and issue of sovereignty might hold back the taken unified decision to hold. That is why the securitization theory within the EU holds a unique place because every Member State is sovereign, but they also make their own policies while regarding the EU's external policies as well. The entirety of these questions builds the foundations of this paper. The Paper will then continue to explore the threat of the most obvious example which is immigration itself. The immigration crisis affected and unbalanced the EU's internal and domestic politics since 2015 and within this threat collective securitization process evolved within the EU.

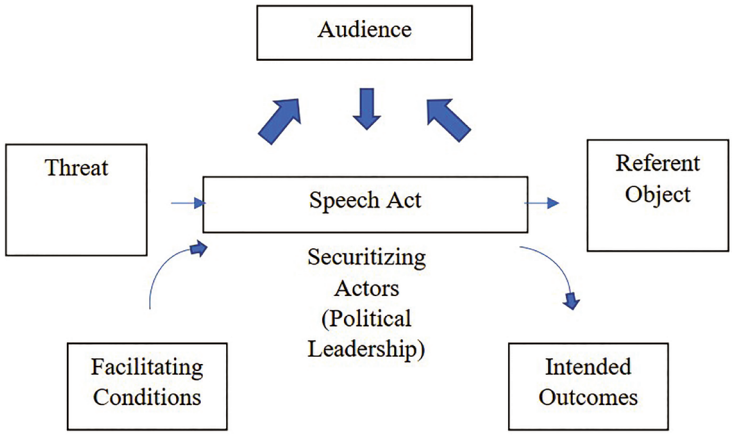
As a multi-complex organisation, this paper's aim will be set upon the theoretical possibilities of the political and cultural evolution of the European Union through the theorized securitization process with the current immigration crisis.

II. Securitization Theory of Copenhagen School as a gauge

The Securitization Theory of Copenhagen School means that in international relations and national politics, securitization is the process through which state actors convert routine political concerns into "security" issues, allowing exceptional and manipulative tactics to be utilized for the sake of security.[1] These tactics and routines have various kinds of components which can be named the components of securitization. This theory of securitization had been chosen for this research to define the various political and security directions which were taken by the EU and its Member States regarding the immigration crisis.

[1] Buzan, Barry – Wæver, Ole – De Wilde, Jaap: *Security: A new framework for analysis*. Lynne Rienner Publishers, USA, 1998. 25–26.

Moreover, the components of the securitization process are Threat, Speech Act, Audience, Securitizing Actors, Facilitating Conditions, Referent Object, and Intended Outcome.



1. table: This figure is based on the definitions by Buzan, Barry – Wæver, Ole – De Wilde, Jaap: Security: *A new framework for analysis*. Lynne Rienner Publishers, USA, 1998.

The first component of the securitization process is *the Threat*, the securitizing actors will portray a specific issue of interest as a threat or a matter of defence. The second component of securitization is *the Speech Act*, and it means this act generally entails the securitizing actor using colourful language and ways to achieve an objective.[2] The second component is *the Securitizing Actor*, which is the one who is in a position of authority to handle the threat if they make a securitizing action and take emergency measures, either by modifying their behaviour or by directing securitisation executors.[3]

As for the third component, *the Audience* means that the population or a group of people from whom the speech act derives its strength and validity in the face of fabricated threats. Securitization theory also extensively relies on the concept of "audience," as one of the theory's basic assumptions is that securitization is an intersubjective process that primarily relies on audience consent on the problem.[4] Furthermore, the Audience and the Speech Act are always in a feedback loop which provides a channel for them to contribute further legitimacy for the Securitizing Actors.

Another important and fifth component is *the Referent Object*, which is the object that is endangered and has to be safeguarded is a crucial concept in securitisation.[5] This concept stands as the identity of the securitizing process. Through these components, the securitizing actors achieve their intended outcomes which can be legitimacy, power or further approval of the population.

All these components structures the securitization process and this paper will use this structure to deep dive into the collective securitization process of the European Union with the next given threat example: Immigration.

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[2] Balzacq, Thierry: The three faces of securitization: Political agency, audience and context. *European journal of international relations*, Vol. 11, No. 2. 2005. 171–201.

[3] Floyd, Rita: Securitisation and the function of functional actors. *Critical Studies on Security*, 2020. 1–17.

[4] Balzacq, Thierry – Léonard, – Ruzicka, Jan: Securitization'revisited: Theory and cases. *International relations*, Vol. 30, No. 4. 2016. 494–531.

[5] Eroukhmanoff, *Clara: Securitisation theory*. E-International Relations Publishing. England, 2017. 105.

III. Threat Example: The Immigration

Immigration and security policy by their nature are inextricably linked. In political discussion, media coverage, and public opinion, the migration-security nexus has always remained consistent. Although immigration securitization is not a new issue, the contemporary forms of discourse and their ramifications for public policy and international politics necessitate ongoing research and critical analysis.[6] Political necessities sometimes deliver its legitimacies from security thus far it indicates the securitization process throughout the world and of course in the EU as well.

Since the beginning of the last decade and as a consequence of statements made by numerous international organizations, states, academia, and the media, migration has become identified with a new danger to the liberal world; subsequently, this discussion has reached a peak, normalizing the idea of immigration as a threat.[7] The point of threat always stands for fear over the people, furthermore, the democratization of fear over the population ensures the advancement of power and that is why the issue of immigration plays a central role in the securitization theory studies.

Immigration was always problematic when looking through the perceptions of politicians but of course, it is mostly converted into a threat or an opportunity to be gained from. For example, we can assume the threat construction of immigration slips into many sectors of society through economy, culture, security or even education. Furthermore, the assumptions can be made as that the change and outsiders always bring their problems with them and that is how immigration usually converted to a securitized theme.

IV. Collective Securitization of EU

The EU has always been recognized as a multifaceted security entity with capabilities in a wide range of security-related topics and issues which these experiences combine to produce a type of security governance that aims to protect against a variety of risks. Nonetheless, there is a variety of differences between security and the securitization process on governance against a threat such as actors and audience. The process of European integration has been a tale of European nations transforming toward post-Westphalian sovereignty, resulting in a de-securitization of inter-state interactions and the emergence of a security community surrounding the EU.[8]

However, indicating the EU as an actor was still complicated until the Lisbon Treaty pressed on the topic of collective-defence (Definition of this indicates that if the Member State of EU is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, under Article 51 of the United Nations Charter[9]). Furthermore, the first steps of being the security actor were taken but the EU alone cannot be the actor caused by its complex structure also organisation does not have enough autonomy to act directly as a single securitizing actor.

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[6] Colomé-Menéndez, Desirée – Koops, Joachim A. – Weggemans, Daan: A country of immigrants no more? The securitization of immigration in the National Security Strategies of the United States of America. *Global Affairs*, 2021. 1–26.

[7] Ibrahim, Maggie: The securitization of migration: A racial discourse1. *International migration*, Vol. 43, No. 5 , 2005. 163–187.

[8] Lucarelli, Sonia: The EU as a securitising agent? Testing the model, advancing the literature. *West European Politics*, Vol. 42, No.2, 2019. 413–436.

[9] Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012. 13–390. [TEU] Article 42(7).

To build the actor-audience relationship in this collective securitization process EU uses its institutions, tools, or common policies to act as an actor (European Commission, European Council). These elements were used to create a relevant narrative to construct further EU wide security policies.[10] The Common Foreign and Security Policy (CFSP) and the Common Security Defence Policy (CSDP) can be shown as the policies mentioned above. Article J.1 of title V of the Maastricht Treaty[11] defines the common security policies within the EU to safeguard its values and interests in general. Within the securitization process, the actor needs a narrative to use to build its *referent object*. Furthermore, this paper theorizes that the policies mentioned assists the EU to construct the narrative (*speech act*). On account to that use of such values and culture by EU legitimizes their actions and policies in its narrative.[12]

However, building a narrative system would need a decision-making process to create a feedback effect within the EU in this collective securitization field. In order to guarantee that, the EU's influence is exercised as effectively as possible by concerted and convergent action, Article 16 of the EU Treaty requires the Member States to notify and consult one another within the Council on any topic of foreign and security policy of general concern.[13] Concerns and interactions within the Council by the influence of the EU through the Member States further contributes to the narrative.

Moreover, the construction of threat through the narrative by the tools and policies of the EU which with their reception by the Member States are seen to be indicative of the cyclic interaction that permits collective securitization.[14] Interactions and permits represents the feedback loop of the securitization process and places the Member States as the audience in the process which would lay the foundations for the facilitating conditions.

Through the securitization process, the actor would also need *facilitating conditions* to create the *referent object*. Furthermore, the EU has implemented a collective securitization of its external border to restore the Schengen region and so to protect Europe's integrity and identity which the European Commission proposed in 2015[15] to make FRONTEX (*European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*) into a full-fledged European Coast and Border Guard.[16] In 2019 a regulation came into force to finalize the process of full transformation.[17]

Furthermore, the securitization of migration, and therefore of Schengen, is the most visible example of the reinterpretation (characteristics of securitization arrangements) of the EU's borders:

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[10] Sperling, James – Webber, Mark: The European Union: security governance and collective securitisation. *West European Politics*, Vol. 42. No. 2, 2019. 228–260.

[11] Treaty on European Union. OJ C 191, 29.7.1992. 1–112. [Maastricht Treaty] The Article states that the Union and its Member States shall define and implement a common foreign and security policy, governed by the provisions of the Title and covering all areas of foreign and security policy.

[12] Floyd, Rita: Can securitization theory be used in normative analysis? Towards a just securitization theory. *Security Dialogue*, Vol. 42, No. 4–5, 2011. 427–439.

[13] Power of decision in the field of CFSP. https://www.cvce.eu/en/collections/unit-content/-/unit/d5906df5-4f83-4603-85f7-0cabc24b9fe1/86fd74cd-fd13-4d81-be8a-a215037dacf0 (11.02.2022.)

[14] Ceccorulli, Michela: Back to Schengen: the collective securitisation of the EU free-border area. *West European Politics*, Vol. 42, No.2, 2019. 302–322.

[15] A European Border and Coast Guard to protect Europe's External Borders. https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6327 (11.02.2022.)

[16] Floyd, Rita. Collective securitisation in the EU: normative dimensions. *West European Politics*, Vol. 42, No.2, 2019. 391–412.

[17] Regulation (EU) 2019/1896 of the European Parliament and of the Council of the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ, L 295, 13.11.2019. 1–131. Article 24.

the Schengen MSs' external borders have come to be visibly EU borders, maintained, and monitored by EU agencies (such as FRONTEX), as a result of uncontrolled/undesired migrant influx which to preserve the threat. This is but a sign of the pointed securitization process over the external Schengen borders of the EU.[18]

Another relevant piece of facilitating condition on the process of collective securitization on the example threat of immigration is the EU and Turkey agreement regarding coming refugee flow from the Middle East.[19] Furthermore, the EU has reinforced its borderland, and the Balkans and Turkey have become a huge buffer zone of fortified nations which any travel via these countries requires a spectacular cross of refugees over the fenced-in buffer states.[20] This radical fortification of external borders of the EU with the attempts to contain the coming refugees who are running from the war or worse shows the direct implications of securitization because of the protection of integrity and unity of the EU. Once more on the topic of integrity and unity (*topics of speech act in this example*) can be perceived as legitimate reasons for security and collective securitization but in the context of the EU (*an organisation which lays its foundations over human rights and freedom*), this security process turns to a securitization process.

V. Conclusion

In the sense of security and safety of the EU, this research cannot deny the existence of threats from the irregular flow of coming immigrants, refugees, and asylum seekers. But turning the political scope of a refugee or an immigrant into a national security topic which in this case turns into an integrated EU issue causes securitization by necessity. Securitization is a process to transform the issue at hand to the necessary outcome. In this case, the political problem of immigrants turned into a security problem by the EU to safeguard the already fragile integrity, unity and culture of Europe. Of course, these reasons can be listed as moral which the securitization process usually benefits from in its speech act to legitimize their actions and policies.

This paper does not blame or support the political decisions of countries or organisations regarding the securitization processes, only to determine If there was a collective securitization process within the EU against the threat of the Immigration Crisis. In the conclusion, I came to the point of the obvious securitization process by the European Union and its sovereign Member States with or without cooperation.

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[18] Lucarelli, 2019. 413–436.

