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FOREWORD

Established in 1982, the Polish Association of Constitutional Law ('The Polish Branch of the International Association of Constitutional Law' until 1992) has – since its early days – participated in the work undertaken by the International Association of Constitutional Law (IACL). The members of the Polish Association include Polish representatives to the bodies of the IACL and members that have been involved in the scholarly activity of the IACL, in particular in the work carried out by the World Congresses in: Belgrade (1983), Paris and Aix-en-Provence (1987), Warsaw (1991), Tokyo (1995), Rotterdam (1999), Santiago de Chile (2004), Athens (2007), Mexico (2010), and Oslo (2014).

It has become a tradition of the Polish Association that the outcome of those international scholarly conferences is published in a collection of contributions delivered by Polish scholars at the conferences. Initially, the collections were published in various periodicals and, later, also on the Internet; since the Congress in Athens, the contributions have been compiled in separate volumes, namely: *VII World Congress of Constitutional Law, Athens 11-15.06.2007. Lectures of the Polish Delegation*, Kozminski University Publishing House (2008) and *VIII World Congress of Constitutional Law, 6-10 December 2010. Polish Reports*, Wydawnictwo Sejmowe (2011). Wishing to preserve that worthwhile initiative, this volume comprises papers delivered by our fellow scholars at last year's IX World Congress in Oslo. We would like to thank the Constitutional Tribunal of the Republic of Poland for the compilation and publication of this collection.

Krzysztof Skotnicki
President of the Polish Association of Constitutional Law

JUDICIAL DIALOGUE AND THE NEW DOCTRINE OF CONSTITUTIONAL SOVEREIGNTY IN JUDGMENTS OF CENTRAL EUROPEAN CONSTITUTIONAL COURTS

Abstract

The enactment of the Treaty on the Functioning of the European Union has resulted in many judgments of national courts in some Member States in which the concept of sovereignty plays an important role. The application of this concept seems to be significant in national legal discourses pertaining to constitutional law. The paper will thus concentrate on the meaning of the concept of sovereignty and its application by constitutional courts in Hungary and Poland; it will also analyse the potential influence of sovereignty on the wider aspect of the acceptance and implementation of the principle of the supremacy of EU law in these Member States. From the perspective of the theory of judicial discourse, it seems that the principle of the supremacy of EU law remains a double-bladed sword. On the one hand, there is a view on the primacy of EU law from the perspective of the Court of Justice of the EU and, on the other, there is the reception of that principle by national courts in the Member States. It seems that the three doctrines adopted by constitutional courts in Germany, Hungary and Poland do not necessarily lead to the inefficacy of EU law in these countries. Moreover, it also seems that there is no unanimous reason, and the political power and formal positions of the constitutional courts in these Central and Eastern European (CEE) states are different in many respects.

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Introduction

Recent developments in the law of the European Union have raised the question concerning the scope of application and the meaning of the principle of primacy within the context of judicial rulings. Two waves of judgments by certain national courts in Central and Eastern Europe (CEE) seem to be conspicuous. The first wave comprises judgments of some CEE constitutional courts that include doctrines on the relationship between national constitutional law and European law. This wave of judgments has resulted in the adoption of different versions of the principle of primacy or autonomy between the law of the European Union and national constitutional law in different CEE states. In Poland, the doctrine of the constitutional supremacy of the Polish Constitution was adopted (strong version), whereas the Czech Constitutional Court adopted the doctrine of the constitutional review of EU law (weak version). Finally, the position adopted by the Hungarian Constitutional Court was based on the doctrine of absolute separation between the Hungarian Constitution and EU law. Later on, the doctrines of the three CEE constitutional courts converged under the shadow of the judgments of the Federal Constitutional Court of Germany concerning the constitutionality of the enactment of the Treaty on the Functioning of the European Union. The enactment of the Treaty thus resulted in significant judgments of constitutional courts in some Member States, in which the concept of sovereignty and the doctrine of sovereign powers started to play an increasingly important role. The application of this concept seems to be significant not only in national legal discourses pertaining to constitutional law, but also for the prospective development of the European legal order. It seems that the judicial discourse in Europe has been split into two parallel, yet not necessarily congruent, relationships: one between the judiciary in Member States and the Court of Justice, on the one hand, and the dialogue of constitutional courts in some Member States with both the Luxemburg Court and other constitutional courts, on the other. The former type of judicial dialogue traditionally plays an important, if not crucial, role in preserving efficacy of EU law and its applicability in Member States. The latter “constitutional” dialogue seems to be split between the vertical dimension

and the horizontal one, namely the dialogue with the Court of Justice of the EU and the dialogue with other constitutional courts. The question arises whether there is any congruence between the doctrines adopted by the constitutional courts, the number of preliminary references from a given state and the number of judgments by the Court of Justice of the EU on the infringement of EU law by a given state.

The construction of a European legal order through judicial monologue

The autonomous character of EU law has been established due to the process based on the judicial understanding of the autonomy of the European Communities, and later on – the European Union, as a separate legal order. The autonomy has been understood in two ways. First of all, the autonomy could be understood as the internal one. In a series of cases, the ECJ established the doctrine of the superiority of EC law over the legal systems of the Member States. In two benchmark cases, the ECJ introduced this concept, stating in the *Van Gend en Loos* case (26/62; 1963) that EC law created “a new legal order” and reaffirming this later in the *Costa v. ENEL* case (6/64; 1964), where it was emphasised that the Communities were in reality governed by their “own legal system”. These developments gave rise to the assertion that EC law must be superior to any other legal system of any Member State, albeit the content of this doctrine has never been clear.

Firstly, the question arises how to solve a potential conflict between EC law and the constitution of a Member State. The question seemed to be pressing, since many Member States, especially in Central Europe, had adopted the doctrine of the superiority of constitutional rule over any other law, including international or EC/EU law. One potential solution to this problem was unsuccessfully offered by the authors of the Treaty establishing a Constitution for Europe. Article I-6 of the Treaty establishing a Constitution for Europe contained the explicit statement concerning the superiority of the EU legal order: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States”.

Additionally, Article I-6 has been supported by the political declaration of the Member States, according to which the explicit statement on the superiority of EU law should not be treated as constitutive in the sense that it was intended to create a new legal principle. According to the declaration, the principle of primacy was rather to be found as declaratory and based on the long-standing doctrine having been established by the European Courts, since Declaration 1 reads as follows: “The Conference notes that Article I-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance”.

The idea of inserting the primacy claim into the system of quasi-constitutional rules on the European level failed when the Constitution for Europe was doomed to failure by voters in France. Another solution was to be found; and indeed, it has been found. A solution based on a political obligation rather than on the existence of an explicit rule is in the Treaty on the Functioning of the European Union. The obvious primacy claim of Article I-6 was removed from the Lisbon Treaty and was eventually expressed in Declaration 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty: “The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law”.

Most interestingly, the Conference additionally decided to attach, to the Final Act, the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260). The opinion explicitly refers to the well-established judicial practice: “It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community”.

This solution creates a very interesting puzzle, where the policy principle is to be supported by the legal doctrine and judicial practice, rather than the other way around, which is much more common in constitutional law. In many legal systems (English, French, German, Polish), the concept of sovereignty sets out limits for the application of the principle of superiority. From the functional perspective, the concept (or a constitutional

principle) of sovereignty plays an important role, creating a ground for the so-institutionalised *Kompetenz-Kompetenz* dilemma.

After enlargement – from judicial dialogue to a spill-over effect?

It should however be noted that the solutions to this problem might be found through the interactive process, transforming the monologue of the Court of Justice into a more refined and complex version of judicial discourse leading to genuine judicial dialogue. This kind of dialogue taking place between Member States and the European Courts seems to be a new and powerful tool shaping the division of labour between European Courts and courts in Member States. Two types of judicial dialogue may be distinguished.

The first type is a vertical dialogue between the ECJ and the supreme and other courts of Member States. The institutional framework for this kind of dialogue is based on the preliminary reference procedure provided for in Article 267 TFEU (Łazowski 2010).

The other type of judicial dialogue is rather informal and based on observation, adjustment and coordination of the judicial practice of different judicial institutions in Member States. This kind of judicial dialogue may take different forms, ranging from explicit references to other courts' decisions to implicit references to some concepts and doctrines applied by other courts in Member States (Kumm 2005). Two ways of setting this problem by the Polish and German Constitutional Courts call particular attention. In three of its judgments, the Polish Constitutional Tribunal established a refined doctrine of constitutional supremacy and its limits. In the judgment of 27 April 2005 in the case P 1/05, the Polish Constitutional Tribunal found the European Arrest Warrant Framework Decision unconstitutional, since the Polish Constitution explicitly prohibited the extradition of Polish citizens, whereas the EAW Framework Decision was based on the cooperation requiring "surrender" of an offender to another Member State. The Tribunal, however, suspended the annulment of the EAW Framework Decision for an 18-month adjustment period, and meanwhile the Polish Constitution was amended, enabling the operation of the EAW system between Poland and other countries. The same decision

was taken by the Federal Constitutional Court of Germany, which also found the Framework Decision unconstitutional in Germany.² However, the immediate annulment of the European Arrest Warrant Framework Decision put Germany in a difficult situation (Komarek 2007).

In another ruling, concerning the constitutionality of the Treaty of Accession between Poland and the EU, the Polish Constitutional Tribunal emphasised the need for cooperation and political participation, criticising the extension of the pro-European interpretation of legal acts in Polish law. Departing from a relatively traditional concept of supremacy as control over the interpretation of the Constitution, the Tribunal reached the conclusion that the principle of interpreting the Constitution in a manner that is favourable to EU law has its limits, and “in no event may it lead to results contradicting the explicit wording of constitutional norms”.³ Additionally, the Tribunal explicitly established its right to review the constitutionality of EU law and to determine its potential contradiction with the Polish Constitution. The Tribunal found that:

When reviewing the constitutionality of the Accession Treaty as a ratified international agreement, including the Act concerning the conditions of accession (constituting an integral component of the Accession Treaty), it is also permissible to review the Treaties founding and modifying the Communities and the European Union, although only insofar as the latter are inextricably connected with application of the Accession Treaty.⁴

At the same time, the Tribunal sketched a broader concept of a multicentric legal order and inclusive sovereignty, stressing the need for cooperation and participation in the EU law-making process, since the application

² The German Federal Constitutional Court: 2 BvR 2236/04 of 18.7.2005.

³ Quoted from the translation of a summary of the judgment of the Polish Constitutional Tribunal in the case K 18/04 (11.5. 2005) in S. Biernat (ed), *Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union (2003-2014)* (Trybunał Konstytucyjny, Warszawa 2014) 59; (<http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf>).

⁴ *ibid.* 56.

of EU law is based on coexistence of different legal rules produced by different law-making bodies and applied by various court structures.

Finally, the Polish Constitutional Tribunal established a doctrine of constitutional identity which amounts to a claim for sovereignty in particular areas, strictly limited to basic constitutional principles and the protection of human rights. Thus, the source of sovereignty seems to be found in the sophisticated concept of rights, rather than in political power and its monopoly over the territory. This problem loomed on the horizon together with the doubts concerning the constitutionality of the Treaty of Lisbon. In the judgment concerning the Treaty of Lisbon, the Polish Constitutional Tribunal clearly articulated the concept of constitutional identity as a source of sovereignty which enables the state to be involved in the EU within the constitutional limits. The Tribunal observed that:

The guarantees of that balance in the Constitution are “normative anchors”, which serve the protection of the state’s sovereignty, in the form of Article 8(1), Article 90 and Article 91 of the Constitution. In the view of the Constitutional Tribunal, the indicated constitutional provisions have not been infringed by the provisions of the Treaty of Lisbon challenged in the application. The accession to the European Union and the relevant conferral of competences do entail surrendering sovereignty to the European Union. The limit of conferral of competences is determined in the Preamble to the Constitution by recognising the state’s sovereignty as a national value; and the application of the Constitution – *inter alia* with regard to the realm of European integration – should correspond to the meaning which the introduction to the Constitution assigns to regaining sovereignty understood as a possibility of determining the fate of Poland.⁵

Similar reservations to the unlimited primacy of EU law have been raised by the Federal Constitutional Court of Germany, the Czech Constitutional

⁵ Quoted from the translation of the judgment of the Polish Constitutional Tribunal in the case K 32/09 – judgment of 24 November 2010 (Constitutionality of the Lisbon Treaty); see S. Biernat (ed), *supra* n. 3, 204-205 (<http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf>).