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Financial and Economic Aspects of Public Administration

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Financial Law Related Challenges as a Result of COVID-19 Pandemic

I. Introduction

The COVID-19 pandemic has many legal, economic, and social consequences. As a result, almost every country was faced with challenges in resolving this crisis. Actions are taken by individual countries, although using different types of intervention instruments, their main purpose was to protect the economy against the socio-economic consequences of the COVID-19 pandemic. Due to the existing situation, these changes may also result in the need to modify the financial law, which was faced with various challenges. As indicated in the literature: „*The COVID-19 pandemic is the first major test of the global financial system since the G20 reforms were put in place following the financial crisis of 2008. While significantly different in nature from the 2008 crisis, this real-life test may hold important lessons for financial policy (...)*".[1] Therefore, it can be concluded that the economic crisis related to the COVID-19 pandemic is another crisis, after the financial crisis of 2007–2008, which may reveal those areas of financial law that will require changes. One of them is undoubtedly issues related to public debt, as an acute consequence of the COVID-19 pandemic is the increase in indebtedness of many countries, mainly caused by the financing of various interventions counteracting its socio-economic effects.

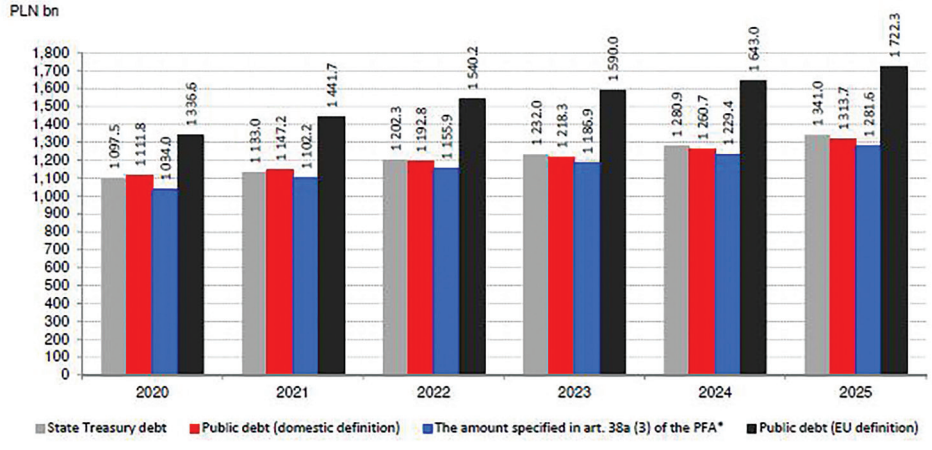
Therefore, in the paper selected areas of financial law that may require changes due to the consequences of the COVID-19 pandemic were analyzed. For the analysis, mainly those related to public debt, such as an increase in hidden public debt, the need to improve normative fiscal rules aimed at limiting the increase in public debt, were selected. The study uses the comparative law method.

II. The problem of hiding public debt and its consequences for financial law

Unfortunately, the COVID-19 pandemic contributed to an increase in the public debt of many countries, including the European Union (EU) Member States. The reasons for this were various. On the one hand, it was caused by economic consequences, because the limitations related to counteracting the pandemic prevented many entrepreneurs from operating and suffered losses on this account. On the other hand, states wishing to limit these negative socio-economic consequences introduced various types of aid programs, which were directed mainly to entrepreneurs. As a consequence, public indebtedness increased as states financed these programs mainly by incurring liabilities that increased the amount of public debt. By way of example, in Poland, aid programs

[1] Lessons Learnt from the COVID-19 Pandemic from a Financial Stability Perspective. Financial Stability Board, 2021, https://www.fsb.org/wp-content/uploads/P130721.pdf (30.01.2022.)

were referred to as the so-called there were 7 anti-crisis shields (in total in 2020–2022). Forms of support were addressed mainly to entrepreneurs and took various forms. These included, among others, subsidizing the salaries of employees subject to economic downtime, the possibility of applying for a loan to cover the current costs of running a business, including for entrepreneurs who do not employ employees, the introduction of exemptions from social security contributions, support targeted at specific industries (*e.g.* gastronomic, tourist).[2] In 2020. the total amount spent on this aid by the state amounted to PLN 162.9 billion, so it was significant. 86% of entrepreneurs used it. Most often it was subsidizing salaries and social security contributions, reducing working hours or working remotely. Such a significant amount of state aid, unfortunately, increased Polish public debt, as before. This is confirmed by the data presented in Table 1.

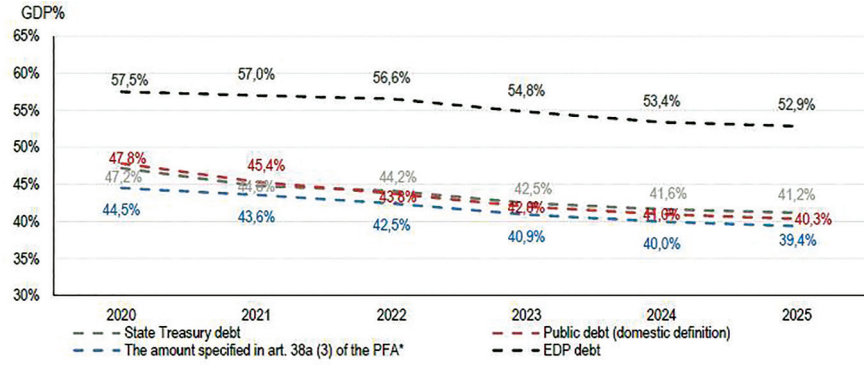


**The amount of public debt recalculated using the yearly average of foreign currency exchange rates for the year concerned and reduced by the value of State budget liquid funds raised to finance the borrowing requirements for the following budget year.*

1. table: Public debt forecasts in Poland in the years 2020–2025. Source: The Public Finance Sector Debt Management Strategy in the years 2022–2025 (summary). Ministry of Finance. Warsaw, 2021. https://www.gov.pl/web/finance/debt-management-strategies (30.01.2022.) 18.

The data in Table 1 shows that the amount of public debt in Poland (EU definition – black colour) increased from PLN 1,336 trillion in 2020. is expected to increase to the amount PLN 1,540 trillion in 2022. In the remaining years 2023–2025, the amount of debt is also to increase and in 2025 it is forecast that it will amount to PLN 1,722 trillion. The amount of Polish public debt concerning GDP in 2020–2025 is presented in chart 1.

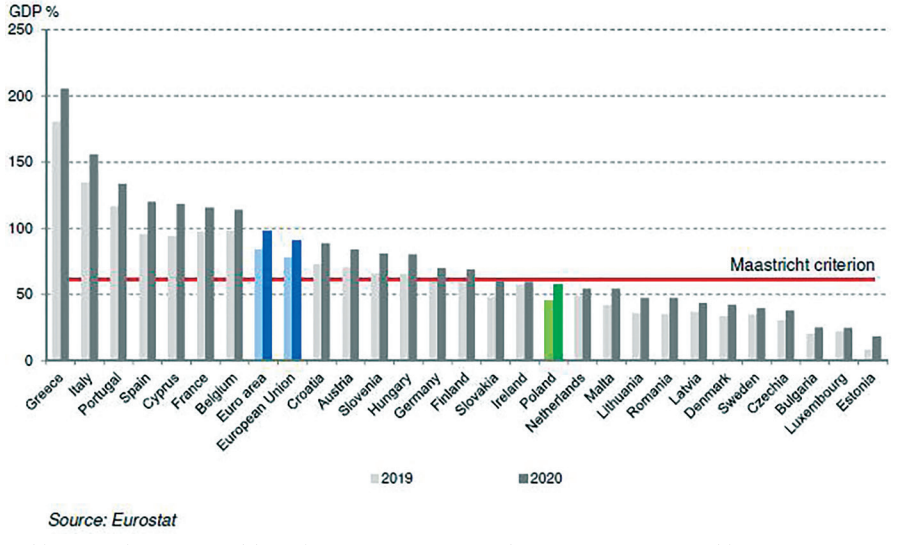
[2] Dębkowska, Katarzyna – Kłosiewicz-Górecka, Urszula – Szymańska, Anna – Ważniewski, Piotr – Zybertowicz, Katarzyna: *Anti-crisis Shield. A lifeline for companies and the economy?* Polish Economic Institute, Warsaw, 2021. 13–15.



2. table: Public debt- to -GDP ratio in Poland in the years 2020–2025. Source: The Public Finance Sector Debt Management Strategy in the years 2022–2025. Ministry of Finance. Warsaw, 2021. https://www.gov.pl/web/finance/debt-management-strategies (30.01.2022.) 36.

The data included in chart 1 shows that in Poland in the analysed period, the ratio of public debt to GDP (black line) is to be at a similar level of 53%–57% and is expected to decline. Of course, this prediction depends primarily on what the future of the COVID-19 pandemic will take, what its socio-economic consequences will be, and how long it will last.

The increase in public debt in the EU Member States as a consequence of the COVID-19 pandemic has occurred in many of them. This is illustrated by the data presented in Table 2. They show that the average level of public debt in relation to GDP, both in the Euro zone and in the EU, exceeds the level of 60% of GDP, *i.e.* the fiscal Maastricht criterion. Additionally, this level increased in 2020 compared to 2019, *i.e.* the year before the COVID-19 pandemic.



3. table: General government debt in the European Union Member States. Source: The Public Finance Sector Debt Management Strategy in the years 2022–2025 (summary). Ministry of Finance. Warsaw, 2021. https://www.gov.pl/web/finance/debt-management-strategies (30.01.2022.) 22.

The above data indicate that one of the consequences of the COVID-19 pandemic is the increase in public debt in many EU countries, including Poland. Such a situation may pose a threat to the sustainability of the public finances of these countries. Therefore, one of the challenges faced by financial law may be to strengthen regulations aimed at counteracting the increase in public debt. The existing regulations of Polish and EU financial law that serve this purpose include, among others, normative fiscal rules. These include, for example, the fiscal criteria for debt and public deficit for the EU Member States. According to Art. 126(2) of the Treaty on the functioning of the European Union[3] and in Protocol[4] there were established the so-called reference values of the public deficit and debt of the general government sector. The criterion connected with the public deficit is 3% of GDP, and with the public deficit – 60% of GDP.

Nevertheless, the financial or economic crises, including the economic crisis related to the COVID-19 pandemic, indicate that they are not effective enough as, despite their introduction, the level of debt increases during such periods. This is confirmed, for example, by the previously mentioned data on the increase in public debt in many EU countries, which can be associated with the economic effects of the COVID-19 pandemic. Therefore, in the next part of the study, the issue of the need to improve normative fiscal rules regarding public debt is analysed.

Another problem related to the COVID-19 pandemic in Poland is the increase in hidden public debt. This is mainly related to the need to finance activities aimed at counteracting the effects of the COVID-19 pandemic. Of course, for social reasons, such an action can be considered justified. Nevertheless, one should also bear in mind the negative consequences it may have for the sustainability of public finances. In Poland, in order to make it easier to hide public debt, two methods of its calculation are used – the Polish method according to regulations of Polish financial law and the EU method (as a debt of the *general government* sector). This is due to the desire to hide part of the public debt so that there are no consequences resulting, inter alia, from the content of Art. 215 sec. 5 of the Polish Constitution[5], which prohibits incurring public debt if its relation to GDP exceeds 60%.[6]

As an aside, it should be mentioned that the COVID-19 pandemic also had a mixed impact on financial management at the sub-local (including regional) level. There are issues connected with this, such as importance and type of spending responsibilities, the characteristics of subnational government revenues, the flexibility of fiscal frameworks, fiscal health or pre-pandemic financial conditions, scope and efficiency of government support.[7]

III. Necessity to improve the legal regulations of the legal regulations

In the beginning, it is necessary to briefly describe the essence of fiscal rules. A fiscal rule is defined as a permanent limitation of fiscal policy, usually expressed in form of a synthetic total index (*e.g.*

[3] Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202 7.6.2016.

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[6] Tyniewicki, Marcin – Kozieł, Michał: Current Problems of Financial Law in Poland and in the Czech Republic Including Effects of the COVID-19 Pandemic. *Bialystok Legal Studies*, Vol. 26. No 4. 2021. 52–64.

[7] The Territorial Impact of COVID-19: Managing the Crisis and Recovery across Levels of Government. OECD, 2021, https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-COVID-19-managing-the-crisis-and-recovery-across-levels-of-government-a2c6abaf/ (30.01.2022.) 20.

admissible one) of fiscal result (budget).[8] The aim of fiscal rules is namely the limitation of increase of defined economic values (*e.g.* public debt, public deficit, public expenses) above an established limit. This is the reason why fiscal rules can be used as an instrument of fiscal consolidation. Literature[9] provides us with traits, which an optimal fiscal rule should possess in order to be effective in praxis. These criteria refer to fiscal rules of supranational nature.[10] The fiscal rules should be also efficient in practice. One of the conditions of efficiency of a fiscal rule is that its aim is defined numerically (*i.e.* as a limitation of national fiscal policy in form of general budget results such as expenses, loans, and debt). Additionally, these rules should also be connected with procedural reforms of budget institutions, which are conducive to responsible fiscal behaviour. Empirical research confirms that the connection of both these kinds of rules supports maintaining budget discipline effectively.[11] In literature, more requirements of the ideal fiscal rules were analyzed.[12]

Unfortunately, the ruts of the crisis, this time related to the economic consequences of the COVID-19 pandemic, showed that the existing fiscal rules regarding public debt did not prevent its growth. This is all the more worrying that in the case of Poland, such rules exist both at the supranational level (the Maastricht fiscal criterion) and at the national level (including the constitutional one prohibiting incurring public debt if its relation to GDP exceeds 60%). It is difficult to clearly indicate how the structure of fiscal rules regarding public debt should be improved so that in a situation of financial crisis or economic crisis they would more effectively than before counteracting the increase in public debt. This is a complex problem because such crisis situations may be dominated by factors such as, for example, the defence of the economy against excessive recession, which is a consequence of the crisis. In such a situation, the need to counteract the economic collapse may turn out to be more important for the state than counteracting the increase in public debt. However, also in such a case, this factor should be taken into account in the construction of the normative fiscal rule. Even in the event of an economic or financial crisis, the

[8] Kopits, George – Symansky, Steven: Fiscal Policy Rules. IMF. *Occasional Paper*. No. 162. 1998. 2.

[9] See *e.g.* Buiter, Willem: *The commandments for a fiscal rule in EMU*. London, 2003, www.willembuiter.com/orep.pdf (01.30.2022.) 6; Buti, Marco Buti – Guidice, Gabiele: *EMU's fiscal rules: what can and cannot be exported. European Commission*. 2002. http://www.researchgate.net/publication/229007051_EMU's_fiscal_rules_What_can_and_cannot_be_exported/file/d912f5091869a3a648.pdf (30.01.2022.), 3; Marchewka-Bartkowiak, Kamila, K: *Fiscal rules. Analyses of the Bureau of Research of Sejm*. Issue 7. 2010. 3.

[10] An optimal fiscal rule should be simple, easy to verify and maintaining financial liquidity of public authorities. It should not determine the optimal size of the public sector, enabling the functioning of automatic stabilizers of the economic situation, and it should not encourage the use of tools of procyclical interaction. Moreover, it should have a long-term nature, take into consideration diverse situations of the Economic and Monetary Union of the European Union (EMU), have a universal character (i.e. be used at the level of economies of the relevant EMU countries and of the whole Eurozone), be credible, be used unbiased and consistently. Buiter 2003. 6.

[11] Buti–Guidice, 2002. 3.

[12] Other requirements which should be met by a fiscal rule are the precise determination of a budget index to which a given rule refers; providing it with a respective legal importance by standardizing it in the constitution or in an act; clear premises of the fiscal rule, which has to be understood by the public; determination of sanctions meant for those not obeying it and a body responsible for imposing them; choice of a rule in accordance to the chosen economic and financial strategy of a country in the medium and long term perspective. Marchewka – Bartkowiak 2010. 3. An ideal fiscal rule should also have such construction which would encourage public authorities to run an optimal fiscal policy as far as social aspect is concerned. Moreover it should guarantee expenditures for social purposes at a defined level. The construction of the fiscal rule should be simple and transparent. It should also be possible to apply it in ex post and ex ante period. Assessment of congruency of carrying out fiscal policy according to the rule should be performed by a neutral body, which is independent from the Executive Branch. Mackiewicz, Michał: Rules of fiscal policy, as a method of deficit limitation. In Józefiak, Cezary – Krajewski, Piotr – Mackiewicz, Michał: *Budget deficit. Causes and methods of limitation*. Warsaw. 2006. 29, see also: Nizioł, Krystyna: Fiscal Rules as an Instrument of Fiscal Consolidation (Chosen Issues). *Bocconi Legal Papers*, No 4. 1–12.

state must not forget about the need to maintain the stability of public finances. Excessive public debt growth, and in the short term, may jeopardize such stability. Of course, in such situations, one cannot expect, for example, that the public debt or the public deficit will always be lower than the Maastricht fiscal criteria. Nevertheless, as indicated in the literature: "*But some principles are still needed – unless one assumes that debt is free. Few would argue that governments can spend as much as they want. Even proponents of a permanent stimulus seem to recognize that fiscal space has its limits*".[13] As a consequence, a problematic issue in times of financial or economic crises is also what the premises of fiscal policy should be in these uncertain conditions.[14] For example, is there a limitation of the "*the increase in debt during the crisis and reducing debt levels when normality is restored*".[15] It is also indicated that it is not possible to apply automatic fiscal rules based on the design of the pre-COVID-19 crisis also during it, without any changes. Also, for technical reasons. "*For example, one key element of the improved Stability Pact has been the emphasis on cyclically adjusted deficits. The difficulties with all calculations of potential output and its growth are obviously magnified by the coronavirus crisis. A mechanical implementation of the econometric procedures used so far to recover potential output from past data about GDP would lead to a sharp drop in the level of potential output, including presumably revisions in past output gaps. A mechanical resurrection of the old rules is thus out of the question*".[16] Nevertheless, in many OECD countries, in order to counter the effects of the COVID-19 pandemic in 2020 a variety of methods have been used, including measures such as fiscal rules on public debt. It was the main type of fiscal rule that was one of the most frequently used.[17]

The issue of improving fiscal rules can be considered both in relation to the rules at the supranational and national levels. First of all, it is necessary to take into account the fiscal rules at the EU level, which are supranational in nature and have a broad spectrum of impact, because they apply to all EU Member States. They are also related to the coordination of fiscal policy at the euro area level. Nevertheless, there are also some, according to which fiscal rules for the euro zone countries should not limit the coordination of fiscal policy, which is to support economic growth. As Achim Truger points out: "*In order to achieve sustainable and upward-convergent well-being, the EMU needs policy coordination well beyond numerical fiscal targets. The necessary coordination between member states could target material well-being, full employment, quality of life, ecological and economic sustainability. Countries should then follow an economic policy strategy that allows them to meet commonly agreed economic, social and environmental targets (...). One achievable proposal in this direction is to develop an integrated scoreboard of economic, social and environmental indicators to monitor developments and draw attention to deviations, which should be addressed by coordinated policies. They could be analysed in an annual well-being and convergence survey*".[18]

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[13] Gros, Daniel: Lessons From the COVID-19 Crisis for Euro Area Fiscal Rules. *Intereconomics*. No 5. 2020. https://www.intereconomics.eu/pdf-download/year/2020/number/5/article/after-COVID-19-rethinking-fiscal-rules-in-europe.html (30.01.2022.) 281.

[14] Gros, 2020. 281–284.

[15] Gros, 2020. 281–284.

[16] Gros, 2020. 281–284.

[17] The Territorial Impact of COVID-19: Managing the Crisis and Recovery across Levels of Government. OECD, 2021. https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-COVID-19-managing-the-crisis-and-recovery-across-levels-of-government-a2c6abaf/ (30.01.2022.) 4.

[18] Truger, Achim: Reforming EU Fiscal Rules: More Leeway, Investment Orientation and Democratic Coordination. *Intereconomics*. No 5. 2020. https://www.intereconomics.eu/pdf-download/year/2020/number/5/article/after-COVID-19-rethinking-fiscal-rules-in-europe.html (30.01.2022.) 277–281.

Undoubtedly, therefore, the COVID-19 pandemic may contribute to the improvement of the construction of fiscal rules regarding public debt so that in the future they will be more effective in times of economic or financial crises. At present, however, it is difficult to clearly indicate the direction of these changes.

IV. Other challenges to financial law related to the consequences of the COVID-19 pandemic

The literature also currently points to other public finance problems related to the Covid-19 pandemic. By way of example, it is possible to point to increasing processes of debudgetisation of public funds in Poland. Unfortunately, the COVID-19 pandemic has contributed to the acceleration of this process. Many extra-budgetary funds have been created that are not included in the public finance sector. In this way, the liabilities they incur are not disclosed in the amount of Polish public debt. This clearly violates the principle of transparency of public finances.

In connection with the COVID-19 pandemic, two more funds were established in Poland – the COVID-19 Counteracting Fund and Polish Development Fund which were aimed at financing the state's actions to counter the effects of the COVID-19 pandemic. It was they who largely contributed to the increase in Polish public debt in 2020.[19]

Other challenges related to the financial law related to the COVID-19 pandemic include those relating, inter alia, to the need to strengthen the openness and transparency of public finances or the protection of consumers in the financial market. The need to improve the functioning of the principle of openness and transparency of public finances in practice should contribute to increasing the stability and security of public finances. For if Polish public authorities will have, for example, obligations to present data on real public debt or to disclose financial transfers, which have so far been recognized in extra-budgetary funds, the possibility of hiding public debt will be limited. As a result, the reliability of data on public debt will be improved, thus increasing the security of public finances.

Another challenge to financial law is related to the protection of consumers in the financial market and concerns the consideration of the effects of the COVID-19 pandemic resulting from the deterioration of their financial situation (for example, due to job loss). If such consumers have credits or loans, it may significantly deteriorate their financial situation. Therefore, a systemic solution to this problem can be considered, *e.g.* through periodic, temporary reduction of costs related to the loan.[20]

In this connection, the challenges that banking law may face in connection with the COVID-19 pandemic can also be mentioned. These include, for example, the application of measures to stabilize bank lending during the COVID-19 pandemic.[21] Another challenge in the field of banking law is to ensure balance in the banking system of a given country. As indicated in the literature: "*Going forward, it is of the utmost importance that the authorities strike the right balance between ensuring that*

[19] Tyniewicki–Kozieł 2021. 62–64.

[20] See *e.g.*: Monitoring the financial stability implications of COVID-19 support measures. The document is based on the notes prepared for the 25 March and 24 June 2021 ESRB General Board meetings, https://www.esrb.europa.eu/pub/pdf/reports/esrb.20210908.monitoring_the_financial_stability_implications_of_COVID-19_support_measures~3b86797376.en.pdf (30.01.2022.) 19.

[21] Monitoring the financial stability implications of COVID-19. see also: Carletti, Elena – Claessens, Stijn – Fatas, Antonio – Vives, Xavier: T*he Bank Business Model in the Post-COVID-19 World*. https://voxeu.org/content/bank-business-model-post-COVID-19-world (30.01.2022.)

the banking industry is adequately prepared to tackle the expected increase in non-performing exposures and their continued role in the provision of financing to household and non-financial corporations. Whilst it is understandable that prudential regulators may wish to ensure that individual banks are sound and solvent, it is important to consider also the aggregate, systemic perspective".[22] Therefore, it can be concluded that also banking law, including its regulations concerning consumers in the financial market or macroprudential supervision, may also be subject to systemic changes related to the consequences of the COVID-19 pandemic.

V. Concluding remarks

The COVID-19 pandemic forced states to take a number of interventions to counter its socio-economic effects. State aid took various forms. In Poland, as a rule, there was financial aid, which in various forms was directed mainly to entrepreneurs. The necessity to finance aid programs meant that in many EU countries, including Poland, there was an increase in public debt. The excessive public debt of a state may pose a threat to the sustainability of the public finances of a given state. Thus, the question arises of how to effectively control the amount of public debt in times of economic or financial crises. This is one of the challenges the COVID-19 pandemic brings to the financial law. It is related to the need to develop such a structure of fiscal rules limiting the public debt so that they are also effective in times of financial or economic crises. Other challenges of financial law may concern, for example, the problem of hidden public debt in Poland or the existing extra-budgetary funds, improvement of transparency and openness of public finances, and consumer protection in the financial market. All these issues may be the subject of future research, which should serve to improve the financial law.

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[22] Gual, Jordi: T*he post-COVID-19 recovery: What challenges and roadmap for the banking industry?* https://voxeu.org/content/post-COVID-19-recovery-what-challenges-and-roadmap-banking-industry (30.01.2022.)