Court and the Hungarian Constitutional Court. It has been suggested that the doctrine of sovereignty has been used by the constitutional courts in Central Europe primarily for the domestic, internal reasons. Wojciech Sadurski has pointed out that the constitutional courts attempt at gaining recognition and legitimacy through the process of the protection of the national system against exuberant, extensive application of the principle of the primacy of EU law (Sadurski 2006, 2012). This strategy, albeit modified, has not been invented in any post-communist country (*ibid.*). The courts in Poland, Hungary and the Czech Republic simply adopted a sceptical attitude towards the superiority of EC law, which was expressed many years earlier by the German Federal Constitutional Court in two waves of the so-called “*Solange*” cases in 1974 and 1986.⁶

The German Federal Constitutional Court emphasised the need for the constitutional control and protection of constitutional rights, concentrating on the relationship between the German Constitution and the development of EC/EU law in a long series of cases, including the *Bruner* case [1994], the *Banana* case [1997], and the *Treaty of Lisbon* case [2009]. The Court cautiously avoided any direct invalidation of EC law, at the same time setting out the potential limits of constitutionality in respect of the application of EU law (Kumm 1999). It seems that the recent case concerning the constitutionality of the Lisbon Treaty comprises the complete doctrine of sovereignty based on the concept of *Staatenverbund* – the Sovereign Association of Sovereign States.⁷ The Court explicitly referred to the development of the primacy of EU law, taking into account three fundamental issues: the inexplicit and vague character of the principle of the primacy of EU law; the unlimited power vested in the Constitutional Court so as to control and guard the constitutional order; and the character of the EU as the purpose-oriented association of interdependent, rather

⁶ Federal Constitutional Court of Germany, judgment of 29 May 1974, 37 BVerfG 27 and judgment of 22 October 1986, 73 BVerfG 339.

⁷ Federal Constitutional Court of Germany, judgment of 30 June 2009, BVerfG, 2 BvE 2/08, paras: 33, 229, 235, the English translation available also at the website of the Federal Constitutional Court (<https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>).

than independent, but sovereign states. The German Court expressed these three concepts in the following three lucid passages:

1. “The primacy of Union and Community law over national law is still not explicitly regulated” (para 33);
2. “The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to” (para 235);
3. “Article 24.1 of the Basic Law underlines that the Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign” (para 229).

The last sentence directly expresses the concept of internal sovereignty within a long-term association of states, taking into account that states can cease to participate in this endeavour. In a sense, states remain sovereign by possessing control over the degree of participation, the content of participation or lack thereof, in a similar way in which the Constitutional Court exerts control over the constitutionality of EU law in Germany, even if it represents an astonishing compliance with EU law and only very rarely decides against the validity of EU law or its applicability in Germany. This position has recently been reinforced in the provisional decision of the German Federal Constitutional Court pertaining to the validity of the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning Outright Monetary Transactions (OMT) and the continued purchases of government bonds on the basis of this Decision and of the predecessor programme for Securities Markets (SMP), where the German Court repeats that the protection of constitutional identity remains its exclusive prerogative and this doctrine has been commonly accepted in other EU Member States, and makes reference to the respective judgments of national constitutional and supreme courts.

It seems that the German Federal Constitutional Court treats the doctrine of constitutional identity and a special concept of sovereignty in respect of the participation in the EU as a consolidated doctrine shared by many other constitutional courts and belonging to the common constitutional identity of these Member States.⁸ In the decision, the Court referred to the concept of constitutional control exercised by national constitutional courts, emphasising procedural aspects of constitutional sovereignty. The Court thus reinforced the doctrine and commented on the practice of different supreme and constitutional courts in other EU Member States, considering these judgments as reflecting common constitutional principles and practices of the EU Member States. The Court observed that:

The above-mentioned principles concerning the protection of the constitutional identity and of the limits of the transfer of sovereign powers to the European Union can also be found, with modifications depending on the existence or non-existence of unamendable elements in the respective national constitutions, in the constitutional law of many other Member States of the European Union (...).⁹ This applies to all constitutional organs, authorities and courts. It results from the constitutional principles of democracy (Article 20 sec. 1 and sec. 2 GG) and the rule of law (Article 20 sec. 3 GG), as well as from Article 23 sec. 1 GG, and is safeguarded under European Union law by the prin-

⁸ BVerfG, 2 BvR 2728/13 of 14.1.2014, paras 1-105.

⁹ The German Federal Constitutional Court explicitly referred to the following judgments: the Kingdom of Denmark: Hojesteret, judgment of 6 April 1998 – I 361/1997 – para 9.8.; for the Republic of Estonia: Riigikohus, judgment of 12 July 2012 – 3-4-1-6-12 – sec. nos. 128, 223; for the French Republic: Conseil Constitutionnel, decision no. 2006-540 DC of 27 July 2006, 19th recital; decision no. 2011-631 DC of 9 June 2011, 45th recital; for Ireland: Supreme Court of Ireland, *Crotty v. An Taoiseach* (1987), I.R. 713 (783); *S.P.U.C. (Ireland) Ltd. v. Grogan*, (1989), I.R. 753 (765); for the Italian Republic: Corte costituzionale, decision no. 183/1973; decision no. 168/1991; for the Republic of Latvia: Satversmes tiesa, judgment of 7 April 2009 – 2008-35-01 – sec. no. 17; for the Republic of Poland: Trybunał Konstytucyjny, judgments of 11 May 2005 – K 18/04 – points 4.1., 10.2.; of 24 November 2010 – K 32/09 – point 2.1. *et seq.*; of 16 November 2011 – SK 45/09 – points 2.4., 2.5., with further references; for the Kingdom of Sweden: Chapter 10 Art. 6 sentence 1, Form of government; for the Kingdom of Spain: Tribunal Constitucional, declaration of 13 December 2004, DTC 1/2004; for the Czech Republic: Ústavní Soud, judgment of 31 January 2012 – 2012/01/31 – Pl. ÚS 5/12 – para VII).

ciple of conferral (Article 5 sec. 1 sentence 1 and sec. 2 TEU) and the obligation of the European Union to respect the national identities of the Member States (Article 4 sec. 2 sentence 1 TEU, cf. BVerfGE 123, 267 <352>).

Besides the institutions of the European Union, German constitutional organs are also responsible to make sure that the programme of integration is observed.¹⁰

However, the Court decided to suspend the case and to refer questions for a preliminary ruling on the interpretation of various provisions of EU law to the Court of Justice of the EU, in accordance with point (b) of the first paragraph of Article 267 TFEU. Concurrently, control over a decision and the content of the decision remain two separate issues.

The same issue of controlling the application of EU law was raised by the Hungarian Constitutional Court just at the moment of accession. On 1 May 2004, the Hungarian Parliament enacted a law “on measures concerning agricultural surplus stocks” (the Surplus Act); the law was intended to implement Commission Regulation (EC) no. 1972/2003 of 10 November 2003 and Commission Regulation (EC) no. 60/2004 of 14 January 2004, which had introduced transitional measures with regard to trade in agricultural products and the sugar sector. In the case 17/04 AB Hat, dated 25 May 2004, the Constitutional Court of the Republic of Hungary decided that the Surplus Act was unconstitutional due to being contrary to the requirement of legal certainty, as it was retroactive. As A. Sajo, one of Hungarian constitutional lawyers and judges, pointed out, the problem was: “how did the Hungarian Constitutional Court relate to Community law? Wasn’t the Hungarian Constitutional Court considering and/or disregarding Community law, although it thought otherwise?” (A. Sajo 2004). In its later rulings, the Hungarian Constitutional Court reaffirmed the decision, explaining that the Court limits the application of its power to control constitutionality only to domestic laws. The Court expressed the view that:

¹⁰ BVerfG, 2 BvR 2728/13 of 14.1.2014, paras 1-105; the English translation available also at the website of the Federal Constitutional Court: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html>.

The Constitutional Court also interpreted the relevant articles of the Constitution on sovereignty, democracy, rule of law and European cooperation. According to the Court, the so-called European clause cannot be interpreted in a way that would deprive the clauses on sovereignty and rule of law of their substance. The Court referred however to its former jurisprudence on the free limitation of the exercise of attributes of sovereignty by the holder of the sovereignty, i.e. in fact by the legislator.¹¹

This line of argument, reflecting the internal division between international law which is not controlled in respect of its constitutionality and the internal law, including implemented EU law, which constitutes the subject of control on account of constitutionality, has also been reflected in the decision concerning the constitutionality of the Lisbon Treaty in Hungarian law (Blutman L., Chronowski N. 2011). In its decision 143/2010 of 12 July 2010 (the ‘Lisbon Treaty Decision’), the Hungarian Constitutional Court adopted two views. The first view concerns the formal aspect of the constitutional control, enabling the Court to control the scope of the transfer of sovereignty from the state to the institutions of the European Union. Interpreting Article 2/A of the Hungarian Constitution,¹² the Court thus observed that Article 2/A had in fact created a normative ground for the Court to assess whether and to what extent the transfer of competences in case of the prospective amendments to the EU treaties would be compatible with the Hungarian Constitution. It seems that this position should be maintained under the new Hungarian Constitution, since Article E of the Fundamental Law of Hungary (adopted on 18 April 2011; in force since 1 January 2012) essentially copied the so-called “European Clause” contained in Article 2/A of the former Constitution. Secondly, the Court

¹¹ Hungarian Constitutional Court, decision 61/B/2005. AB, judgment of 29 September 2008, ABH [2008]; press release in English, available at: <http://www.mkab.hu/letoltesek/en_0143_2010.pdf>.

¹² “In the interest of participating as a Member State of the European Union on the basis of international treaties – to the extent required to exercise rights and to perform obligations set forth in the basic treaties – Hungary may exercise some of its authorities stemming from the Constitution in conjunction with the other member states through the institutions of the European Union”. (The EU-clause, ex Art. 2/A 1989 Const.)

pointed out that the doctrine of sovereignty should still be treated as the source of constitutional identity. The Hungarian Constitutional Court expressed the view that the Constitution cannot be interpreted in a way that would deprive the constitutional provisions on sovereignty and on the rule of law of their substance. Concurrently, the Court referred to the concept of sovereignty as the indirect, albeit ultimate, limitation of the principle of the primacy of EU law. Additionally, the principle of the rule of law limits the operation of the principle of the primacy of EU law.¹³

The participatory character of sovereignty has also been emphasised by the Czech Constitutional Court. In the decision on the constitutionality of the European Arrest Warrant Framework Decision, the Czech Court, unlike its counterparts in Germany and Poland, found that the requirement of cooperation was more important than the sole literal meaning of the legal act, and did not decide against the constitutionality of the said act. The doctrine, having been elaborated by the Czech Constitutional Court in its decision Pl ÚS 50/04 of 8 March 2006, was based on the assumption that the Court plays an essential role in deciding on the scope of integration, since it preserves the constitutional doctrine of sovereignty. The Court observed that:

(...) the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic (...). In such determination the Constitutional Court is called upon to protect constitutionalism (...).¹⁴

Later on, in its decision from 2009, the Czech Constitutional Court also ruled the Treaty of Lisbon to be constitutional. However, at the same time, the Court set out limits for the transfer of powers from the sovereign state to the EU institutions, directly referring to the famous *Kompetenz-Kompetenz*

¹³ The decision 143/2010. (VII. 14) of the Constitutional Court of the Republic of Hungary on the constitutionality of the Act of promulgation of the Lisbon Treaty.

¹⁴ Quoted from the translation available at the website of the Constitutional Court of the Czech Republic: <<http://www.usoud.cz/en/decisions/>>.

expression,¹⁵ since “there would be a breach of the Czech Constitution if, on the basis of a transfer of powers, an international organization could continue to change its powers at will, and independently of its members, i.e. if a constitutional competence (competence-competence) were transferred to it”.¹⁶ Thus, it seems that in all relevant jurisdictions – namely Germany, Poland, Hungary and the Czech Republic – the judicial understanding of the sovereignty doctrine is based on two fundamental assumptions. First of all, the European Union does not exert sovereign powers, and thus the principle of the primacy of EU law should be limited to those cases where the Member States transferred the power to the EU. Nevertheless, there are some “inalienable” powers, namely, the powers to waive the power of transferring power. Accordingly, the whole process of the transfer of powers should be controlled by constitutional courts, since the courts control the constitutionality of the integration process, understood as further long-term association of cooperating sovereign states. The judicial empowerment of constitutional courts seems to play an important, if not pivotal, role in this process.

In search of an explanation for a striking divergence

The phenomenon of the judicialisation of the European Union plays an important role in the discourse pertaining to the theory of European integration. It seems that the integration through the judicial activism of the European Court of Justice and the so-called “constitutionalisation” of the European integration gives strong arguments in favour of the Neofunctionalism as a theory which explains the integration as a process based on the spill-over effect. According to the classical definition proposed by L. N. Lindberg:

¹⁵ cf. the more recent judgment of the Czech Constitutional Court which declared the CJEU judgment void; judgment of 31 January 2012, Pl. ÚS 5/12.

¹⁶ The constitutionality of the Lisbon Treaty in the Czech Republic; decision of the Constitutional Court of the Czech Republic 2009/11/03 - Pl. ÚS 29/09; quoted from the translation available at the website of the Constitutional Court of the Czech Republic: <http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedb7ca14d226b879ccaf91a6dcb2>.

‘spill-over’ refers to a situation in which a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth. (...) the initial task and grant of power to the central institutions creates a situation or series of situations that can be dealt with only by further expanding the task and the grant of power. Spill-over implies that a situation has developed in which the ability of a Member State to achieve a policy goal may depend upon the attainment by another Member State of one of its policy goals. (Lindberg 1963, p. 10)

This mechanism may play an important role in the case of the application of EU law by national courts. It is not strange then that the unique position and role assigned to the ECJ – i.e. that of an initiator of judicial multilevel dialogue – led some theorists to the proposition that the Court plays a central role, initiating the integration on the legal level, where the political discourse is blocked by the lack of unanimity or power of major players on both the EU and the national levels (Weiler 1991 and 1994). The construction of governance structure based on the judicial activism of the ECJ has even been explained as judicial *coupe d'état*, where the European Court created the doctrine of the primacy of the European Communities law (Stone Sweet 2007).

The spill-over effect may however play an adverse role of an obstacle in integration, since the Member States, and especially their courts, may adopt a similar set of doctrines, reasoning, concepts and legal instruments in order to diminish the effect and scope of the doctrine of the primacy of EU law (Arnull 2007). This position has been taken by some Intergovernmentalists, who claimed that States remained principal actors on the European scene and were ultimate decision-makers. This position has been defended unsuccessfully by different authors (cf. Moravcsik 1993, Carruba et al. 2005, 2008). The failure of Intergovernmentalism lies probably in the fact that it has not been successful in explaining the integration process through the lens of intergovernmental cooperation shaped by the states on the legal level. It seems that the discretion enjoyed by the ECJ

was not in fact curbed by any successful strategy adopted by any Member State (Stone Sweet and Brunell 2012).

It seems however that things have changed with the enlargement and the creation of a platform for the horizontal judicial discourse, and the coordination of state driven policy concerning the minimisation of the discretion successfully having been controlled by the ECJ. W. Sadurski has demonstrated successfully how the CEE constitutional courts have limited the application of EU law by rejection of the full application of the doctrine of the primacy of EU law (Sadurski 2012).

Sadurski explains the process in two ways. First of all, he demonstrates how sovereignty still plays an important role in post-communist countries. He envisages that the constitutional doctrine of sovereignty plays a double role. Firstly, it preserves control over the protection of rights on the part of national constitutional courts. Secondly, it also plays an important role in empowering these constitutional courts in front of other domestic actors, especially the elected lawmaker. It seems however that this explanation is only partly satisfactory. Sadurski appears to be right in his suggestion that the enlargement confronted the ECJ with homogenous constitutional courts applying the unified argumentation and holding very similar institutional positions characterised by the three elements: *ex post* and *ex ante* review; an individual claim (*actio popularis*); and the ultimate character of their judgments which cannot be reviewed by any other institution, becoming in fact the last word in the constitutional and quasi constitutional dialogue, such as the one concerning the relation between a domestic constitution and EU law.

Sadurski proposes a straightforward explanation suggesting that the euro-scepticism of the CEE constitutional courts stems from the historically shaped pattern of transformation, where rights adjudication was earlier than the division of power in which the CEE constitutional courts did not in fact take significant part. This led the CEE courts into the *Solange* story pattern, i.e. the repetition of earlier reservations expressed by the German and Italian constitutional courts. Secondly, the *Solange* strategy has been adopted by the courts strengthening their position in front of other actors, namely the lawmakers.

It seems however that both explanations are seriously weakened by the following two contingencies. Firstly, unlike the *Solange* story, the later judgments of the CEE constitutional courts have been based on the present, unconditional criticism and open rejection of the primacy doctrine by the German Federal Constitutional Court in 2010.¹⁷ It appears that the spill-over effect led in this case to the adverse direction, resulting in the fragmentation of the primacy principle, understood and applied in different ways in different Member States.¹⁸ Secondly, the argument about the domestic game of power which led the CEE constitutional courts to the declaration of the sovereignty principle and the implied doctrine of constitutional superiority does not seem to be satisfactory, given the fact of differences in the political situation between Poland and Hungary.

The Polish Constitutional Tribunal in fact declared the need to shift some of its competences to the lawmaker. In the EAW case, the Tribunal emphasised the need for action to be taken by the Parliament, which inevitably led to the amendment of the Polish Constitution.¹⁹ Thus, the Tribunal proved to be unwilling and unable to stretch the pro-European interpretation of the Constitution, leaving the final decision on the resolution of the alleged conflict between the EU and the Polish constitutional law to the parliamentary majority. A strikingly different solution has been adopted by the Czech Constitutional Court, which declared the constitutionality of the EAW, strengthening its own position *vis-à-vis* the Czech Parliament and the Czech President.²⁰ Later on, in the Lisbon Treaty case, the Czech Constitutional Court declared its competence to review the constitutionality of the EU Treaties (Komarek 2013).²¹

Meanwhile, nothing of this kind took place in Hungary. The Hungarian Constitutional Court has never declared its position concerning the primacy of EU law or of the Hungarian Constitution, observing the separation doctrine according to which the Court revised the Hungarian law

¹⁷ German Federal Const. Court, BVerfG, 2 BvE 2/08, 30.6.2009.

¹⁸ The opposite conclusion may be drawn however from an analysis of the preliminary reference procedure in new Member States; cf.: A. Łazowski (ed) (2010); M. Broberg and N. Fenger (2013).

¹⁹ Judgment of 27.4.2005, P 1/05, Polish Cons. Tribunal ("EAW case").

²⁰ Judgment of the Czech Constitutional Court of 3 May 2006, Pl. ÚS 66/04.

²¹ cf. the Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12.

exclusively.²² Even in the case of the Lisbon Treaty, the said Court declared compatibility between the Hungarian Constitution and the act of ratification of the Treaty and its incorporation into Hungarian legal order.²³

Additionally, it should be mentioned that references to European law and to the obligations resulting from the Hungarian membership in the EU became an additional power in the Court's struggle for power against the Hungarian lawmaker that recently amended the Fundamental Law, narrowing the Constitutional Court's competences. In its recent judgment concerning the constitutionality of the Fourth Amendment to the Hungarian Fundamental Law, the Hungarian Constitutional Court referred openly to EU law and the necessity of applying rules conferred by the supranational institutions as the argument in favour of its control over amendments to the Constitution, stipulating that:

The power of the Constitutional Court is a restricted power in the structure of division of powers. Consequently, the Court shall not extend its powers to review the constitution and the new norms amending it without an express and explicit authorization to that effect. (...) The Constitutional Court shall moreover consider the obligations Hungary undertook in its international treaties or those that follow from membership in the EU, along with the generally acknowledged rules of international law, and the basic principles and values reflected therein. All of these rules – with special regard to their values that are also incorporated into the Fundamental Law – constitute such a unified system (of values), that shall not be disregarded neither in the course of constitution-making or legislation, nor in the course of constitutional review conducted by the Constitutional Court.²⁴

²² cf. case 17/04 AB. Hat, the Hungarian Constitutional Court, 25.5.2004.

²³ Decision 143/2010 of 12.7.2010 (the "Lisbon Treaty-decision").

²⁴ The Constitutional Court of Hungary (2013.5.23) on the constitutional review of the Fourth Amendment to the Fundamental Law of Hungary, decision II/00648/2013 of 2013-04-23; summary in English at the official website of the Hungarian Constitutional Court <<http://www.mkab.hu>>, available also at: <[http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-2-005?fn=document-frameset.htm&f=templates&q=\\$uq=\\$x=\\$up=1&force=2777](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-2-005?fn=document-frameset.htm&f=templates&q=$uq=$x=$up=1&force=2777)>

The Court simply stated that it had to take the international obligations of Hungary into account and thus it had to maintain control over the process of the introduction of constitutional amendments by a 2/3 parliamentary majority. It seems that, within the context of the Hungarian constitutional law and the system of constitutional control adopted in the recently amended Fundamental Law, the primacy doctrine may potentially serve as the argument of last resort in favour of the wider scope of control exerted by the Hungarian Constitutional Court.

Conclusion

Certainly the evidence justifying external or internal operation of a given legal rule should be referred to the practice of adjudicating bodies and the justifications provided by them. In other words, whether the EU creates one complex legal system, being compatible with the Neofunctionalist theories, or a set of independent legal systems, as it has been stressed by Intergovernmentalists, depends on the practice of the EU Courts, the courts in Member States and on the justification of these practices.

It seems that the alleged scepticism or at least partial refusal of the unconditional acceptance of the primacy of EU law by some constitutional courts does not give any significant argument against the Neofunctionalism as the most influential theory of European integration.

On the other hand, the application and extension of the liability for breach of EU law may enhance the coherence of judicial practice even on the level of constitutional courts. This seems to be possible under the assumption that the standardisation is plausible, given the incentive structure and institutional framework of the participants to the judicial dialogue in the European legal order. This issue could fruitfully be analysed from the perspective of an economic analysis of law applied to the standardisation of judicial practice.

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CONSTITUTIONAL JUSTICE BEYOND LIBERAL CONSTITUTIONALISM*

Preface

1. Democratic ideals and constitutional institutions serving their implementation undergo endless changes. In consequence, formed during the Enlightenment and maintained in a liberal spirit, the philosophical foundations of contemporary constitutionalism are today the subject of uneasy verification. Ponderous questions to constitutionalists emerge, namely, whether constitutional institutions in their present shape keep up with the dynamic changes of democratic axiology, and whether hitherto institutions are a functional device for realising socially important values.

The aim of this paper is to provide a critical analysis of the crucial institution of liberal constitutionalism – judicial control over the constitutionality of laws. It seems that the eternal dispute about the nature of relations between democracy and constitutionalism – at the centre of which there lies the debate on the legitimacy of constitutional review – enters a new phase. The new constitutional order, being formed before our eyes, forces a change of perspective in considering the role and legitimacy of constitutional review by the judiciary and its relation to democratic axiology.

I start the proposed analysis with a reconstruction of the role of constitutional review in a traditional model of liberal constitutionalism (part I). In part II, I attempt to describe a new paradigm of a constitutional institution's legitimacy in the era of the transformation of the public sphere. It is composed of specific normative requirements addressed to a constitution and a constitutional court itself. In the institutional dimension, these requirements come down to the postulate of reflexive action of the constitutional

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court in the conditions of globalism and constitutional pluralism (part III). This means discursive openness of the constitutional court in the dialogue on the content of basic laws. However, the liberal model of a constitutional court as a custodian of the individual's rights needs to be complemented with a new function, as a centre promoting the political solidarity of a constitutional community, so that constitutional courts can continue their traditional stabilising role (maintaining constitutional orders). Hence, in part IV, I endeavour to sketch the place of a constitutional court in reinforcing solidarity bonds within the community.

The affirmation of specific non-liberal constitutional solutions is not the goal of this paper. These solutions should be assessed with great caution as well as the knowledge of the realities and political culture of the communities in which they have been adopted. I refer to them only for illustrative purposes, when presenting the symptoms of wider processes. My intention is only to show that institutional frameworks and substantive foundations determined by liberal constitutionalism prove too narrow for effectuating present constitutional claims of individuals and communities, who more and more vociferously demand moral recognition and real participation in public life.