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The Role of the Institution Supervising the Financial Market in Poland

I. Introduction

Abuses and frauds on the financial market, in particular at the interface between the capital market and banking, are phenomena that have characterized the last two decades.[1] Therefore, consumers must be protected in this market to the highest possible extent. In Poland, the tasks of supervisory authorities on the financial market are regulated by many legal acts. Many such authorities supervise both the financial market in Poland as well as entities on this market, and the highest control body is the financial supervision committee. However, many other entities cooperate with or subordinate to the commission and cooperate with international bodies, including the bodies of the European Union. Such institutions include, among others Office of Competition and Consumer Protection, Financial Ombudsman, Consumer Organizations, The Arbitration Court at the Polish Financial Supervision Authority and Supervision over foreign entities.

The problem that has been described in this article is to identify the tasks and functions of the most important authorities supervising the financial market in Poland and to answer the question of whether customers are sufficiently protected on this market. The article uses the research method in the form of analysis and discussion of state institutions in Poland and shows the areas of the old and new consensus along with their perception of financial markets, the nature of supervision and instruments of influence.

II. The importance of the financial market

The financial market is one of the most important markets in the modern economy. There are transactions between issuers of financial instruments and those who have savings. The financial market is the market through which one type of asset is exchanged for another. In the vast majority of cases, it is an exchange of money for financial assets, which are characterized by the fact that they bring their owner income in the form of dividends or profit resulting from the difference between their purchase price and their sale price.[2]

The financial market uses many instruments, the skilful application of which determines the development not only of individual entities but as a consequence of the entire economy.[3] One of the most important participants in the financial market is the state that exists on this market as:

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[1] Masiukiewicz, Piotr: *Piramidy finansowe: teoria, regulacje, praktyka*. PWN, Warszawa, 2015. 11.
[2] Czekaj, Jan: *Rynki, instrumenty i instytucje finansowe*. PWN, Warszawa, 2017. 22–23.
[3] Banaszczak-Soroka, Urszula: *Rynki finansowe: organizacja, instytucje, uczestnicy*. CH Beck, Warszawa, 2012. 17.

- an entity influencing the economic situation
- an entity that regulates and controls transactions on the financial market
- an entity concluding transactions on the financial market, most often as a borrower.[4]

Being a part of the economic and social system, the financial market is one of the most important elements of the functioning of a State. The events of the recent years when the financial crisis shook the foundations of the contemporary world have confirmed this thesis. What led to this crisis was, among other things, greed for money and depreciation of certain values as well as inefficient enforcement of law and a lack of a deeper reflexion on the potential consequences of a collapse of the financial market.[5]

The financial market is governed by two principles: competitiveness and the coexistence of profit and risk. Under the first rule, if there was a possibility of a safe investment bringing high profits, then other financial institutions would also take advantage of it, which in effect would lead to a reduction in the profitability of such an investment to the market level. According to the second rule, the greater the potential profit an investment is to generate, the greater the risk associated with it must be, and therefore the greater the likelihood that the investment may result in a loss.[6]

III. Supervision over the financial market

Supervision over the financial market in functional terms also referred to as supervision over the financial sector, or simply financial supervision means the application by the state of administrative law norms to supervised financial institutions in order to ensure compliance with the law. It may relate to various areas of their activity and may be exercised by a more or less numerous specialized entities. From the institutional point of view, supervision over the financial market means all organizational and legal solutions regulating the relations between the supervising entity or entities and the supervised entities.[7]

Areas	Perception of financial markets	The nature of supervision	Instruments of influence
Old consensus	– rational, wise and self-healing – financial innovation is an important component of financial stability and security – corporate governance and business models by free private choice	– formal and superficial – a micro-prudential perspective – private domain security – supervision isolated from politics	– market discipline supported by regulation – extensive transparency – private financial risk management

[4] Czekaj, 2017. 26.

[5] Nieborak, Tomasz: *Rynek finansowy jako dobro wspólne, ruch prawniczy, ekonomiczny i socjologiczny rok LXXIX – zeszyt 3*. Widzial Prawa i Administracji UAM, Poznań, 2017. 161–174.

[6] Pachucki, Marcin: *Piramidy i inne oszustwa na rynku finansowym. Poradnik klienta usług finansowych*. CEDUR, Warszawa, 2016. 18.

[7] Monkiewicz, Jan: Wyzwania współczesnego nadzoru nad rynkiem finansowym. In: Gąsiorkiewicz, Lech – Monkiewicz, Jan (ed.): *Wyzwania współczesnych rynków finansowych*. Wydział Zarządzania – Politechnika Warszawska, Warszawa, 2019. 62.

Areas	Perception of financial markets	The nature of supervision	Instruments of influence
New consensus	– pro-cyclical, often unreliable, with no guarantee of self-repair – financial innovation as a factor that may destabilize the financial system – corporate governance and business models subject to public scrutiny	– material, deep and multi-pillar – a macroprudential perspective with interconnectedness – public domain security – consumer protection as an important component of the surveillance system – policy-related surveillance	– market-supported regulatory discipline – extensive supervision powers – public financial risk management

1. table: Old and new regulatory and supervisory consensus of financial markets. See: Monkiewicz, Jan: Wyzwania współczesnego nadzoru nad rynkiem finansowym. In: Gąsiorkiewicz, Lech – Monkiewicz, Jan (ed.): *Wyzwania współczesnych rynków finansowych*. Wydział Zarządzania – Politechnika Warszawska, Warszawa, 2019. 66.

In Article 1, paragraph 2 of ACT of 21 July 2006 on supervision of the financial market the most important Polish legal acts that regulate the supervision of the financial market are listed. In this case, supervision over the financial market includes, inter alia:

1) banking supervision, exercised in accordance with the provisions of the Act of August 29, 1997 – Banking Law, the Act of August 29, 1997 on the National Bank of Poland.
2) pension supervision, carried out in accordance with the provisions of the Act of August 28, 1997 on the organization and operation of pension funds.
3) insurance supervision, carried out in accordance with the provisions of the Act of 11 September 2015 on insurance and reinsurance activities.
4) supervision over the capital market, exercised in accordance with the provisions of the Act of July 29, 2005 on Trading in Financial Instruments.
5) supervision over payment institutions, small payment institutions, providers providing only the service of access to information about the account, payment service offices, electronic money institutions, branches of foreign electronic money institutions carried out in accordance with the provisions of the Act of 19 August 2011 on payment services.[8]

The purpose of supervision over the financial market is to ensure the proper functioning of this market, its stability, security and transparency, confidence in the financial market, and to ensure the protection of the interests of market participants.[9] The Polish Financial Supervision Authority supervises the financial market in Poland. It operates on the basis of the act on supervision over the financial market. Although its operation is overseen by the Prime Minister, it is more independent than other entities that make up the government administration.[10]

The Polish Financial Supervision Authority accepts information on irregularities in the activities of the supervised entities. The information obtained is used to analyze market practices and take actions aimed at eliminating possible practices that violate the law and/or the interests of customers. The Polish Financial Supervision Authority does not consider the reported allegations

[8] Article 1 (2) of ACT of 21 July 2006 on supervision of the financial market.
[9] Article 2 of ACT of 21 July 2006 on supervision of the financial market.
[10] See: Judgment of the Constitutional Court of June 15, 2011, K 2/09, OTK-A 2011/5, poz. 42.

and does not take a position on the individual case presented in the correspondence addressed to the supervisory authority. Information on irregularities together with the personal data contained therein may be used as part of the supervisory activities carried out, including the transfer to the entity subject to supervision by the Polish Financial Supervision Authority to which the reported case relates.[11]

In Poland, there are many institutions authorized to take actions in the field of irregularities in the activities of financial market entities, reported by clients of these entities. However, these institutions are not obliged to deal with each individually reported case, but after analyzing the signalled problem, they decide on the possibility of taking action according to their competencies.[12] In addition to the financial supervision committee, the deputy has other entities that supervise and exercise control over the financial market, which include the following institutions.

- Office of Competition and Consumer Protection (UOKiK) – the President of UOKiK is the central body of government administration competent in matters of competition and consumer protection. He conducts proceedings in cases concerning the recognition of the provisions of a standard contract as illegal, as well as in cases of practices infringing collective consumer interests. UOKiK may prohibit the use of a practice deemed to violate collective consumer interests and impose financial penalties on entrepreneurs who use such practices. A practice that violates the collective interests of consumers is understood as an entrepreneur's behaviour that is contrary to the law or decency.[13]
- Financial Ombudsman – The tasks of the Financial Ombudsman include, in particular, considering applications in individual cases, brought as a result of failure to recognize the client's claims by a financial market entity in the course of considering complaints and applications regarding non-performance of actions resulting from the complaint considered in accordance with the client's will. The Financial Ombudsman may bring an action on behalf of clients of financial market entities in cases regarding unfair market practices regarding the activities of these entities, as well as, with the consent of the plaintiff, take part in proceedings already pending. A financial market entity that breaches the disclosure obligations regarding the procedure for examining complaints or breaches the deadlines for examining complaints may, by way of a decision, impose a fine of up to PLN 100,000.[14]
- Consumer Organizations – In individual cases, consumers can obtain free legal assistance from the municipal / poviat consumer ombudsman or entities cooperating with the Office of Competition and Consumer Protection and implementing projects of free legal assistance.[15]
- The Arbitration Court at the Polish Financial Supervision Authority – is a permanent and independent arbitration court established to resolve disputes between financial market

[11] Polish Financial Supervision Authority (KNF). https://www.knf.gov.pl/dla_konsumenta/Ochrona_klienta_na_rynku_uslug_finansowych/KNF (17.01.2022.)

[12] Client protection in the financial services market. https://www.knf.gov.pl/dla_konsumenta/Ochrona_klienta_na_rynku_uslug_finansowych (08.12.2021.)

[13] Office of Competition and Consumer Protection (UOKiK). https://www.knf.gov.pl/dla_konsumenta/Ochrona_klienta_na_rynku_uslug_finansowych/UOKIK (13.06.2017.)

[14] Financial Ombudsman. https://www.knf.gov.pl/dla_konsumenta/Ochrona_klienta_na_rynku_uslug_finansowych/rzecznik_finansowy (08.12.2021.)

[15] Consumer Organizations. https://www.knf.gov.pl/dla_konsumenta/Ochrona_klienta_na_rynku_uslug_finansowych/organizacje_konsumenckie (14..05.2020.)

participants, in particular disputes arising from contractual relations between entities subject to Commission supervision and recipients of services provided by these entities.[16]
– Supervision over foreign entities – applies to the insurance, banking and capital sectors, including the manner and procedure for submitting consumer complaints.[17]

IV. Customer protection in the financial market

Changes in the regulation and supervision of the financial market, which took place in the decade after the global financial crisis of 2008, also changed the sphere of consumer protection on the financial market, both at the international, European and national levels. The regulatory framework in the financial markets has been strengthened in response to the financial crisis.[18]

The customer protection system is a system of interrelated institutional and procedural solutions, as well as norms of substantive law, the overarching goal of which is to ensure an appropriate level of security to customers, and in a broader sense – to all participants of the financial market. The essence of protection is not to prevent clients from concluding unfavourable contracts on the financial market, but to enable them to make informed decisions under the conditions of full information, in a market free from frauds and abuses.[19]

The customer protection system should prevent panic on the financial market and eliminate the so-called contagion effect, which consists in transferring, sometimes hidden, the risk to individual participants in the financial market. This system is one of the essential elements of the safety net, aimed at maintaining the stability of the financial market. It should be effective, which means covering each of the protected areas with it, while at the same time excluding disputes over competencies.[20]

The purpose of the protection of consumers of financial services is to take action and create appropriate legal regulations at the national and international levels, preventing various irregularities. consumer protection should consist, in particular, of enabling informed decisions to be made in relation to financial services, in the knowledge of the opportunities and risks associated with them.[21]

[16] The Arbitration Court at the Polish Financial Supervision Authority. https://www.knf.gov.pl/dla_rynku/sad_polubowny_przy_KNF (17.11.2021.)

[17] Supervision over foreign entities. https://www.knf.gov.pl/dla_konsumenta/Ochrona_klienta_na_rynku_uslug_finansowych/nadzor_nad_podmiotami_zagranicznymi (14.06.2017.)

[18] Jurkowska-Zeidler, Anna: Zmiany w otoczeniu regulacyjnym rynku finansowego Unii Europejskiej, w: XXV lat przeobrażeń w prawie finansowym i prawie podatkowym – ocena dokonań i wnioski na przyszłość. Ofiarski, Zbigniew (ed.): *Fundamentalne zmiany regulacji i nadzoru jednolitego rynku finansowego Unii Europejskiej w ramach unii bankowej*. Uniwersytet Szczeciński. Wydział Prawa i Administracji, Szczecin, 2014. 711.