I. The significance of constitutional review in liberal democracy

2. More than 200 years since the triumph of liberal constitutionalism, a constitution still remains an expression of community aspirations and individual expectations. Hence, the integrational function of basic law (i.e. maintaining the solidarity of a community) appears with full force. The key role in sustaining this symbolic function of the constitution was played by judges. It is thanks to their activity in the second half of the 20th century that the process described by D. Rousseau as the resurrection of the constitution as a normative act² establishing the identity of a political community took place. Therefore, the in-depth consideration of the constitution cannot be separated from reflection on the place and role of the judiciary, especially constitutional judges in the transformation of contemporary constitutionalism.

² D. Rousseau, 'Une Résurrection: La Notion de Constitution' (1990) 1 *Revue du Droit Public*.

3. Constitutional justice, considered both as a political idea and a legal institution, is a function of the place and time in which it is established. Therefore, it is determined by past experiences, faces the challenges of the present day, as well as is inspired by the expectations of the future.

The judicial control of legislation is a flagship institution of liberal constitutionalism. Thus, it grew in the soil of the philosophical tenets of the Enlightenment as an answer to the progressive process of advancing the democratisation of power. The idea of judicial control over the constitutionality of law is typically regarded as a necessary and practical complement to the assumptions of the liberal theory of the rule of law. Spanning two centuries, this idea, on the one hand, underwent dynamic institutionalisation and, on the other, was the subject of acute doctrinal and political disputes as regards its democratic legitimacy. For it is beyond doubt that “*quis custodiet ipsos custodes* is the weak spot in the role attributed to the rule of law in liberal democratic theory”.³

4. Progressing juridification of the lifeworld (referring to the terminology of Habermas) meant that democratically created legislation interfered more and more with the individual’s rights. So constitutionalism, based on liberal foundations, needed new mechanisms to control the power of parliaments. Courts were appointed as the centres of these mechanisms. An accomplished exponent of this kind of political philosophy was K. Popper, who believed that, in the long run, all political problems are legal-institutional ones, and that the real progress of equality is determined by the institutional control of power.⁴ There is not a shred of doubt that the union of constitutional liberalism and democracy is rather a marriage of convenience, for, from a philosophical and historical point of view, they are two separate orders, sometimes based on opposite values.⁵ The basis of the legitimacy of liberal constitutional governance – namely the counterfactual concept of political self-limitation of the sovereign people by means of an act of substantial constitution – implies that judges are equipped

³ J.M. Maravall, ‘The Rule of Law as a Political Weapon’ in J.M. Maravall and A. Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press 2003) 266.

⁴ K. Popper, *Open Society and Its Enemies* (Routledge, London, New York 2002) 426.

⁵ F. Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76(6) *Foreign Affairs* 22-23.

with a broad discretionary power. It resulted from the right to interpret principles of the social contract in the context of problems stemming from current politics. In this way, the authorisation of current politics, in the light of *a priori* established and substantively understood constitutional principles, became one of the basic functions of constitutional judges.⁶ The problematic nature of their power derived from the lack of democratic legitimacy, when juxtaposed with the legislator's power.

Irrespective of the differences in the subject of normative justification for the existence of the judicial control of constitutionality (such as the implementation of the principle of checks and balances in the American model and the hierarchical compliance of normative acts in the European model), it is undeniable that the judicial control of legislation was in practice meant to be a crucial factor in correcting, or even forming, state policy, and having custody of the legislature. Hence, the strong emphasis of the juridical nature of judges' decisions played a vital self-legitimising role. The juxtaposition of the legal and political aspects of the work of judges was the axis of the liberal narrative legitimising constitutional jurisprudence.

5. The judicial control of constitutionality, relying on the above-mentioned foundations became a lasting element of modern democratic systems and, at the same time, a major catalyst of transformations within democratic axiology. The effect of the convergence of democratic and liberal ideals was the formulation of liberal democracy, in which democratically created policy must fit in the framework set by the rigid principles of constitutionalism. C. Sunstein aptly observes that although it is often declared that constitutions are the expression of the identity of those who write them, in reality it is just the opposite. Liberals treat the constitution as an element of the previous imposition of rules (pre-commitment strategies). In this way, communities use their founding documents as protection against the most typical problems in their political life.⁷

⁶ A. Stone Sweet, *Governing with Judges* (OUP 2000) 137.

⁷ C. Sunstein, 'Against Positive Rights' (1993) 1 *East European Constitutional Review* 35-38.

Therefore, we may assume that modern constitutionalism is based on the liberal principle of legitimacy, which invokes the hypothetical consent of *demos* as a premise legitimising law. It assumes that citizens may only be legitimately subject to those norms that rely on arguments and premises that the citizens themselves cannot rationally rebut. It became conceptually possible to separate the sovereign's will (constituent power) and the legislative body, until their mutual confrontation.⁸ Constitutional courts were seen as the arbiters of these disputes, and thus were placed above current politics – as the exponents of a higher category of rationality.

This process also meant a considerable reduction of the sovereign's role in constitutional policy. The Western, and thus liberal, model of democracy was to be primarily symbolised by the figure of an independent judge.⁹ Even B. Ackerman, the liberal constitutionalist most staunchly affirming the role of the people in constitutional governance, limits its activity to exceptional, incidental events described as “constitutional moments”.¹⁰ This means that a constitutional court may easily monopolise the constitutional debate. J. Rawls suggests a public test for whether an argument may be a “public reason”. A question to be asked is whether such an argument could be considered, for example, in justification of a court decision, particularly in justification of a constitutional-court judgment. J. Rawls clearly states that “in a constitutional regime with judicial review, public reason is the reason of its supreme court”.¹¹

II. Legitimacy of constitutional institutions in the era of the transformation of the public sphere

6. The rising importance of a constitutional judiciary in the institutional design of contemporary democracies impels certain authors to conclude

⁸ M. Granat, *Od Klasycznego Przedstawicielstwa do Demokracji Konstytucyjnej (Ewolucja Prawa i Doktryny we Francji)* (Lublin 1994) 137.

⁹ F. Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76(6) *Foreign Affairs* 27.

¹⁰ B. Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992) 48-54.

¹¹ J. Rawls, *Political Liberalism* (Columbia University Press 1993) 231.

that we live in an age of juristocracy, that is to say, of judicial supremacy.¹² Today, however, even from the perspective of the assumptions of political liberalism, the place of courts in the public sphere is no longer so easily identifiable. The legitimacy of the present-day public sphere poses many difficulties connected with the evolution of the understanding of the very notion of ‘power’, as well as with the erosion of hitherto used notions, and related searches for new formulas for legitimising power. The theses of a legitimacy crisis of contemporary power, more and more expressly present in public opinion, are the most important symptoms of changes related to moving to new social structures, as well as to a new understanding of politics and the constitutional institutions that provide checks in this respect.

In social sciences, it seems that the currently dominant way of understanding legitimacy is not the search for a single, universal principle validating a social order, but the treatment of such legitimacy as a complex communication process in which arguments drawn from various systems (moral, political, and legal) may be employed. The overlapping of various discourses is now one of the distinctive features of modern constitutionalism. This entails the necessity to refer to the transformation processes of the two planes of analysis, being equally important for the legitimacy of a constitutional court. These planes are the currently prevailing trends in jurisprudence in the theory of democracy and in the theory of constitutionalism.

7. The last decades of the 20th century witnessed a clear deliberative turn, thanks to which democratic legitimacy started to be viewed in connection with a public deliberation process about collective decisions of a political community.¹³ The deliberative view of democracy entails the necessity to remodel the concept of power, which is exercised “with others and not over others”.

¹² R. Hirschl, *Toward Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); K. E. Whittington, *Political Foundations of Judicial Supremacy* (Princeton University Press 2007).

¹³ J. S. Dryzek, *Deliberative Democracy and Beyond. Liberals, Critics, Contestations* (Oxford University Press 2000) 1.

The supporters of this trend identify themselves as representatives of a new, original political philosophy. According to Ch. F. Zurn, the deliberative theory of democracy has overcome the weaknesses of both aggregative majoritarianism and liberal constitutionalism traditionally oriented towards the protection of a minority (minoritarian constitutionalism). It offers a thorough and more convincing approach to legitimacy in constitutional democracy, by recognising the problem of pluralism and taking into account the role of political interactions in the search for reasons on the basis of which public issues should be resolved.¹⁴ Such a view allows meritocratic and popular elements to be combined, because:

Contemporary theories of deliberative democracy likewise attempt to combine a focus on the quality of decision-making process characteristic of expertocratic models with a focus on popular input and participation characteristic of populist models, without, however, succumbing to the potentially antiegalitarian elitism of the former or the potentially ungrounded decisionism of the latter.¹⁵

8. Constitutional institutions also undergo dynamic transformations. As G. Teubner notes, if we adopt a broad definition of constitutionalism – namely as a collection of meta-norms (principles) similar in nature to Hart’s secondary rules determining how norms of a lower level are to be forged, applied, executed and interpreted¹⁶ – then we must not ignore the observation that it is precisely as secondary norms that they “give an answer not just to the cognitive question of ‘What is valid law?’, but also to the more intricate normative question of ‘Who are the legitimate actors and what are the legitimate procedures for producing law?’”.¹⁷

¹⁴ Ch. F. Zurn, *Deliberative Democracy and Institutions of Judicial Review* (Cambridge University Press 2007) 65–66.

¹⁵ *ibid.* 83.

¹⁶ A. S. Sweet, ‘Constitutionalism, Legal Pluralism and International Regimes’ (2009) 16(2) *Indiana Journal of Global Legal Studies* 626.

¹⁷ G. Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory’, Leon Petrażycki memorial lecture (Faculty of Law and Administration, University of Warsaw, 24 May 2004) 45.

It appears that a characteristic feature of contemporary constitutionalism is a break with cast-iron opposition between the legal and political components, which was the foundation of the liberal constitutionalism theory.¹⁸ At the source of these processes lay dynamic transformations within the public sphere, which – as J. Habermas pointed out – are not indifferent to the quality of democracy. In the strictest sense of the constitutional aspect, what is meant here are changes connected mainly with the dispersion of sovereignty, the proliferation of the constitutional sources of law and the pluralism of centres for the interpretation of constitutional values. Contemporary political power is marked by strong institutional dispersion under the influence of multilevel constitutionalism, the effect of which has been the overlapping of the spheres of influence in the case of particular power segments, including those that are supranational in nature. A pluralistic constitutional order is utterly different from a highly homogeneous, hierarchically ordered system in which the supreme position is taken by a constitution and where a constitutional court operates as its sole and authoritative interpreter. M. Rosenfeld put it aptly when remarking that new constitutionalism relies on numerous sets of norms which mutually cross, overlap, share one space and are connected more horizontally than vertically.¹⁹

For these reasons, it seems necessary to search for such a theory of constitutionalism that would allow a better understanding of current political practice, and would simultaneously allow the political-legal system to be stable. Hence, the constitution is increasingly regarded as a “purposive device whose true value lies in its instrumental efficacy rather than its ontological legitimacy”²⁰ and in its *a priori* nature, derived from the idea of pre-commitment.

9. According to N. Walker, we live in “post-holistic constitutionalism”, in which constitutional claims are far more partial and fragmentary. New constitutional networks are rather focused on material values

¹⁸ R. Bellamy, *Political Constitutionalism* (Cambridge University Press 2007) 2-3.

¹⁹ M. Rosenfeld, ‘Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism’ (2008) 6 *ICON* 417.

²⁰ E. Carolan, *The New Separation of Powers. A Theory for the Modern State* (Oxford University Press 2009) 5.

and not democratic procedures, and concentrate on individual rights and public goods.²¹

The effect of the mentioned processes is also the fragmentation of the logic of action in the public sphere – each public sphere develops its own formal rationality that is at odds with rationalities of other codes. G. Teubner writes of “social constitutionalism”, in which:

inevitably despite all attempts at co-operation, a new specialised division of labour will be formed in which private law will have the task of working out the independence and autonomy of social partial constitutions, whereas public law will concentrate on developing typically political constitutions, on creating political surrounding of civic constitutions, and on making network connections between various partial constitutions.²²

It has to be remembered that the framework of discussion about fundamental rights is decisively expanding – and encompasses many complicated issues around which consensus may only be attained in a discursive way (bio-ethical problems, environmental safety, the claims of certain social groups demanding legal recognition of their identity, etc.). The original aim of constitutionalism was setting the limits of the state’s power in its relations with individuals, whereas nowadays the problem is drawing the limits of the interference of supranational powers not only in the sphere of private autonomy but also the autonomies of other integrated communities – for example, families and religious or cultural groups. It means that, for legal institutions, embracing horizontal relations between individuals, within the scope of constitutional guarantees, is equally important as the formation of citizen-state relations.