[19] FSB. Consumer Finance Protection with particular Focus on credit, Bazylea, 2011. 3.

[20] Monkiewicz, Jan – Rutkowska-Tomaszewska, Edyta: *Ochrona konsumenta na Polskim i międzynarodowym rynku finansowym*. Wolters Kluwer, Warszawa, 2019. 106.

[21] Commission of the European Communities. Komunikat Komisji – Edukacja Finansowa, KOM (2007) 808. Bruksela, 2007. http://ec.europa.eu/transparency/regdoc/rep/1/2007/PL/1-2007-808-PL-F1-1.Pdf (17.11.2021.).

V. Conclusions

Consumer protection in the financial market is needed to maintain the stability of the entire financial system. Each country requires appropriate authorities that supervise the financial market and ensure that consumer regulations are complied with on this market. It is often up to them to decide whether consumers who are weaker parties to the economic turnover will have equal rights and opportunities to appear in court and defend their rights. For institutions supervising the financial market, the most important thing is to ensure the proper functioning of this market, its stability, security and transparency, as well as confidence in the financial market. As a rule, people are rational in their actions on the market, they can assess all possible economic choice options in terms of their costs and benefits and choose the ones that best take into account their preferences. However, they need help and support in situations where their financial well-being is at risk.

In Poland, there are many institutions supervising the financial market and there are many legal acts regulating these issues. The most important authority in Poland is the Polish Financial Supervision Authority. However, consumer protection on the financial market in Poland is not sufficient despite so many tasks and functions performed by authorities and institutions that are to ensure security.

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Financial Ombudsman. https://www.knf.gov.pl/dla_konsumenta/Ochrona_klienta_na_rynku_uslug_finansowych/rzecznik_finansowy (08.12.2021.)

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FSB. Consumer Finance Protection with particular Focus on credit, Bazylea 2011. 3.

Commission of the European Communities. Komunikat Komisji – Edukacja Finansowa, KOM (2007) 808. Bruksela, 2007. http://ec.europa.eu/transparency/regdoc/rep/1/2007/PL/1-2007-808-PL-F1-1.Pdf (17.11.2021.)

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Judgment of the Constitutional Court of June 15, 2011, K 2/09, OTK-A 2011/5, poz. 42.

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Definitions of Internal Audit Functioning in Poland and in the World

I. Introduction

The purpose of this paper is not only to show the historical sources of internal audit definitions which are the basis for the current regulations in Poland and the world but also to draw attention to the value of internal audit as a useful tool in the service of organizations and to indicate the direction of its development. This article is an overview. It is a compilation of definitions functioning in Poland and in the world to indicate how internal audit is defined in different countries. Due to the limited scope of publication marks an overview of the discussion itself and an attempt at its general summary has been prepared. But it should be noted that the analysis of internal audit definitions in Poland and the world shows similar problems. As in all other areas, also in auditing, despite often precise and clear definitions, which are the source of appropriate regulations and significant support of procedures, standards and methods, the key factors seem to be simply the auditors' willingness to remain objective. The keys are ethical motivations of individual employees and managers resulting from the sense of responsibility for achieving the objectives and mission of a given organization. No matter how appropriate the definition is, how well it corresponds to the demands of the organization and the legal obligations, it is always the human decision that matters most in the end.

II. The origins of internal auditing

The contemporary term internal audit is associated with the Latin *audire* (to hear, listen, examine) and *auditio* (to listen). The source of the name dates back to the 4th century BC when the first officer called *the auditus*[1] was hired in Rome to "listen to books". The method of verification assumed at that time shaped the contemporary *standard of objectivity*, which distances the auditor from the subject of analysis. In this context, A. Piaszczyk defines the auditor as a straightforward analyzing, neutral, objective listener of accounts, who remains passive towards the audited area[2].

When, in 1941, J.B. Thurston said at the first meeting of the founding members of the Institute of Internal Auditors (IIA) that the commonly accepted and used definition of the term "*audit*" as one of the elements of internal audit did not fully reflect the meaning and functions that an auditor performs in practice and was only a nod to history, undoubtedly a breakthrough in the

[1] Herdan, Agnieszka – Stuss, Magdalena – Krasodomska, Joanna: *Audyt wewnętrzny jako narzędzie wspomagające efektywny nadzór korporacyjny w spółkach akcyjnych*. Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2009. 55.
[2] Piaszczyk, Artur: *Audyt wewnętrzny*. SKwP, Warszawa, 2004. 45.

definition of audit took place.[3] Therefore, in 1947, the IIA published the "Statement on the Responsibilities of Internal Auditors", which included guidelines on the objectives of the audit, the scope and the first definition of internal audit, which said that internal audit is an independent activity that evaluates the functioning of an organization from within its structure. Internal audit as a form of control is concerned with measuring and evaluating the effectiveness of other types of control, the analysis of accounting and financial operations and other operational activities, forming the basis of a protective, constructive service function towards management.[4] Thus, was born the basic definition, which evolved to become the guideline for the most important standards in internal auditing worldwide, at the same time indicating operational activities as the proper place for effective internal auditing activities.[5] An update of the definition in 1957 extended the tasks to the evaluation of the activities of the audited institution and the assessment and review of management, and in 1971 emphasized the complexity of the tasks in an enterprise by publishing a definition of internal audit as an independent activity that evaluates the functioning of an organization from within its structure. Internal audit as a form of control is concerned with measuring and evaluating the effectiveness of other types of control, forming the basis of a protective, constructive service function towards management.[6] In this definition, there is no longer any reference to the analysis of accounting and financial operations and other operational activities, included in the definition of 1947, and thus the area of implementation of audit tools is extended to all activities and structures of the audited organization.

After the end of World War I, the term *operational audit* became popular in North America. According to B. Cadmus, it is *not the working methods but the auditor's aspirations and position that distinguish it*. At the same time, the author noted that, for practical reasons, the operational audit should be combined with a financial audit, taking into account the tasks and characteristics of both operational and financial.[7] As mentioned earlier, the discussion on the definition of the audit was also joined by V.Z. Brink, J.A. Cashin and H. Witt, this time defining internal audit as a part of managerial control, which in turn is a component of control in general, while internal control and employee self-control are, according to them, much narrower concepts than an internal audit.[8]

Brink and Cachina – the most influential members of the Institute of Internal Auditors in 1958 gave their point of view on the understanding of internal audit, according to them, internal audit is a unique part of the accounting area. Auditors and statutory auditors use many common working tools, which leads to the erroneous thesis that there is little difference in their work or their ultimate objectives. The internal auditor does investigate and find corroborations of assumptions, but these relate to a broader scope and are only partially related to bank accounts. Besides, the internal auditor, being an employee of the audited company, is more interested and

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[3] Dooley, D. E.: Nothing New Under the Sun? *The Internal Auditor*, XXII, Summer 1965. 10. Cited after: Piaszczyk, 2004. 45.

[4] Statements of responsibilities of the Internal Auditors. *The Accounting Review*, Vol.30. No.1. 86. Cited after: Lisiński Marek (eds.): *Audyt wewnętrzny w doskonaleniu instytucji*. Polskie Wydawnictwo Ekonomiczne S.A., Warszawa, 2011. 28–37.

[5] Lisiński, 2011. 37.

[6] Sawyer, Lawrence B. – Dittehofer, Mortimer A. – Scheiner, James.H.: *Sawyer's Internal Auditing. The Practice of Modern Internal Auditing*. Altamonte Springs 1996. 3. Cited after: Lisiński Marek (eds.): *Audyt wewnętrzny w doskonaleniu instytucji*. Warszawa, 2011. 37.

[7] Cadmus, Bradford: *Operational auditing, a tool for modern internal auditors*. Orlando 1964.5. Cited after: Piaszczyk, Artur: *Audyt wewnętrzny*. SKwP, Warszawa 2004. 45.

[8] Brink, Victor – Cashin, James – Witt, Herbert: *Modern Internal Auditing*. An Operational Approach, New York 1973.10–11. Cited after: Piaszczyk, 2004. 45–46.

personally involved in increasing the profitability of the company and providing effective services to the management of the organization.[9]

III. Contemporary definitions

Changes within the organization, as well as changes in the institution's environment due to technical, technological and information developments, led the Institute of Internal Auditors to publish an update of the "Definition of Internal Audit" in September 2016. The Institute of Internal Auditors in Poland published an update of the "Definition of Internal Audit, Code of Ethics and International Standards for the Professional Practice of Internal Auditing", which included the current definition of internal audit, in which the financial and accounting accents were the lowest in the history of definitions published by the IIA. Internal audit,[10] as of 2016, is an independent and objective activity that aims to add value and improve the operational activities of an organization. Internal audit deals with the systematic and structured evaluation of the processes: risk management, control and organizational governance, and has an impact on improving their performance. It provides advice on the achievement of organizational objectives, assuring the effectiveness of the audited processes.[11]

A dozen years earlier, at the end of the 20th century, the financial and accounting aspect of the definition of internal audit was still clearly marked by W.B. Meigs, for whom internal audit is the testing and checking by an independent auditor of financial documents, accounting records and other documents from inside and outside an organization[12], and by B. Soltani, according to whom an internal audit is a form of service provided by an auditor who issues a written report assessing whether the financial books are kept in accordance with generally accepted accounting principles.[13]

One of the most relevant scientific definitions of auditing was created by L.B. Sawayer, highlighting the origins and objectives of auditing in practice. According to him, the origin of the internal audit is in good bookkeeping skills, transformed into a profession whose purpose is management. Sawayer pointed out that internal audit was primarily concerned with certifying the accuracy of financial data. Today it deals with the provision of services, including the examination and evaluation of controls and all spheres of activity of public and private entities.[14] In another publication, Sawayer names the terms which have so far been used interchangeably with the definition of internal audit: management auditing, operational auditing, program auditing, results auditing, operations appraisals, etc. *However, the word "internal audit"* defines its functions most

[9] Ramamoorti Sridhar: *Internal Auditing: History, Evolution, and Prospects*. The Institute of Internal Auditors, Florida, 2003. 2–20.

[10] Original definition from: The Institute of Internal Auditors, Definition of Internal Auditing, Code of Ethics, and International Standards for the Professional Practice of Internal Auditing, Altamonte Springs, Florida, September 2016.3.; „Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes". Standardy. Instytut Audytorów Wewnętrznych. https://www.iia.org.pl/o-nas/standardy (15.03.2022.)

[11] The Institute of Internal Auditors, Definicja audytu wewnętrznego, Kodeks etyki oraz Międzynarodowe standardy praktyki zawodowej audytu wewnętrznego, Altamonte Springs, Floryda, 2016.3. https://www.iia.org.pl/o-nas/standardy (10.02.2022.)

[12] Meigs, Walter – Whittington, Ray – Pany, Kurt: *Principles of Auditing*. Boston 1989.33. Cited after: Lisiński, 2011. 39.

[13] Soltani, Bahram: *Auditing: An International Approach*. Harlow, 2007. 2–3.

[14] Sawyer–Dittehofer–Scheiner 1996. 3. Cited after: Lisiński, 2011.

precisely, since it is an umbrella term, "*containing all forms of activity assessment performed by an auditor working within and for a given organization*".[15] Similar definitions were also proposed by J. Banaszkiewicz for whom the internal audit is an independent and objective assessment of the way, management and control of an organization. At the same time, management is the protection of assets and the use of the organization's resources while maintaining efficiency and economy.[16] Lucka, in turn, claimed that audit activities are performed within the framework of organizational independence.[17]

Another attempt to define an internal audit came from INTOSAI (International Organization of Supreme Audit Institutions), which defined it as a tool that shares many of the characteristics of an external audit but, by operating from within the organization, can properly carry out the tasks set by the entity's management. Through the internal audit, managers of an entity gain assurance from internal sources that the processes for which they are responsible are operating to an extent that minimizes "*the likelihood of fraud, error or wasteful or inefficient practices*".[18]

Ratliff and Reding noted the expanded responsibilities and skills of the 21st-century internal auditor, who must be prepared to audit all aspects of operations, control systems, mission performance, information, and information systems, legal, financial, reporting, fraud, environmental and quality.[19]

C. Paczuła claims that an internal audit is a valuable tool for the management of an enterprise, as it proactively, independently, professionally, and objectively deals with the assessment of the effectiveness of internal control systems and risk management processes, the effective conduct of all operations and activities of an enterprise. According to Paczula, internal audit also deals with proper uniform processing, accounting, and reporting, bringing added value by revealing deficiencies and weaknesses and pointing out ways to improve the quality and efficiency of work. An audit provides management with advice on assurances as to the state of the audited activity or unit. The auditor assesses whether the actual state is consistent with that described in the reports.[20]

In turn, B.R. Kuc emphasizes that in Polish the word audit (especially external audit) is synonymous with the audit of accounts. The external audit *has been limited to the audit of financial statements*.[21]

E.J. Saunders, *the founder of the Polish Institute of Internal Control (PIKW) and between 2001 and 2002 advisor to the Ministry of Finance on control and internal audit*, in connection with the introduction by the EU of the necessity to implement internal audit in public administration, defined an internal audit as follows: a professional assurance activity that is an effective tool for the management of an enterprise because it proactively, independently, professionally and objectively assesses the effectiveness of internal control systems and risk management processes. Internal audit, in his view, examines the effectiveness in the conduct of all the company's operations and activities,

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[15] Sawyer, Lawrence: *The Practice of Modern Internal Auditing*. The Institute of Internal Auditors, Inc. Altamonte Springs 1981.6, Cited after: Piaszczyk, 2004. 45.