More and more frequently, constitutional matters are presented in the categories of good public governance. This means that input legitimacy connected with traditional institutions of political representation is supplanted by output legitimacy, focused on effectiveness in the execution

²¹ N. Walker, ‘Constitutionalism and Incompleteness of Democracy: An Interactive Relationship’ (2010) University of Edinburgh School of Law, Working Papers Series No.2010/25, 25.

²² G. Teubner, *op. cit.* 27.

of the competences conferred upon the institutions. In reference to constitutional courts, this results in making them evaluable through assessment of their effectiveness in influencing constitutional practice; their activity is regarded as an element of implementing the principles of good governance in the constitutional domain.²³ The traditional liberal model of constitutional judiciary reduced the mentioned effectiveness to effective protection of the individual's fundamental rights. Practically, this meant that stress lay on the professionalisation of judges, who saw their role as guardians of fundamental rights, legally conceptualised and objectified as regards their content. However, such a model does not seem to be a satisfying answer to the challenges outlined above, connected with the transformation of the public sphere. This is one of the reasons why a crisis of liberal constitutionalism is more and more frequently alluded to.²⁴

III. Reflexivity of constitutional institutions

10. The adjustment of constitutional institutions to a new social reality becomes a challenge for theoreticians of the rule of law. It means an increasingly close connection between thus far opposed dimensions of constitutionalism: the effectuation of public autonomy (i.e. articulation of the people's will) and the protection of private autonomy (the so-called qualification of this role through the prism of the individual rights). This would enable constitutional institutions to be invigorated with a republican spirit.

The challenge is therefore to devise a proper institutional architecture which would secure an open forum for the articulation of a broad spectrum of attitudes existing within a political community (a state) made up of smaller communities. Sustaining a constitutional order that would meet the challenge of integrating the pluralistic spheres of the functioning of civil society, by eliminating possible conflicts between the regional logics on which they are based, thus emerges as a challenge to institutions which are emanations of the rule of law. Simultaneously, a new socio-legal

²³ A. Harding, P. Leyland, *Constitutional Courts. A Comparative Study* (Wildy Simmonds & Hill Publishing 2009) 24.

²⁴ M. Tushnet, 'A New Constitutionalism for Liberals?' (2003) 28 *New York University Review of Law & Social Change* 357.

order should provide for an appropriate level of legitimacy – attained in a discursive way – for decisions taken within these structures.

Therefore, today's theories of democratic legitimacy and constitutionalism are inseparably connected by the search for procedures which would allow the system to be simultaneously effective and reflexive, understood as an ability to make and implement political decisions that enjoy an appropriate level of legitimacy. In reference to particular branches of government, this postulate translates into various directives. In the case of the legislature, it may be assumed that everything comes down to the postulate that a responsive model of law-making should correspond to assumptions of the deliberative concept of democracy, while the activity of administrative authorities and of the judiciary should aim to provide the broadest possible legal inclusion of citizens. These are important and responsible tasks since, as G. Teubner observes, the inclusion/exclusion distinction has perhaps become the fundamental meta-code of the 21st century, mediating all other codes.²⁵

It seems that the above findings allow the positing of the thesis that concern for the quality of communication processes (i.a. equal access to participation in public affairs) is the backbone of contemporary constitutional challenges. As a result, the responsiveness and reflexivity in the activity of judges – treated as participants of public deliberation, involved both in general practical discourse as well as in the legal discourse, where the latter is a special kind of the former – also gain in importance. It is apparent that, under such new conditions, courts may legitimise their power primarily through effectiveness in forming reflexive frameworks of discourse around the individual's rights considered in a series of complicated interdependencies.

11. The abolition of experts' monopoly on knowledge about public affairs would surely be favourable to designing broad frameworks of debate about political decisions.²⁶ The awareness of the values of pluralism

²⁵ G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalisation* (Oxford University Press 2012) 137.

²⁶ U. Beck thoroughly covers the role of experts as guardians of rationality in *Reflexive Modernization. Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford University Press 1994) 46-52.

in contemporary societies precludes the radical act of the previous auto-foundation of the bases of democracy.²⁷ This is a completely different perspective than the traditional formula of liberal constitutionalism based on the pre-commitment and limitation of political power in the name of substantial values. The core of interactive democracy, according to P. Rosanvallon, is to be “permanent generalisation”, namely the ability of public institutions to react continuously to all forms of political exclusion, and to include potentially discriminated individuals or groups in public debate. A significant element is the capability to interpret debate results in terms of constitutional principles.²⁸ It means shifting the accents towards output legitimacy, combining an institution’s legitimacy with its social recognition. The authority is a derivative of both judges’ competence and the trust that society places in them.²⁹

The suggested formula is to be a response to the scant, virtually non-existent participation of citizens in executing judicial power in contemporary political systems. In search for an answer to the question quoted at the outset – *Quis custodiet ipsos custodes?* – Rosanvallon points directly to the people themselves as the controllers and supervisors of all political decisions. According to the idea of “counter-democracy”, the real *demos* act as a supervising and vetoing body by making ongoing political judgements. It is through this kind of activity that the legally non-institutionalised forms of practising sovereignty, which provide opportunities for a specific “resurrection” of *demos* in contemporary constitutionalism, find expression.³⁰

A reflexive institution may perform its function only as long as it operates with awareness that its authority does not include the final say in concluding the constitutional discourse. Therefore, the new constitutional order must be supported on the institutional arrangements that promote, on the one hand, the information openness of the constitutional court and, on the other, the activity of citizens at the level of constitutional policy.

²⁷ P. Rosanvallon, *La Légitimité Démocratique. Impartialité, Réflexivité, Proximité* (Paris 2008) 213.

²⁸ *ibid.* 337-338.

²⁹ *ibid.* 262.

³⁰ P. Rosanvallon, *La Contre-Démocratie. La Politique à L'âge de la Défiance*, Seuil 2006.

12. A constitutional court should therefore show concern for providing the equal and free participation of individuals and social groups in the legal formulation of political will. Obviously, of crucial importance here will be concern for fundamental communication values such as the freedom of speech and access to public information, now considered in the context of cyberspace.

The key institutional challenge seems to be designing such a model for proceedings before the constitutional court that would guarantee, in the broadest possible manner, the participation of the “social factor” in constitutional court proceedings. This involvement would rely on the supply of information to the said court in the examination of complicated cases that require capturing a number of dependencies that are difficult to deal with at the stage of an abstract review (including the horizontal impacts of fundamental rights) and which emerge from the structures of network society. This also means the intensification of co-operation with social partners described, not incidentally, as “friends of the court” (*amici curiae*). This co-operation is an instrument of communication between the constitutional court and the public. The institution of a constitutional complaint is also of utmost importance if the above-indicated attitudes and values are to materialise in jurisdiction, as such an institution is a direct instrument of reflexive response to an infringement of the individual’s rights both in horizontal and vertical relations.

However, a real challenge is the enhancement of civic participation on the constitutional level. In this context, constitutionalists and legal philosophers put forward ideas concerning various forms of weak constitutionalism, which would make constitutional institutions, and a constitution itself, more discursive and open to citizen participation. This would help overcome distrust with which liberal constitutionalism refers to constituting authority.³¹ One may indicate specific examples of constitutional solutions already practised today in Latin American states, promoting a more participational procedure for constitutional change. The constitutional provisions of Ecuador, Venezuela and Bolivia provide for

³¹ J. I. Colón-Ríos, ‘The End of the Constitutionalism-Democracy Debate’ (2011) 1(4) Victoria University of Wellington Legal Research Papers 19.

the possibility of convoking a constituent assembly by gathering the signatures of the appropriate number of citizens (12%, 15% and 20% respectively). This means placing the right to initiate debates on the direction of constitutional reforms in the hands of organised communities. As J. I. Colón-Ríos rightly observes, this mechanism revolutionises the old dispute between democracy and constitutionalism by shifting the accents of the former debate from the constitutional court onto the direct relation between citizens and the constitution.³²

IV. Solidarity as a constitutional value

13. Naturally, authentic changes are possible only if the proposed institutional architecture is imbued with values on which the new constitutional order is to be built, and of which constitutional judges should be custodians. The hitherto dynamic development of constitutional judiciary was marked by principles that were classical instruments of building a liberal constitutional order (i.a. legality and proportionality), but in new circumstances the value of solidarity seems to be the most significant.

N. Walker aptly notes that constitutionalism is fundamentally an answer to empirical and normative incompleteness of democracy, understood as an ideal of the rule of the people – its intrinsic incapability to secure conditions in which democratic ideals could be realised.³³ Solidarity is precisely one of the unfulfilled ideals of democracy.

The idea of solidarity remains in some opposition to the liberal-democratic model of modern constitutionalism. The latter is constructed on the basis of a rigorous concept of law's autonomy in regard to other normative orders, which is revealed through the primacy of the substantively viewed fundamental rights of the individual over communal values or goals. Liberalism, focused on negative freedoms, does not generate normative foundations strong enough to support and advance collective solidarity in the face of complicated social problems.³⁴

³² *ibid.* 27.

³³ N. Walker, *op. cit.* 1.

³⁴ Li-Ann Thio, 'Constitutionalism in Illiberal Polities' in M. Rosenfeld and A. Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 136.

14. The axis of tension between liberal and non-liberal visions of political order is the conflict between private autonomy, expressing the supremacy of a subject's rights and of freedoms understood in a negative way, and public autonomy, affirming primarily the right to political participation and a number of 'positive freedoms'. These differences translate into a concrete shape of constitutional institutions.

From the perspective of liberalism, both dimensions are separate. Liberals embed concern for solidarity either uniquely in the private sphere (philanthropy) or else they comprehend it as the task of institutions operating in compliance with abstract principles of procedural justice (e.g. J. Rawls). However, republican philosophy (communitarianism) strives to include "individual human dignity and the social dimension of human existence".³⁵ In this way, the individual and collective dimension of solidarity fuse, directly united with the status of the individual in a political community. The ethical status of solidarity is far more profound – it becomes a duty of any member of a community.³⁶ A characteristic trait of republican political thought is the conviction that: "Nor can political institutions effectively embody moral voices unless they are sustained and criticized by an active citizenry concerned about the moral direction of the community".³⁷

The currently prevailing model of liberal democracy is based on two pillars. Democratic legitimacy is catered for by the mechanism of free and equal universal suffrage, which legitimises current policy carried out by the legislature and the executive. From the start of modern constitutionalism, in the post-revolutionary age, universal suffrage was sanctioned as a display of individuals' solidarity, an expression of the unanimity of their will. But this was solidarity taken in purely abstract terms, trying theoretically to cope with the issue compared by J. J. Rousseau to squaring the circle – how to remain free while simultaneously being subject to law?

³⁵ See the declaration of Responsive Communitarian Platform: <<http://communitariannetwork.org/about-communitarianism/responsive-communitarian-platform/>>.

³⁶ The 'obligation of solidarity' category in contemporary social thought appeared expressly for the first time in Pope Paul VI's encyclical entitled *Populorum Progressio* of 1967, in which it is presented as a universal moral duty of people in charge of public affairs.

³⁷ Responsive Communitarian Platform, *op. cit.*

On the grounds of the model presented, the liberal element, expressing itself in the institutions of the rule of law upheld by the judiciary, is responsible for the steerability and stability of the whole system. The judiciary has to protect minority rights by securing at least a minimum level of formal solidarity within a community. In this way, liberalism has given rise to court-centric, rights-based constitutionalism.³⁸

Thus, it may be said that liberal constitutionalism distinguishes itself by the ontological primacy of the constitution over the state and its policy.³⁹ The constitution primarily must *ex ante* preserve the individual's freedom from the potential dangers posed by each and every subsequent political majority. On the other hand, a material view of constitutional rights, characteristic of liberal constitutionalism, makes them an insurmountable barrier for any collective goals, including even those that have a constitutional anchor.

The most comprehensive justification of this model has been delivered by R. Dworkin in his concept of "rights as trumps". The conviction that individual rights are non-reducible in the face of any sovereign power (even democratically legitimised) serves to protect the fundamental principles of human dignity and political equality. To the American philosopher, this right of every citizen "to treatment as an equal" is the foundation of legal order. It is based on the claim that "the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured themselves."⁴⁰

This view of R. Dworkin proves that some form of the fulfilment of solidarity is also possible on the ground of liberal constitutionalism. However, it is a very narrow understanding of this idea, and closely related to the concept of fundamental rights. In effect, the mentioned idea finds justification to a greater extent in the pre-societal rights of community members, which must be protected by constitutional institutions, rather than in current politics. But in the republican view, rights acquire their content within and not beyond current policy, thus they must, to a greater

³⁸ Li-Ann Thio, *op. cit.* 135.

³⁹ M. La Torre, *Constitutionalism and Legal Reasoning. A New Paradigm for the Concept of Law* (Dordrecht 2007) 8.

⁴⁰ R. Dworkin, *Taking Rights Seriously* (Duckworth London 1978) 198-199, 227.

extent, be collated with strictly political goals, including the requirements of an active pro-solidarity policy.

15. Political solidarity may be realised both in vertical relations (between the state and the individual) as well as horizontal ones (between individuals). Both dimensions expose a vast area in which solidarity may be pursued, that is, the space in which individual ethics meets the general rules of social life. Liberal constitutionalists are decisively far less interested in mutual relations between them, whereas republican (communitarian) thinkers expose the mutual connection between both dimensions of the functioning of the individual, through the lenses of both civic rights and duties. This should not be surprising because the active promotion of a substantive vision of the common good is characteristic of all illiberal polities.⁴¹ Also in this context, Latin America provides interesting examples of the incorporation of a new axiology into constitutions.

The example of Ecuador's constitution may be interesting, as it directly incorporates in the basic law the concept of "the good way of living system" (Title VII)⁴², which demands that public politics is founded on the principles of equality, equity, progressivity, interculturalism, solidarity and nondiscrimination, and also that the criteria of quality, efficiency, effectiveness, transparency, responsibility and participation (Article 340) are taken into account. The constitutional idea of "the good way of living" is to express what is meant by the indigenous "*sumak kawsay*". The individualistic pursuit of "a better life" – characteristic of western liberal civilisation, is replaced with the postulate "to live well" within a just community. Naturally, the concept of the good way of living may easily be instrumentalised by a particular political power. Hence, a necessary complement of new material constitutional models is an independent constitutional court, operating reflexively on the basis of such models, and overseeing the quality of deliberation in public matters.

⁴¹ *ibid.* 134.

⁴² See the English translation of the Constitution of the Republic of Ecuador, available at: <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>>

16. The above considerations allow the positing of a thesis that the liberal paradigm of legitimacy of constitutional justice sets too narrow a framework to allow the normative potential embedded in the constitutional idea of solidarity to be used to the full. Championing solidarity by a constitutional court would rely here on identifying barriers or disruptions in the creation and development of solidarity bonds within particular communities in different spheres of political or social activity.

In carrying out these tasks, a constitutional court should also show great restraint. From the perspective of the essence of constitutional justice, the proper area of concern for solidarity would be nothing but a political community viewed as the broadest of solidarity spheres and considered on the level of the nation-state.⁴³ A constitutional court should therefore oversee the solidarity distribution of a certain good, namely of political power. For, as M. Walzer reminds us:

The community is itself a good – conceivably the most important good – that gets distributed. But it is a good that can only be distributed by taking people in, where all the senses of that latter phrase are relevant: they must be physically admitted and politically received. Hence membership cannot be handed out by some external agency; its value depends upon an internal decision. Were there no communities capable of making such decisions, there would in this case be no good worth distributing.⁴⁴

However, contemporary pluralist societies need institutions that mediate reflectively between smaller communities, by securing equal access to participate in public affairs. Constitutional judges should play the part of custodians of the rules of the political game, protecting against “bad solidarity” (like particularism or various forms of domination) expanding

⁴³ As an aside, let us only add that, under present conditions, the state is not actually the broadest sphere of solidarity, for we are witnessing the formation of supranational communities. In this way, solidarity also gains a new dimension. Courts, considerably involved in these processes, acquire a new plane of activity. Their role is here incomparably more difficult, since the directives of solidarity may be expressed here both as a call to deepen integration and as an obligation to protect the constitutional identity of the national community that they represent.

⁴⁴ M. Walzer, *The Spheres of Justice* (Basic Books New York 1983) 58.

in public space. In the fulfilment of this task, a constitutional court should show well-advanced reflexivity, which may indeed function as legitimising its judicial decisions (output legitimacy).

The connection of solidarity with the idea of the rule of law is increasingly being recognised by legal and political thinkers. As L. Morlino points out, the rule of law determines a procedural dimension of the quality of democracy. However, it stays in close connection with *decisional output*, namely the effects of political decisions and their implementation.⁴⁵ One can clearly see that contemporary constitutionalism links the authority of power and law with the formula of output legitimacy, and pushes input legitimacy, connected with the traditional idea of political representation, to the background.

In consequence, as A. Czarnota rightly notes:

The best means to achieve social solidarity in contemporary late-modern society is to construct it in reference to the discursive method, the institutional foundation of which would be the rule of law. Democratic rule of law guarantees the sphere of public and private autonomy. Thus, they guarantee the freedom of opinion, which is indispensable for the functioning of democracy. Simultaneously, they allow for the public sphere to be arranged in such a manner as to realise a policy of social cohesion, namely of social solidarity.⁴⁶

Constitutional courts seem to be an element of the institutional structure of constitutionalism that best safeguards the just rules of the distribution of political power in a community. It ensures that no one is left out of it because their legal subjectivity is questioned. In economic matters, traditionally related to issues of solidarity, constitutional courts play second fiddle. Here, all kinds of political, and not legal, instruments

⁴⁵ L. Morlino, ““Good” and “Bad” Democracies: How to Conduct Research into the Quality of Democracy” (2004) 20(1) *Journal of Communist Studies and Transitions Politics* 7.

⁴⁶ A. Czarnota, ‘Prawo a współczesne odmiany solidaryzmu społecznego’ in A. Łabno (ed), *Idea solidaryzmu we współczesnej filozofii prawa i polityki* (Warszawa 2012) 72-73.

of governance are more adequate, and naturally more sensitive to complicated interdependencies between the spheres of social and economic life.⁴⁷

V. Conclusion

17. The transformation of the public sphere of contemporary democracies means that constitutional courts are expected not so much to fulfil a reactive function in protecting individual rights, but rather to actively participate in forging legal frameworks for discourse on the constitutional identity of a community. Only in this way, and not through deficient electoral procedures, the principle of the sovereignty of the people can be fully realised in new political circumstances. In other words, the basic task falling to judges is to correct all actions that threaten solidarity understood primarily as the inclusion of “others” by encompassing them in the common category of the political “we”. This is of particular importance in the context of the prevailing pluralism of contemporary communities. Therefore, of equal importance are the institutional mechanisms for activating citizens to participate in constitutional politics. Constitutional courts, by becoming more responsive to various structures of a network state, in which the significance of constitutional values is now determined, may serve as a guarantor of pro-solidarity attitudes, by reinforcing the space of trust within the “community of communities”, namely a state.

In consequence, the thesis that solidarity determines the foundation of the legitimacy of power in its modern formula seems to be justified. However, the idea of solidarity is realised differently in various spheres of public life. As a constitutional value, it constitutes a general directive binding in the whole network of communities making up a contemporary state; as a legal principle, it may serve as an autonomous constitutional model determining the form of a political community (a state); by contrast, in the policy sphere, it is a directive to implement relevant social programmes, run by the administration, in order to enhance solidarity.

⁴⁷ Li-Ann Thio, *op. cit.* 143.

E. Durkheim, one of the fathers of the doctrine of solidarity, discerned this dependence, claiming that democracy may “(...) appear as the political system by which the society can achieve a consciousness of itself in its purest form. The more that deliberation and reflection and a critical spirit play a considerable part in the course of public affairs, the more democratic the nation”.⁴⁸ Therefore, judges should protect the authority of law understood as the instrument of social integration founded on the constitutional idea of solidarity.

⁴⁸ E. Durkheim, *Professional Ethics and Civic Morals* (Routledge Sociology Classics, New York 2001) 89.

THE EUROPEAN COMITY OF CIRCUMSPECT CONSTITUTIONAL COURTS. SEARCHING FOR CONSTITUTIONAL REASON, RELEVANCE AND VOICE²

Stop for a second in a rushing crowd. There is the Other next to you. Meeting Him is the greatest experience of all. Talking to the Other, feeling him out while at the same time knowing that he sees and understands the world differently, is crucial to building the atmosphere for positive dialogue.³

Some PEOPLE BELIEVE IN FATE, OTHERS DON'T. I DO and I don't. It may seem at times as if invisible fingers move us about like puppets on strings. But for sure, we are not born to be dragged along. We can grab the strings ourselves and adjust our course at every crossroad, or take off at any little trail into the unknown.⁴

I. European constitutionalism. Setting the scene

I will argue below that the European constitutional landscape today is being dominated by the overlapping consensus of constitutional courts which forms the heart of supranational adjudication in Europe

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² This paper builds on, and follows, my paper entitled 'Constitutional Identity in the European Legal Space and the Comity of Circumspect Constitutional Courts' presented at the IX World Congress of Constitutional Law in Oslo, 16-20 June 2014. Published in the present form, it is a more nuanced and expanded (yet by no means final!) version of the arguments presented at the 2014 Congress and in the "Oslo paper".

³ R. Kapuściński, *Ten Inny* [*The Other*] (Warszawa 2010) [the English translation of the quoted passage is mine].

⁴ Thor Heyerdahl, *Kon-Tiki Across the Pacific by Raft* (Foreword to the 35th Anniversary Edn, New York, London, Toronto, Sydney 2009) [italics in the original].

with different interests, power struggles and jostling for better positions. Post-national law sees law as a never-ending discourse and conflict as written into the DNA of the system. Dogmatic and exclusive “*either ... or*” logic becomes untenable as hierarchy is highly divisive from the external perspective of pluralistic systems which look for ways to coexist and cooperate, and not simply cancel each other out. Each system stakes its own claim to constitutional distinctiveness. The uniqueness of European legal space resides in different courts speaking for their respective legal systems and coming up with divergent interpretations of the systemic relationship between EU law and national laws. Seen from this perspective, the main concern of European constitutionalism should be the proper understanding and categorisation of the EU as a supranational community designed to complement states, and not replace them, to provide a new platform for citizens’ interests and to protect them beyond state borders, often against the excesses of their own states.⁵ It recognises that a constitutional court aspiring to be “good” must be able to go beyond the mere defence of its constitution when it is attacked and accept the challenge of promoting domestic constitutional values as part of the European constitution-building process. It aims at redrawing the constitutional *status quo* and points towards new opportunities and methods of understanding the world of European constitutionalism. Such an approach stems from accepting that the legitimacy of judicial power comes not only from within the systems but is also a consequence of systems interacting, learning and adapting.

Judges usually see their legal order above all the others and consider themselves at the centre of the legal universe. They are solely to protect their own legal systems from outside encroachments. EU law questions this state of affairs rather dramatically and demands that account be taken of perspectives different from one’s own. The Court of Justice (hereinafter: the CJ or the Court) asserts, in the name of the autonomy and effectiveness of EU

⁵ For an approach underlining the rupture by “*Van Gend case law*” with the traditional reading of constitutions and states, see M. Everson, J. Eisner, *The Making of a European Constitution. Judges and Law Beyond Constitutive Power* (Routledge 2007) 41, and A. Vauchez, ‘The Transnational Politics of Judicialization. Van Gend en Loos and the Making of EU Polity’ (2010) 16(1) *European Law Journal* 1, and more recently A. Vauchez, *L’Union par le droit. L’invention d’un programme institutionnelle pour l’Europe* (Paris 2013), in particular Chapter III pp. 181-223.

law, the full and unconditional primacy of the said law over any national law, whereas a constitutional court anchors the primacy of EU law in its constitution and claims residual jurisdiction to strike down EU law as incompatible with constitutional norms. This approach means that we are faced with a constitutional impasse, as neither court is willing to defer to the other. Reconciliation and reasonable deference should rather come in good time from the reassurance that EU law is no threat. Such reconciliation, however, hinges on necessary accommodations to be made by both sides of the process: the CJ and national courts. It is thus crucial to work out theories of justification and deliberations which would have judges strive for mutual understanding by generalising and universalising their language,⁶ renouncing a single and universally operational theory. The sharing of a common legal discourse then becomes a challenge and takes the place of an obsolete search for “who has the ultimate authority”. It is much more difficult to try to communicate and search for a common understanding than simply entrench behind constitutional lines and lie in wait.