[16] Banaszkiewicz, Jolanta: *Audyt wewnętrzny, Spojrzenie praktyczne*. Warszawa 2003.6. Cited after: Lisiński, 2011. 42–50.

[17] Lisiński, 2011. 42–50.

[18] INTOSAI, Auditing Standards, Washington DC 1991.71, Cited after: Lisiński, 2011. 40.

[19] Ratliff, Richard – Reding, Kurt: I*ntroduction to Auditing: Logic, Principles and Techniques*. Altamonte Springs,The Institute of Internal Auditors, Forida, 2002. Cited after: Ramamoorti, 2003. 10.

[20] Paczuła, Czesław: Audyt wewnętrzny w świetle polskiej literatury i badań. *Rachunkowość – audytor* nr 4 (11), Warszawa 2004, Cited after: Sawicki, Kazimierz: *Relacje między kontrolą wewnętrzną*. Audytem wewnętrznym, kontrolą zarządczą i rewizją finansową, Szczecin, 2013. 39–40.

[21] Kuc, Rafał Bolesław: *Kontrola- Kontroling- Audyt 3 w 1- podobieństwa i różnice*. Warszawa, 2008. 242.

their correctness, the uniformity of processing, accounting, and reporting, thus bringing added value by revealing deficiencies and weaknesses and by identifying ways to improve the quality and efficiency of work. The auditor assures whether the actual state of the assessed entity or operation is consistent with the reported state. On the basis of the examination and assessment carried out, the internal auditor also provides advice to the audited entity.[22]

However, the most important definition of audit, functioning in Poland and the world, has been created and published by the Institute of Internal Auditors (IIA).[23] The "Manual of Internal Auditing in Poland[24]" published in 2003 by the Ministry of Finance and currently regarded as a knowledge base, clearly defines the IIA definition as a model for the proper understanding of the concept of internal auditing in the sphere of public finance in Poland, quoting the definition of the Public Finance Act of 2001.[25]According to this definition, an internal audit is an objective and independent assessment of the functioning of an entity in terms of financial management, which, by examining legality, economy, purposefulness, reliability, as well as transparency and openness, provides the head of the entity with information on the state of the managed entity.[26] Immediately after this definition, a comment was added that this definition should be seen through the prism of the Standards for the Professional Practice of Internal Auditing" developed by the Institute of Internal Auditors.[27]

According to the "Glossary of Terms" of the Supreme Audit Office, the word audit is synonymous with control (in the functional meaning) and means conducting research or reviews establishing the actual state of affairs and comparing it to the required (desired) state of affairs, as well as preparing an assessment on this basis. The Audit can be considered from various perspectives, e.g., the *entity conducting it (internal, external), the time of conducting it (ex-ante control, ex-post control, control in progress), and the area examined (financial control, control of task performance)*.[28]

E. Chojna-Duch defines an internal audit as a form (type) of control based on advisory activities and performing functions supporting the management of a public entity through independent control and advisory activities undertaken in the system of entity management. According to Chojna-Duch, thanks to the work of an internal audit the manager of the audited entity receives a diagnosis covering the entire management of the entity including its financial management,

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[22] Saunders, Edmund: *Audyt wewnętrzny*. Warszawa 2008, 21–22, Cited after: Lisiński, 2011. 42.

[23] According to this definition, internal audit is an independent, objective assurance and advisory activity designed to add value and improve the operating activities of an organization. Audit according to the Institute of Internal Auditors is based on systematic and structured evaluation of risk management, control and governance processes helping the organization to achieve its objectives. The Institute of Internal Auditors: Definition of Internal Auditing, Code of Ethics and International Standards for the Professional Practice of Internal Auditing, Altamonte Springs, Florida, September 2016. https://www.iia.org.pl/o-nas/standardy (10.02.2022.)

[24] Ministerstwo Finansów, Podręcznik Audytu Wewnętrznego w Polsce, Warszawa 2003. 6. http://www.mf.gov.pl/c/document_library/get_file?uuid=d25de3cc-46cc-4765-8dfb-3872090eaa18&groupId=764034 (08.02.2017.)

[25] Ustawa o zmianie ustawy o finansach publicznych (Dz. U. 2001, Nr 102,poz.1116 z późn. zm.)

[26] Ministerstwo Finansów, Podręcznik Audytu Wewnętrznego w Polsce, Warszawa 2003. 6. http://www.mf.gov.pl/c/document_library/get_file?uuid=d25de3cc-46cc-4765-8dfb-3872090eaa18&groupId=764034 (08.02.2017.)

[27] Internal audit is a non-judgmental, objective, assurance and consulting activity, prepared to add value and improve the operations of the audited institution. Through a systematic, disciplined approach to assessing and improving the effectiveness of the organization's risk management, control, and governance processes, it contributes to organizational development. In: Ministerstwo Finansów, Podręcznik Audytu Wewnętrznego w Polsce, Warszawa 2003. 6.

[28] Płoskonka, Józef et. al: *Glosariusz terminów dotyczących kontroli i audytu w administracji publicznej*. Najwyższa Izba Kontroli Warszawa 2005. 13, 32. https://www.nik.gov.pl/plik/id,1704.pdf (10.02.2022.)

objective information relating to all aspects in which the entity functions and thanks to this he/she can assess the activity of the entity in the area of control procedures.[29]

On the other hand, Jagielski writes for the Supreme Audit Office that the internal audit is a component of the internal control system, extending this system by control, monitoring and advisory mechanisms and serves to help managers of organizational units in the assessment and diagnosis of all processes (and states) functioning in the audited entity. In his opinion, the audit in the sphere of public finance refers primarily to financial management, but also the organizational, personnel, procedural or control sphere.[30]

Marek Lisiński, in turn, pointed out that the internal audit serves to improve the audited institution, because belonging to the instruments of management through a process of independent, objective examination using available research methods and techniques, it diagnoses problems in every area of the institution's activity, analyses and evaluates them and contributes to their elimination.[31]

Both the quoted definitions by Chojna-Duch and Jagielski point to the advisory aspect of an audit and activities of a financial nature. Thus, these definitions form an opposition to the definitions presented by international organizations and foreign authors, but it is also clear that they refer to the specificity of the sphere of public finance and express its essence.

IV. Conclusion

In this modern approach, the internal audit constantly evaluates management control mechanisms and performs an advisory function by assessing them and identifying their weaknesses. As a result, it can influence the introduction of changes to the management control system and, as a consequence, significantly influence the quality of management in the audited institution. Since 2010, the audit has become the opposite of control, as it focuses on deficiencies of entire systems, and not on specific individual errors, as control does.

Depending on how the definition of audit as such is understood and how the implementation of audit into a specific system is approached, the essence and most important functions of internal audit are outlined in different ways. However diverse the definitions and their application in the system, the focus of the internal audit is always ultimately on finance. Each definition, even if it relates to other aspects of an organization's operation, is always ultimately accounted for in the financial aspect. However, the quality of the implemented definition is created by the individual decisions of the decision-makers and their ethics.

It should be noted that the key to the proper adoption of internal audit implementation patterns is the operation based on the highest ethical standards which should be maintained by both the management of the audited organization and the auditors themselves. In the idea of internal audit, the goal cannot be the realization of particular interests of auditors or the management but improving the quality of functioning of the organization and increasing the possibilities for development.

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[29] Chojna-Duch, Elżbieta: *Polskie prawo finansowe*. Finanse publiczne, Warszawa 2006. 60.

[30] Jagielski, Jacek: Audyt wewnętrzny – miejsce w systemie kontroli i organizacja. *Kontrola Państwowa*, nr 3, Warszawa, 2003. 3. https://www.nik.gov.pl/plik/id,1704.pdf (10.02.2022.)

[31] Lisiński, 2011. 42.

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INTOSAI, *Auditing Standards*. Washington DC 1991. 71.

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Methodology

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How to Make the Law More Communicative (if at all possible)?

I. Introduction

It is said that: *ignorantia iuris nocet* – but is it possible to understand the law at all? How to make the law more communicative? This paper aims to explain how the law (more precisely, the language of legal texts) co-creates and sometimes distorts the image of the world, which is considered reliable and indisputable. An important problem here concerns the fact that in spite of the law being created democratically, its contents (affecting the way cases are adjudicated) are determined by interpretation, which can sometimes be quite ambiguous. Doubts as to the interpretation methods caused by lawyers adopting unclear rules of interpretation can lead to a state of affairs different from societal expectations (but in line with the government's demands) and are justified by nothing but the authority of legal expertise. The legal approach to the issues presented in the article differs, of course, from that demonstrated by the linguists. However, the text, as the object of research, plays a crucial role for lawyers raised in a neo-positivist spirit and the analytic tradition.[1] The paper is rooted in legal theory, not a sociological analysis of legal phenomena.

I would like to deal with the issue of relativeness of the interpretation of the law. The issue of relativity or even the fictitiousness of law is not new.[2] It has been analyzed by the so-called critical scholars, such as the school of critical legal studies. However, the article is supposed to bring new problems concerning the criticism of legal interpretation and to propose a solution, perhaps somewhat revolutionary. The problem is that there are two worlds: the world of legal relations for lawyers and the world of regular citizens. Consequently, there are also two ways of understanding legal texts.

I believe that an explanation of this assumed fact is not ideological or socio-technical. Ideology is seen as a source of all main problems with the interpretation that contribute to the multiplicity of ways of understanding a legal text. According to the approach this article presents, the reason for the problem with interpreting laws (which is connected with understanding and communication) involves the *quasi-idiomaticity* of legal texts.[3] This means that the expressions that make up legal

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[1] Czepita, Stanisław – Wronkowska, Slawomira – Zieliński, Maciej: Założenia szkoły poznańsko-szczecińskiej w teorii prawa. *Państwo i Prawo*, Vol. 68. No. 2. 2013. 3–16; Peczenik, Aleksander: Can Philosophy Help Legal Doctrine?. *Ratio Juris*, Vol. 17. No. 1. 2004. 106–117.

[2] The word 'fiction' is used in its technical meaning. This word is a tool which appears in the text as an antonym to reality, i.e. one which really exists objectively (regardless of a person's will) and empirically. As the old saying goes, in this world nothing can be said to be certain, except death and taxes. In fact, it is only death that is certain, whereas taxes are based on assumptions and faith in what others, especially lawmakers, are saying.

[3] Zieliński, Maciej: Decoding Legal Text. In: Ziembiński, Zygmunt (ed.): *Polish Contributions to the Theory and Philosophy of Law*. Rodopi, Amsterdam, 1987. 165–178.

texts resemble idioms. They cannot be read directly, i.e. without knowing the rules (or idioms in the regular language). It can be said that these rules are not commonly known – they are the domain of professionals (an ancient tradition according to which the law is something sacral is still alive). To demonstrate this problem, the Polish theory of legal interpretation, called "derivational", and the idea of humanistic interpretation (i.e. rationality of human actions, including the conventional person of the legislator) will be presented here. Thus, problems with communication between the lawmaker and addresses are rooted in the semiotics.

The article proposes a simple solution. Namely, legal texts should be published in two equivalent forms. First, as a standard legal text. Second, in an accessible and understandable form for people who have the lowest language competencies (at the level of primary school, which is compulsory in most countries). This could be a form whose task is to translate and explain a formal legal text. But this is not enough. It might sound too revolutionary, but, in fact, this form should have a binding force (the same as the regular form). The problem lies in the relation between these two forms in the event of a collision. But this is a technical problem, to be solved by legal scholars.

In the first part, I will present the so-called "soft" critical views on the interpretation of the law and, on the ambiguity of the law in general. It is important to stress that ambiguity of the law may lead to the fictitious role of a standard legal text (such as the text of an act of parliament, which has a professional character, etc.). In the second part, a thesis about the quasi-idiomaticity of a legal text will be presented. The last part will contain comments on the "popular" form of legal texts, that is, the version that translates idioms into an understandable and simple language. In fact, legal provisions and legal knowledge too are still a manifestation of the sovereign's will – or the will of a very elite group with political power (broadly understood – knowledge is also a kind of power).[4]

Moreover, legitimating all legal decisions is "a kind of game", but we do not have prescriptions as to what is legitimate. Some factors make this game bad or good for democracy or a civic society, or for promoting fairness or social welfare etc. Which factors increase the level of legitimating, assuming that legitimization of fiction is possible at all?[5] It can be said, that the suggested solution, that is, a popular form of legal texts, supports egalitarianism of the law and its democratic nature.

The problem of the fictitiousness of a legal text has been raised by law criticism movements in a broad sense. Critical movements try to replace the strictly judicial narrative with an alternative one. For example, research texts created by the critical race theory are written as stories, enriched with retrospectives or interviews about experiences of those who have been affected by unjust (in a purely human and emotional sense: sad, malicious) decisions or social situations. Legal scholars who are within the critical race theory movement, use personal narratives to season their legal reasoning, arguments etc. For example, they share experiences to illustrate the impact of hate speech. A legal language or a specific language of legal texts is too formal and too unemotional to express for example how it feels to be barred from a store because of one's race. The legal language and the official narrative of the law, which declares formal equality, equal rights for all etc., turn a blind eye to such situations. What is more, the formal language of law creates a distance between life and text. How to build bridges? The critical race theory scholars use "I" in their critiques to

[4] Sankaran, Kamala – Singh, Ujjwal Kumar (eds.): *Towards Legal Literacy. An Introduction to Law in India*. Oxford University Press, New Delhi, 2008. 11–12.

[5] Peczenik, Aleksander: *Scentia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law*. Springer, Dordrech, 2005. 11–16.

erase the distance between the reader, the writer of the text and real life.[6] It changes the way of storytelling, imposes a personalist perspective, taking into account real human needs and feelings. Typically, in statutes, as it is known, the law is very distant from such humanism.

These real experiences are a counterweight to the judicial narrative. To understand these stories, you have to immerse yourself in the real world, in reality. It is not an easy task. Legal philosophers, such as Ronald Dworkin, claim that judges do not have to do it – they can create their own stories.[7] One may say that law is a socially shared project, not only an elite empire of judges or courts. As a society, we need to find a mechanism that will make law essentially a joint enterprise.[8]

II. Law and Interpretation

The creation of law and its interpretation are, from the point of view of the text, related. Let us try to outline it briefly. The starting point involves two basic problems. First of all, one can assume that lawyers read legal texts in such a way as if they had some deeper layer.[9] Detailed solutions in the field of legislation (and judicial practice) are a product of political compromise, arbitrary assessments, particular interests or ideologies (or perhaps corruption and unreliable lobbying). Nevertheless, these solutions are binding, thus affecting legal theories. Therefore, the science of the law, creating consistent and organized concepts, must assume *per se* that its efforts do not only boil down to the description of laws (legal texts) but rather consist in discovering a deeper sense of these laws or other regulations. In principle, however, legal texts do not have a hidden agenda. By examining them, one can discover at most certain existing political and ideological practices or (non-consistent) attitudes of politicians or lawyers who create a given text. Second, the reading of legal texts refers to a certain preconceived image of the entity writing this text. In the juridical sense, a legal text is created or published by an institution equipped with law-making competencies.

The legislator is a highly idealized entity. It is a creation of the views of legal scholars and commentators, who attribute certain features to it. These are the qualities of someone judicious and fair, such as knowledge of the world, rationality, and above all honesty, truthfulness, goodness and virtue.[10] They are not true but derive from a certain tradition (royal coronation ceremony, divine rights of kings, etc.). The legislator creates a world which it then describes in legal texts.

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[6] Russel, Kathyn: Critical Race Theory and Social Justice. In: Arrigo, Bruce A. (ed.): *Social Justice/Criminal Justice. The Maturation of Critical Theory in Law, Crime, and Deviance*. Wadsworth Publishing, Scarborough, 1999. 178–187.

[7] Dworkin, Ronald: *Law's Empire*. London, 1986. 196.; Dworkin, Ronald: *Taking Right Seriously*. Harvard–Cambridge, 1980. 72.

[8] The Court of Justice of the European Union could be seen as the example of a kind alienation of a public institution. As mentioned, 'alienation' means a state of affairs where the operation of an institution remains beyond not only the control, but even the awareness of ordinary citizens. The mechanism governing the operations of this institution lies beyond not only the cognitive abilities of ordinary Europeans, but also their cognitive willingness: one can assume that nobody feels like investigating the nature and operations of this institution (as this knowledge won't do them any good anyway). Therefore, it can create its own reality, more or less different from what surrounds ordinary citizens, as well as create its own justifications and reasoning. Naturally, national courts seem to be closer to citizens, more rooted in the feelings of ordinary people. With regards to a social role of courts confer: Dworkin, 1986.

[9] There is no empirical justification for this assertion, but it seems that if legal knowledge is part of real science, an object of legal science must be considered as something that can be multidimensionally scrutinized. Moreover, there are for example functional interpretations that assume that legal texts have many layers.

[10] Prima facie rationality is understood in its epistemic-technical sense, but it has also axiological dimension (the so-called axiological rationality).

Such a formal approach is not enough. It must be additionally assumed that the text is created by a rational entity with appropriate knowledge and ethical characteristics. In essence, however, this is a counterfactual or idealizational assumption.[11] Such an entity is the creator of the legal text. It creates a certain reality in this text; the world imagined by such a creator is in a way a text with a status of a story. It requires decoding[12]. It is not true that ordinary language competence suffices to read it.

Of course, there are two possible situations. The first, probably rare, is where the legal text or its part (a given set of provisions) is straightforward or clear. The so-called direct understanding of legal texts takes place when the interpretation of the law is not necessary because the law-applying entity has no doubts regarding the meaning of a given legal provision (which has to be applied in a specific case). Second, when it requires interpretation (because of its ambiguity etc. or because it is believed that the law itself is an interpretive enterprise).

Laws are meant to predispose the readers in a specific way toward the word defined and toward what it signifies[13]. Even if challenging texts occurs only occasionally, it can affect the important rights and obligations of citizens. Therefore, if only for this reason, we should look for a method that will make the law accessible to everyone and easier to read (understand).

Is a common (average) language competence (of a user of a given language) sufficient for reading a legal text?[14] It is safe to say that it is not. There are some commonly accepted (by legal scholars and commentators) principles of interpretation of the law that is widely understood legal traditions. They constitute the common good of legal cultures that take advantage of the rules of exegesis of the text that draws from hermeneutic ideas. Certain principles of interpretation form part of the culture of our communities and they are embedded in this culture. The principles of interpretation shall be understood here as these directives (standards) which define how the legal text should be interpreted correctly. Therefore, they refer to pragmatically understood interpretations (as a set of interpretive activities). The principles of interpretation show a lot of similarity with purposive directives, which indicate how to proceed to get the desired result (in this case, an adequately interpreted provision). An example of such general principles of interpretation is a second-order principle, which stipulates that interpretation must (should) be done under the law (this condition is coherent in nature – the result of interpretation cannot lead to incompatibility of the rules of the legal system) and must (should) be based on the directives for the interpretation of law adopted in the case law and among legal scholars and commentators.

The clarity of the law is not an instrumental condition but in fact a guaranteed condition. It must be read in the context of two statements. Firstly, provisions are to be formulated (if possible) clearly, secondly, clear regulations cannot be subject to special interpretative measures, that is, the ban on the interpretation of explicitly understood provisions (*clara non sunt interpretanda*) must apply.

Legal interpretation has an innovative aspect, directed to the future. Innovation excludes generalization. And makes laws unpredictable. There is no point in attempting to create a general theory that would distinguish good interpretations from bad ones.[15] Moreover, no interpretation

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[11] Harsanyi, John: Morality and the Theory of Rational Behaviour. In: Sen, Amartya – Williams, Bernard (eds): *Utilitarianism and beyond*. Cambridge University Press Cambridge, 1982. 39–62.

[12] Zieliński, 1987. 165–178.

[13] Lucy, William: *Philosophy of Private Law*. Oxford University Press, Oxford, 2006. 249.

[14] Marmor, Andrei: *Philosophy of Law*. Princeton University Press, Princeton, 2011. 137–145.

[15] Grabowski, Andrzej: Clara non sunt interpretanda vs. omnia sunt interpretanda A Never-Ending Controversy in Polish Legal Theory? *Revus. Journal for Constitutional Theory and Philosophy of Law*, Vol. 27. 2015. 67–97.

concept will constitute a description of judicial practice, because it is based on a series of unclear, unspecified and unsaid premises, supplemented by judges' declarations that they apply only legal norms, and not internal (alternatively institutional, that is having support in institutional practice) rules of economic settlement of matters. In addition, the concepts of interpretation essentially express a normative claim of creators of these concepts equipped with authority. This claim is unjustified because it seeks to shape the interpretation practice within a narrow and professional interpretive community, that is, lawyers who know the methods of reading legal texts.[16]

It should be emphasized once again that it is possible to justify descriptive and non-descriptive statements formulated by jurisprudence, and the subject of critical reflection of this text involves the fact that there is no such justification.

III. Is the legal text written in the form of expressions similar to idioms?

It can be assumed that conditions under which the exercise of coercive power by courts is carried out must be justified. Court's authority to interpret laws is justifiable, but it is not automatically presumed.[17] Therefore, a normative concept of legal interpretation is a matter of political or legal legitimacy, it may include moral considerations, ethical concepts or promote certain ideologies. The most important Polish theory of legal interpretation is called the derivational theory of juristic interpretation (formulated by M. Zieliński and developed in the so-called Szczecin's School of the Theory of Law). In general, however, this theory was introduced to Polish philosophers in the 1970s. This theory has a normative character and is mainly based on the linguistic analysis of the characteristic features of legislative texts (in Poland) and the scrutiny of the accomplishments of legal scholars and commentators, as well as judicial decisions.[18]

The starting point is an observation that law is created differently from how it is read. In other words, the relationship between the rules of making law and the rule of reading this legal text is important. The concept of interpretation of the legal text functioning in the Polish legal writings, while it seems relatively typical for Central Europe and not only, assumes that law is created by issuing legal texts by the legislator, but reading these texts requires the interpreter to take into account the multilevel nature of these texts.

According to the main conception in Polish legal theory, particularly on the ground of a conception of interpretation formulated by R. Sarkowicz, there are at least two levels of a legal text.

The first level is descriptive; it is a description of the world created and imagined by the creator of the text. This is the level at which the law emerges. The said text includes the so-called legal provisions. One can find sentences in legal texts. These sentences can be called provisions. They are sentences in a grammatical sense (they start with a capital letter and end with a full stop or semicolon). Even if they describe something as sentences, what is described is not a reality. In fact, a legal provision is distinguished from the norm (or norms) encoded in this provision.

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[16] Peczenik, Aleksander: Stressing Legal Decisions and Theory of Law. In: Biernat,Tadeusz – Patecki, Krzysztof – Peczenik, Aleksander – Wong, Christoffer – Zirk-Sadowski, Marek (eds.): *Stressing Legal Decisions*. Polpress, Kraków. 2004. 12–16.

[17] Leiter, Brian: Law and Objectivity. In: Coleman, Jules L. – Himma, Kenneth Einar – Saphiro, Scott J. (eds): *The Oxford Handbook of Jurisprudence & Philosophy of Law*. Oxford University Press, New York. 2002. 980.

[18] Cf. Gizbert-Studnicki, Tomasz – Pałecki, Krzysztof – Woleński, Jan: 20th-Century Legal Theory and Philosophy in Poland. In: Pattaro, Enrico – Roversi, Corrado (eds): *Legal Philosophy the Twentieth Century. The Civil Law World*. Springer, Dordrecht, 2016. 568–574.