According to A. Stone Sweet, Europe possesses an overarching constitutional structure, comprised of fundamental rights and the shared authority of judges to adjudicate individual claims. In this system, “no single organ possesses the ‘final word’ when it comes to a conflict between conflicting interpretations of rights; instead, the system develops through inter-court dialogue, both cooperative and competitive”.⁷ Constitutional pluralism teaches us that there is a necessary overlap of legal sources without *ex ante* hierarchy; it is the individual who has a choice which source to plead, and judges then have a choice of which right to enforce. Pluralism is more subjective and is defined as an attitude which recognises plurality, in the objective sense understood as sources, jurisdictions and interpretations.⁸ In this sense, plurality is much easier than pluralism. As a result of all this,

⁶ M.P. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, available at <www.ejls.eu/2/25UK.pdf>.

⁷ A. Stone Sweet, ‘A Cosmopolitan Legal Order. Constitutional Pluralism and Rights Adjudication in Europe’ 1(1) *Global Constitutionalism* 53-90.

⁸ Plurality is more objective and connotes overlapping jurisdictions, whereas the latter is more subjective and stands for an attitude which embraces plurality, wants to maintain it and not to destroy it. See N. Walker, in M. Avbelj and J. Komárek (eds), ‘Four Visions of Constitutional Pluralism’ (2008) 2(1) *European Journal of Legal Studies* 336.

constitutional courts are urged to move away from the traditional notion of a constitutional court as a guardian of a constitution only *towards* a court that is more engaged in a constructive dialogue on the European stage and reads its mandate through the prism of European constitutionalism. Constitutional courts today become agents of the common project. It is very important that courts at the level of Member States and the EU play the game, balance sovereign and community needs, and voice their concerns within the procedural and institutional framework of EU law. It is all the more important nowadays when the argument “from the Constitutional identity” is being employed as a legitimate counter-argument in the debate over the importance of uniformity and integrity of EU law. The latter is ready to take the back seat, something that was hardly conceivable forty years ago. This bestows upon constitutional courts a sense of purpose, relevancy, recognition and, last but not least, responsibility. (A) new function(s) call(s) for (a) new framework(s) and the judicial comity aims at providing it/them.

The primacy dispute should be seen as a never-ending process, rather than a zero-sum game, and a move from “hierarchical primacy” to “discursive primacy”. It is time to embrace the fact that constitutional courts at the national and EU level function as a motor for, and a critique of, European constitutionalism. Hierarchic concepts are out of date and unable to capture the uniqueness and complexity of this new emerging comity of constitutional courts operating at different levels and guided by their distinct constitutional allegiances, and yet bound together in their desire to act jointly and with due regard to “the other”. The EU not only teaches others, but also learns from others. That is why constitutional courts must present the EU with their own vision of European constitutionalism before the CJ. Conflicts of jurisdictions and divergent judgments cannot be prevented by means of exclusive jurisdictions and hierarchical rules introduced in advance and in a universal manner. Rather, the question is one of the willingness to step back and recognise the other forum to be more appropriate, for whatever reason, for settling the dispute. This has nothing to do with the hierarchy or the last word though, but rather with the strength of the argument in favour of declining jurisdiction for the benefit of the other or recognising the other. This restraint is a two-way

sword and cuts both ways. Supranational judicial comity is based on a constructive dialogue as a means to judicial protection of human rights. As such, it would elevate judicial comity to the legal duty of each and every court to deliver justice.⁹ Constitutionalism will then be the result of reassurance that every actor plays according to the rules. There are and will be spheres of different and overlapping jurisdictions which interpret the same text and monitor each other's interpretation. As a result, we must come to terms with the novel jurisprudence of mutual monitoring.¹⁰ Factors related to time, adaptation, and accommodation all play their part. Judicial cooperation has contested action and discord inherent in the concept.¹¹ Constitutional courts need a complex deliberative theory for tackling challenges coming their way in the wake of EU law. The compromise is badly needed between reasonable deference towards the CJ, on the one hand, and legitimising and constructive defiance, on the other. It is clear that every time a constitutional court makes concessions, it is preparing to gain some ground elsewhere. Constitutional discourse is like a chain novel: full of turns, bumps and ruptures. What counts though is that there is an agreement to continue adding new chapters, plots and characters. After all, it is nothing spectacular since the entire project is about finding the right balance between diversity and uniformity, between stepping back and learning from others' visions and stepping forward and explaining one's vision to others. The most important of this comparative constitutionalism is that it is not about mere citations to others. It is about readiness to change, absorb and acknowledge that other courts have something important to say. It involves a constructive critique and comparative reasoning. Mutual influence of others implies not only automatic reception, but also rejection.

⁹ N. Lavranos, 'Towards a Solange-Method Between International Courts and Tribunals' in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law. Essays in Honour of Prof. R. Lapidot* (2008).

¹⁰ A.-M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99. In the same vein, see G. Davies, 'Constitutional Disagreement in Europe and the Search of Pluralism', Eric Stein Working Paper 1/2010.

¹¹ E.-U. Petersmann, 'Do Judges Meet Their Constitutional Obligation to Settle Disputes in Conformity with "Principles of Justice and International Law"?' 1(2) *European Journal of Legal Studies*.

II. The comity of constitutional courts. What is in a name?

It is the contention of the present analysis that refocusing the constitutional debate is of utmost significance. The emphasis must be shifted towards the comity of courts transcending the now established and universally recognised “community of courts”.¹² Such comity acts as a decentralised sovereign within a new kind of polity – a cosmopolitan legal order characterised by legal pluralism. The comity of constitutional courts is premised on an important shift in emphasis. “*Judges asking judges*”, as an EU paradigm for relations between the CJ and lower national courts, is complemented in the context of constitutional courts by “*judges monitoring judges*”. The latter plays to the sensitivities and egos of constitutional courts, ensuring their active role in the deliberative process. This shift is crucial for three reasons. *Firstly*, it brings vital rationalisation of the discretionary powers of the courts and provides control of the constitutional disagreement by delineating the parameters within which the actors are free to roam. National courts are acting *not* on their own national authority and are not cast as agents defending an idiosyncratic national tradition *against* the EU. They are instead trying to give meaning to the principles of their national constitutions in the light of a common European constitutional practice. *Secondly*, it allows a margin for discretion and divergence by accepting that not all values are shared, and that the system might be better-off by playing up to the pride of the actors, and allowing them go their own ways. *Thirdly*, it vindicates the role of constitutional courts, while reinventing their vocation in a plural and constitutionally competitive world and making them a catalyst for change and adaptation at the EU level. Without a postulated *shift* from an internal focus (inward perspective of the constitution) towards an external one by opening up and absorbing a European constitution, a *change in the language* (finding common ground and linking nodes of the network, instead of separating and underlining divergences), new logic (not only ever-present “*either ... or*” but also “*both ... and*”) and readiness to problematise reality, constitutional courts

¹² A. D’Alterio, ‘From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?’ Jean Monnet Working Paper 13/10.

risk marginalisation and loss of influence on the way in which European law enters and penetrates their constitutional orders.

A starting premise is the willingness of all the actors to recalibrate their original positions in the light of others' arguments. The comity points towards new opportunities and methods of seeing and understanding the world of European constitutionalism. It is constitutionalism that is free of dogmatism. Rather, the comity is pragmatic in that it both allows and frames a confrontation and a dispute. It brings to the fore a fundamental challenge for judges accustomed to the traditional conception of the legal system as a pyramid with the result that lower laws always conform to the higher-ranking norm(s). It provides a framework to reconcile the contradictory claims and pretensions of the CJ and national courts, since it caters to the pride and relevance of each actor. This must be so, for building a European Constitution is a collective, dynamic and pluralistic enterprise. It calls for never-ending feedback and communication from national courts and their traditions. Its main rationale is to anticipate a dispute and fend it off immediately, rather than to face the uncertainty of a fully-fledged disagreement and its consequences. That is why the comity starts from a different assumption: EU law and national laws are distinct, yet closely interwoven, bodies of laws. Each system must learn from the other, change, engage in a meaningful dialogue and accept otherness. Checks and balances between non-hierarchical legal orders build a whole based on mutual trust and control. Therefore, the comity is built on judicial dialogue and understanding going beyond mere pro-European interpretation and citation of others' decisions. Dialogue acts as a legitimating power and, when properly understood, backs up courts' claims to their visions. Dialogue involving all the interested parties has the potential to arrive at better-reasoned interpretative results, and rewards participants since each has *prima facie* an equal right to succeed. Nothing is set in stone. On the contrary, the equilibrium never ceases to change, move and surprise both onlookers and actors. It is the power of better arguments (*imperio rationis*), and not the argument of power (*ratione imperii*), that counts and dictates the outcomes.¹³ As a result of this discursive premise, the comity

¹³ M. Cogen-Eliya, I. Porrat, 'Proportionality and the Culture of Justification', available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623397>.

embraces the responsibility not only to engage in a dialogue but also to frame it in universal terms. EU law touches constitutional law on so many aspects that it is no longer tenable for constitutional courts to maintain their serene aloofness.¹⁴ The comity pits constitutional courts against the full force of constitutional debate which will be either joined or ignored. To join, however, means to voice one's concerns critically and constructively so as to allow for true migration of constitutional ideas. The main challenge is then in the sphere of language, making it clear that separation as a legal technique is not just outdated, but is alienating and may result in isolation.¹⁵ It requires that legal actors, in their scholarly writings (the role of the doctrine) and case law (the role of the courts), display flexibility and receptiveness to the changing nature of law. Being part of the comity imposes on constitutional courts a responsibility for linking the nodes and connecting the dots within the legal net, by deconstructing overlapping structures and managing consensus among participants of the unique emergent comity of mutual impact and influence. This would allow each autonomous order to evolve in reaction to the other. As a result, changes would always be a by-product of outside reality and its demands. Such comity recognises the systemic functions of constitutional courts,¹⁶ with constitutional courts and the CJ acting in a relational – although not always cooperative – way.

III. The relevance of the “*argument from a domestic constitution*”

Constructive constitutional criticism might benefit EU law, provided that it takes place in a structured and principled fashion and is argument-based. This approach is pragmatic and it recognises that the legal world is no longer black or white (current “solving the conflict logic”) but

¹⁴ For a comprehensive analysis, see J. Komárek, ‘The Place of Constitutional Courts in the EU’ (2013) 9 *European Constitutional Law Review* 420.

¹⁵ On a legitimising force of dialogue in EU law, see A. T. Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (Oxford 2009).

¹⁶ See classic A. S. Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press 2000).

rather grey (with the emphasis on conflict management).¹⁷ The constitutional argument enjoys its own claim to validity and is taken into account as an integral part of the systemic constitutional conversation. It is not simply waved aside as parochial and old-fashioned, but must be considered seriously by the CJ as the part and parcel of this emerging constitutional equilibrium in Europe. The risk in waiting for the EU's impact on Member States' constitutional structures is too uncertain and, in the end, might be too high. Constructive participation in the dialogue is always better than passively waiting for results which are beyond anyone else's individual control. Constitutional courts thus become agents of the common project without renouncing completely their internal constitutional allegiances, since these allegiances are reconstructed in a European context.

Every constitutional court of a Member State has a crucial message to convey for European constitutionalism. As already shown above, respect and communication are hallmarks of the judicial comity of courts, and conflict is seen as a sign that the system is working. The more national experiences are missing, the more the CJ runs the risk of imposing a specific cultural tradition on the whole of European society, as if it were part of the common constitutional background. A constitutional court which sits on the fence is condemned either to accept a cultural homologation established by the strongest voices or to fight a sterile battle of defence, entrenched behind the counter-limits and national sovereignty. All this makes it easier to understand why today the preliminary reference procedure (see below) is on the verge of constitutionalisation and provides a legal avenue for presenting rich and diverse points of view before the CJ and channelling constitutional concerns.¹⁸ The answer by the CJ must strike a reasonable balance between the requirements of both legal orders. For a constitutional court, it is of utmost importance to understand that a preliminary ruling is not the end of sovereignty but rather, and more correctly, the beginning of something new: constructing a discursive constitution of the European legal order which straddles national constitutional law and EU law. In

¹⁷ See J. R. Bengoetxea, N. MacCormick, L. M. Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G. de Burca and J. H. H. Weiler (eds), *The European Court of Justice. Collected Courses of the Academy of European Law* (Oxford 2001).