The second level is the level of directives, called norms, expressing duties. These duties (namely norms of conduct, that is statements ordering someone to do or prohibiting someone from doing something) are read by way of interpretation, using rules indicating which actions the interpreter must undertake for the translation of the provisions (description) into duties (norms) to be correct.[19]

A legal text is written in the form of expressions similar to idioms.[20] It is not read literally, and there is no other way of its reception than individual interpretation (of a purely linguistic sense, on which one could stop being the interpreter).[21] In the process of interpretation, not only the legal text matters. *De facto*, one should consider, in addition to the text, the views of legal scholars and commentators, that is, the views on the meaning of words included in this text (such as "property", "guilt") and axiology, that is, goals and values that in some interpretative situations have priority over the literal meaning of legal provisions. Despite some differences, I believe that the mechanism of interpretation, and its elitism, is similar within our (European or post-Roman) legal culture.[22] It is worth posing a question about who in this case is the creator of the narrative, the story about the law – if democracy assumes the creation of law by the citizens themselves, then the interpretation is expert. The law is not literature. Law belongs to an elite club – lawyers and, in particular, courts (judges). In addition, reading the text assumes that its creator has certain features that are recognized as important from the point of view of interpretation.

IV. On the popular forms of legal texts (laws for all)

"The meaning of the word is not an isolated and independent thing".[23] Some philosophers (e.g. Ronald Dworkin) defend a view of legal interpretation by judges and argues it is proper for courts to interpret the constitution or legal texts *in genere* in light of the correct principles of justice that judges (he claims that these are principles of the whole society, not only values discovered by judges) try to honour.[24] Legal rules (provisions) are interpreted flexibly. How to define or measure an acceptable level of this flexibility? Some premises are added to legal texts. It seems that the application of these premises in legal reasoning is not duly justified (legitimated). Typically, this legitimization is rooted in a traditional position or authority of legal scholars and commentators due to its special social status. In fact, legitimization understood in this way is also a kind of fiction. It is only a kind of declaration of legal scholars that given (and only one) way of understanding laws are correct and appropriate. Therefore, this legitimization is grounded in a claim that legal scholars are owners of legal knowledge – which is mainly specialist knowledge about legal texts. And citizens believe in these declarations. Naturally, it is possible to find that moral or legal justification or legitimization.[25]

It would be hard to deny that interpretation (in the light of the hermeneutic thesis about becoming law in its reading) belongs to the community of judges. It is a mistake to think that

[19] Sarkowicz, Ryszard: Levels of Interpretation of a Legal Text. *Ratio Juris*, Vol. 8. No. 1. 1995. 104–112.

[20] Zieliński, Maciej: *Interpretacja jako proces dekodowania tekstu prawnego*. Uniwersytet im. Adama Mickiewicza, Poznań, 1972.

[21] Grabowski, 2015. 67–97.

[22] Farber, Daniel A.: Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective. *Cornell Law Review*, Vol. 81. 1995–1996. 513–529.

[23] Fairclough, Norman: *Language and Power*. Longman, London, 1989. 94.

[24] Dworkin, Ronald: *Law's Empire*. Fontana Press, London, 1986. 14ff; Dworkin, Ronald: *Taking Right Seriously*. Harvard University Press, Harvard–Cambridge, 1980. 22.

[25] Peczenik, Aleksander: Can Philosophy Help Legal Doctrine? *Ratio Juris*, Vol. 17. No. 1. 2004. 106–117.

this community is sufficiently open and reflective. At which point does the interpretation, and the community that creates rules of interpretation, begin to deviate from spontaneous social expectations? Namely, typically the entire terminological and conceptual grid is interpretive. As far as the interpretation of the law is concerned, it is known that legal interpretation requires the adoption of certain assumptions. These assumptions affect the result of every single act of interpretation. Generally, these assumptions are so unclear, flexible, and imprecise, that they cannot be unambiguously characterized or dressed in the robe of rules.

Legal scholars or politicians assume that judges are in some special way entitled (legitimized) to make arrangements in this respect and at the same time honour the one or other values in which they are rooted (at this point we drop into the ethics of virtues, into the morality of aspirations). This should be discussed. First of all, for the reason that the community of judges is an elite club enclosed in a cocoon of fiction, which they produce, justifying decisions not by any social values, but by what lawyers honoured (if they want to justify their decisions). They are not authoritative representatives of social culture.[26] There is a question about what gives courts the authority to accept such or other premises in their interpretation – even if we consider the rules of interpretation to be embedded in a given legal culture, they are still not democratically justified. While rules of a wedding ceremony etc. can be open, spontaneous, and traditional, rules of interpretation are linked with the structure of our rights, duties, and responsibilities.

It is worth emphasizing that this is not about a dispute over the possibility of an objective interpretation; the objective interpretation of the text is one issue, and the selection and content of the rules governing the interpretation is a completely different one. The important thing is that the principles of interpretation, from the sociolinguistic point of view, are based on beliefs adopted in the legal culture about social reality, accepted values and desirable states of affairs. Such a communication community can be a value in itself, but its functioning is socially justified insofar as it is reflective (it reflects the actual social needs and values) and non-alienated (it is not guided by a particular, professional, ideological or political interest in isolation from the social environment). This is an argumentative community, a community where only certain specific ways of discussion and of justifying one's statements and decisions function. If one wants to justify one's statement or opinion within a given community (e.g., judges), one must accept its rules, regardless of their justness, legitimacy, or rationality.

According to the elitist approach, the community of lawyers is legitimized to form interpretation directives because of the fact that judges and lawyers represent the law having an inherent value, constituting the source of authority, although the power of a sovereign body (state) backed up by coercion (this power is represented by judges and other state entities) is sufficient to impose an interpretation and its methods.

Instead of classical elitism, I would like to propose an egalitarian and open approach. An egalitarian approach, in turn, would seek to subject these rules to democratic control, looking for possible and real ways to achieve this goal. One solution for this could be the publication of legal texts in two forms: articulated (professional) and a pamphlet, adapted to the capabilities of an ordinary recipient, thus with explanations, providing a way of understanding the text. That could be a form similar to popular publications of literary texts – aids intended for primary and secondary school students.

It would be a matter of writing a legal text taking into account what lawyers add to it while interpreting it, deprived of that idiomatic nature that makes the comprehension of the text

[26] See, Zirk-Sadowski, Marek: *Prawo a uczestniczenie w kulturze*. Wydawnictwo Uniwersytetu Łódzkiego, Łódź, 1998. 57.

complex and uncertain when it comes to normative results. It would be in a sense a legal, authentic interpretation of the text.

What speaks for the publication of legal texts in a popular form? The legal text resembles a story written by a systematized writer. The difference lies in the fact that the creator of the legal text gives it a binding character and imposes its authenticity (narrative contained in this text) on everyone over whom they have broadly understood power. Lawyers and philosophers call this the authority of law (for instance, Joseph Raz). However, the position of Jeremy Bentham or John Austin, who stated that it is a practice of respect exercised by physical force, was more accurate.[27] The elitism of the rules of interpretation and the law in general, limiting discourse on the law (available to ordinary citizens), is also based on the fact that the legislator and lawyers have exclusive control over the meaning of words in the legal text. First of all, the legislator has the power to create definitions that regulate or establish the meaning of legal words, not to mention the arbitrary use of persuasive definitions. Secondly, it is not possible to read a legal text and justify an interpretative decision without taking into account the views of the legal academics and commentators. And if there is no legal definition, the views of legal scholars are upheld. Jurisprudence aims to acquire law knowledge, and at the same time, jurisprudence is part of the law that participates in its formation[28]. Both descriptive and normative elements are included in the statements formulated on the basis of jurisprudence.

There are such terms in legal texts whose meaning was determined by legal thought. Courts refer to these scientific definitions and assessments as if they were using the law itself. Aleksander Peczenik noticed that law-applying bodies (for instance, courts) when justifying their decisions, refer to assessments expressed by legal commentators as if they referred to legal texts. Judges, especially of the highest judiciary bodies, derive knowledge about the decisions they should take in the examined cases from the jurisprudence, often taking advantage of *de lege ferenda* postulates, which usually conceal the evaluative character of the statement under the guise of a description, that is, they consider the legal text as the source and basis of the decision taken in a given case. Meaning, arrangements are normative in nature: it is defined how certain terms should be understood. In reality, if the judges did not do so, they would not be able to justify their decisions. The distinction between *de lege lata* and *de lege ferenda* cannot be considered as sharp.[29]

Legal theories and concepts contain elements that depend on the views of legal scholars and commentators to a greater extent than on the content of the legal text (the concept of guilt is a perfect example). Legal commentators read the legal text in accordance with the rules of interpretation. Although these directives or rules of interpretation are formulated directly, they are, firstly, subject to alienation.[30] By 'alienation' we mean here a state of affairs where the operation of an institution remains beyond not only the control but even the awareness of ordinary (non-professional, averagely educated) citizens. Lawyers cite the principles of legal transparency and certainty; however, nobody is certain of the text of the law, as the understanding of the law depends mostly on the opinions of legal commentators. How can citizen O (e.g. taxi driver) convince Professor A that his interpretation is preposterous?

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[27] Bankowski, Zenon: *Living Lawfully: Love in Law and Law in Love*. Springer, Dordrecht, 2001. 39, 62–73.

[28] Peczenik, Aleksander: *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law*. Springer, Dordrecht, 2005. 4.

[29] Peczenik, 2005. 3–7.

[30] It may be seen as a paradox, but de facto whoever has the power to control rules of interpretation, also has a power to change these rules or justify exceptions.

V. Conclusions

Law clarity is to protect against arbitrariness of power. However, the idea of *lex certa* comes from the times of the fight against absolutism, from the 18th century. This idea is 200 years old and needs to be supplemented or expanded with the requirements of legibility of interpretation so that everyone can correctly read legal texts. Judges, including non-lawyers participating in the judiciary (lay judges, etc.), feel the spirit of the rule of law, and this should be enough to judge cases. On the other hand, citizens should, perhaps, receive popular versions of legal texts written in colloquial, plain language.

Laws define the structure of thinking about reality and serve to classify the world. It may be said that laws have the power of a language. The legislator (and the legal text as its creation) has no exclusive right to the narrative about the rules governing the community.[31] It should be required for lawmakers to popularize legal texts and make them easier to read so that they are understandable not only to the priests of Themis but also to ordinary graduates of primary school.

If we assume that the quality of community life is determined by the ability to reconcile the two, that is, the spontaneous and the constituted, then the condition for the correctness of this undertaking, which is society, involves recognition of the partially separable nature of both sets of values. At the same time, however, it is necessary to indicate a clear justification for rules which define legal means of interpreting legal texts.[32] Interpretation of the law is necessary, but the interpretation principles cannot close the legal text off from the claims of the community – citizens, nor can they protect the interests of the ruling elites (for whom lawyers are somehow supported). It generates natural tensions.

Society consists more in a community of principles or consent to the principles underlying this society and solidarity with other people is an important part of the community as a kind of a common enterprise. Law should be easily understood, and the language of law and the citizens' language should be the same. For the law to be comprehensible, it must be written and read in the same way, without the need to have specialist knowledge in order to understand which actions are required or forbidden. Vivid and descriptive colloquial language should serve as a point of reference.

One example is the language of a popular newscast program, whose message is usually clear and simple. The unifying idea of liberalism, assuming the expert understanding of the law and at the same time also the idea of elitism in interpretation, must be replaced with broadly understood multiculturalism and be inclusive. The precondition for building an open law is to open up the rigid legal language (scholarly language), the language of legal texts and legal reasoning. Paradoxically, the more educated and informed the society is (in terms of legal literacy), the more the law closes in the fortress of its own authority (which has already lost its traditional power). The law is not binding simply because it is a law. The authority of law is determined exclusively by its ability to provide valuable directives, not as a result of the legislature's claims[33]. In fact, the form of publication of legal texts is important from the point of view of communication between the legislator and the addressee of the law.

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[31] Bańkowski, Zenon: The Rule of Law and Participatory Model of the Legal Process. In: Jung, Heike (ed.): *Alternativen zur Strafjustiz und die Garantie individueller Rechte der Betroffenen*. Godesberg, Bonn–Bad, 1989. 61–76.

[32] Cf. Goodin, Robert E.: *Reflective Democracy*. Oxford University Press, Oxford, 2003. 246–268.

[33] Dworkin, 1986. 196f.

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