¹⁸ See J.H.H. Weiler, 'Judicial Ego' (2011) 9(1-4) *ICON* 1-2.

this process, constitutional courts become agents of the common project. The dispute about constitutional essentials recognises that each court has an equal right to win only if it comes to the negotiating table with better and credible arguments in favour of national specificity and diversity. The importance of this discourse goes beyond a concrete dispute: rather, it is about building trust with every participant of the constitutional exchange so that next time today's losers will come out on top. A discursive approach to constitutionalism puts constitutional courts in the systemic spotlight, as it calls on those courts to detect and monitor "structural deficiencies" of EU law as well as to manage such deficiencies discursively and bring them to the attention of the CJ. This role bestows on these courts an additional sense of purpose, relevancy, recognition and, last but not least, responsibility. The narrative focused on structural deficiencies presupposes a clash between EU and national law, and this shows why dialogue must be constructive and should be nothing short of a nice conversation. However, this is the only way to make sure that national courts do not lapse into a nationalistic reading of structural deficiencies. Allowing such a lapse would be tantamount to the abuse of the dialogue and would put a defensive mask on the dialogue. In this sense, playing within the community, not outside, requires – as a condition *sine qua non* – conceptual tolerance which precedes constitutional pluralism.

European constitutionalism operates within the coordinate judicial web in which constitutional courts and the CJ (also the ECtHR) agree to defer to one another's decisions as long as these decisions respect mutually agreed upon essentials. It alludes to the analysis of Sabel and Gerstenberg, who claim that an overlapping consensus on fundamental commitments of principle which each order requires the other to respect does not rest on one single doctrine and understanding of what is good, moral, etc. Quite the contrary, all actors agree and acknowledge their differences and their influence on the interpretation of shared commitments, and accord such a possibility to others. As long as others respect jointly agreed essentials, an overlapping consensus is being articulated and adjusted. In this way, our comity extends beyond national territory by means of jurisprudence of mutual respect, peer review and supervision, without pretence to bringing into existence a new overarching entity. Actors build on this

overlapping consensus and at the same time check that others respect essential principles and commitments. Each court reserves the right to assert its residual jurisdiction if it is convinced that there is a violation of shared principles. Sabel and Gerstenberg state the following:

Decision making is horizontal rather than vertical, in the sense that adjudication by one court of the boundaries of shared fundamental principles is contingent on the acceptance of overall outcomes by the others. The commitment to principles shared by all and the possibility that other orders, if convinced that fundamental rights on their understanding are imperiled, will assert their jurisdiction, induce each court to consider its decisions in light of reasons acceptable to all the others.¹⁹

This judicial monitoring of the overlapping consensus takes place within the more general structure provided by the comity, as discussed above, which sets up an argumentative, institutional and procedural framework for voicing constitutional concerns and managing overlap inherent in the European coordinate constitutional order. Such rationalisation of discretionary powers granted to each and every court within the comity is crucial if the system is to function properly. “Constitutional override” resulting from the disregard for the essentials must be seen as the last resort, as an exception rather than a rule, since the comity’s primary concern is about reconstructing circles of coherence, building understanding and finding common ground among reasonable and acceptable divergences. In this sense, the EU’s and the comity’s legal vocation in the years to come is not only “*united in diversity*” but equally “*united from diversity*”.²⁰

¹⁹ Ch. Sabel, O. Gerstenberg, ‘Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order’ (2010) 16 *European Law Journal* 511, 546.

²⁰ Today the relevance of the “argument from the constitution” goes well beyond “*Omega – Sayn-Wittgenstein case law*”. For various constellations, see N. de Boer, ‘Addressing Rights Divergences Under the Charter: Melloni’ (2013) 50 *Common Market Law Review* 1083, in particular pp. 1097-1103.

All this takes on a special importance when one considers the change of internal dynamics in a constitutional litigation.²¹ It also explains why we are not only talking about “*comity*”, but we are also adding the modifier “*circumspect*”. Courts act as political actors wielding persuasion rather than compulsion, engaged in a common enterprise, and redrawing lines between the courts and political institutions.²² The constitutional debate is shifting dramatically from *who* has the final say to *what* the limits of law are. European constitutionalism worthy of the name calls for much more than simplistic and antagonistic arguments from hierarchy. It requires modesty, self-limitation, awareness of the other and, last but not least, readiness to defer to one another’s decisions. Legal systems are linked and the jurisprudence of their courts is the most important tool to make this work. Actors speaking for each order acknowledge not only their differences and understandings but also mutual influence on their decisions. The European legal space is polyarchic because it lacks a final decider! Such a legal order must resolve disputes by exchanges among coordinate bodies, each with a contingent claim to competence, and the parties are bound in these exchanges to re-examine their interpretations of shared principles, also in the light of arguments presented by the others.²³ Legal orders are so interdependent that one cannot be read and fully understood without regard to

²¹ The constraints of space preclude any detailed analysis. Suffice to say that the Court of Justice has come a long way from being merely “a court of integration” to becoming “a court of rights”. See, among others, M. Cartabia, “‘Taking Dialogue Seriously’”. The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union’ Jean Monnet Working Paper 12/2007. On the legitimising consequences of the CJ’s shift from being merely “a competence court” to becoming “a court of rights”, see an excellent analysis by M. Shapiro, ‘The European Court of Justice: Of Institutions and Democracy’ (1998) 32 *Israel Law Review* 3. Furthermore, the introduction by the Lisbon Treaty of the national identity clause added a new constitutional layer to the case law of the Court. S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 147. See in this vein: L.F.M. Besselink, ‘National and Constitutional Identity Before and After Lisbon’ (2010) 6(3) *Utrecht Law Review*; as well as L.F.M. Besselink, ‘Respecting Constitutional Identity in the European Union: An Essay on ECJ (Second Chamber), Case C 208/09, 22 December 2010, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*’ (2012) 49 *Common Market Law Review* 671.

²² Also: ‘Les juges constituants’ (2010) 6 *European Constitutional Law Review* 171-174.

²³ Ch. Sabel, O. Gerstenberg, ‘Constitutionalising an Overlapping Consensus...’, *op. cit.* 513-514.

the other. Novel and challenging questions concern *inter alia* the extent to which the conflict can be decided and interpreted by the courts, as well as the proper role of other actors in this constitutional enterprise, rather than sterile disputes of “the court which has the last word”.

IV. The comity and the art of “*constitutional bargaining*”

It is no coincidence that the analysis opens with the excerpt from Ryszard Kapuściński’s novel *The Other*, as the comity offers an opportunity for constitutional rediscovery and understanding of a single court’s vocation through the lenses of other and equal courts. The courts not only have a voice, but also ears. The role of any constitutional court should be seen as a function of constitutional constraint, self-critique and self-correction. The constitutional reconciliation, however, hinges on necessary accommodations to be made by both sides of the process: the Court of Justice and national courts.²⁴ For the sake of argument, we might assume that two propositions are possible concerning a solution to competing jurisdictions. On the one hand, an interpretation is superior as a result of the court’s place in the hierarchy, since the court placed higher in the hierarchy enjoys superiority. On the other hand, the argumentative school of thought is more ambitious, since it rejects the hierarchy and adopts the quality and strength of reasoning as a counter-argument for the hierarchy. What counts is not “who says” but “how it is said”. The force of arguments prevails over strict hierarchies. The landscape is characterised by the diversity of legal sources, various sites of new governance as a by-product of Europeanisation, privatisation and bureaucratisation, the plurality of the sites of legal expression and the *prima facie* equality of authority claims; the relationship

²⁴ G. Davies, ‘Constitutional Disagreement ...’, *op. cit.* For the negative and unfortunate example of adding fuel to the fire by constitutional courts, see the comment on the judgment of the Czech Constitutional Court following the Court of Justice’s ruling in *Landtovà*: A. Dyevre, ‘The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?’, (available at <<http://www.verfassungsblog.de/the-czech-ultra-vires-revolution-isolated-accident-or-omen-of-judicial-armageddon/>>).

between legal orders is already more horizontal than vertical, heterarchical than hierarchical.²⁵

The interpretive result should never close the door on the interpretation by the other, but rather should leave enough room and options to invite the other and turn the monologue into a dialogue. Judicial review is always a matter of interaction between deference and defiance, and the challenge is to combine the two without falling into the trap of extremism of either attitude. As a result, constitutional judges put on a mantle of political theorists and this recalibrates the discourse on their legitimacy and vocation. Such a denomination helps avoid denouncing judgments as mere political statements rather than legal ones. It liberates the doctrine from analysing what the courts are really saying, since we assume in advance that what they are saying does belong in the courtroom anyway. It is no longer true that only politicians bargain while judges merely argue. Constitutional judges are powerful political institutions, building alliances, speaking for their legal systems and impacting on the political process.²⁶ They do bargain to an ever-increasing extent, even though they pretend that they are only deciding cases.²⁷

Constitutional absolutism has no reason to exist, for it is the deference, mutual respect and learning that define rules of the game. The Court of Justice not only teaches constitutional courts, but it also learns from its constitutional counterparts, who put forward their own vision of the European constitutionalism. These courts must balance constitutional arguments against European integration on a case-by-case basis, avoiding general and abstract principles which might tie their hands in the future and deprive them of breathing room in their interactions with the Court of Justice. It is only under those circumstances that one has a chance to arrive at a true “constitutional synthesis”. All this takes on a special importance when one considers the change of internal dynamics in a constitutional

²⁵ D. Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance’ University of Michigan Law School Public Law and Legal Theory Working Paper 229/2011.

²⁶ On this, see most recently D. Robertson, *The Judge as a Political Theorist. Contemporary Constitutional Review* (Princeton, NJ, Princeton University Press 2010) with further references.

²⁷ M. Shapiro, ‘Judges as Liars’ (1994) 17 *Harvard Law Review* 155.

litigation. Firstly, the Court of Justice gains confidence as a fully-fledged “court of rights”, and not merely as the “court of integration”. Expanding and nuancing its fundamental rights jurisprudence, the Court enters the stage of rights litigation with confidence and its own claim to respect. Secondly, and more importantly, to support our contention, EU law itself undergoes subtle changes in its internal structure. With the introduction of Article 4(2) TEU, which obliges the Union to respect national identity inherent in the political and constitutional structure of Member States, and the recent case law of the Court (cases like *Michaniki* and, more significantly, *Sayn-Wittgenstein*), free movement rights might be restricted on the basis of a national measure which is the expression of national identity.²⁸ The traditional, first-generation constitutional dispute between competing rights and interests turns into the second-generation conflict that goes beyond fundamental rights. Constitutional rules and principles (other than fundamental rights), pertaining to the political and constitutional identity of Member States, become a valid counter-argument for the full operation of Community law. For example, in *Sayn-Wittgenstein*, it was the republican nature of the state which was a relevant restriction on EU rights – the situation hardly conceivable in the early years of the Court’s jurisprudence on the independent nature of law “stemming from the Treaty, that cannot be overridden by rules of national law, however framed”.²⁹ It is submitted that we are witnessing a fascinating process of shifting from an *absolute autonomy* of a European legal order (external sources of human rights were translated/interpolated into the EU legal order

²⁸ For a thorough analysis of Art. 4(2) of the Treaty and the jurisprudence of the Court of Justice, see A. von Bogdandy, S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 147, as well as B. Guastaffero, ‘Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause’ Jean Monnet Working Paper 1/12.

²⁹ In this vein: L.F.M. Besselink, ‘National and Constitutional Identity Before and After Lisbon’ (2010) 6(3) *Utrecht Law Review*; as well as L.F.M. Besselink, ‘Respecting Constitutional Identity in the European Union: An Essay on ECJ (Second Chamber), Case C 208/09, 22 December 2010, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*’ (2012) 49 *Common Market Law Review* 671. On possible ramifications of the “*Sayn-Wittgenstein* jurisprudence”, see also D. Ritleng, ‘Le droit au respect de l’identité constitutionnelle nationale’ in J.-Ch. Barbato and J.-D. Mouton (eds), *Vers la reconnaissance de droits fondamentaux aux états membres de l’Union européenne. Réflexions à partir des notions d’identité et de solidarité* (Bruxelles 2010) 21-47.

by the intermediary of general principles of Community law and thus the Community law pretended to keep its independence from national laws) to *heteronomy*, where the EU is obliged to respect sources that reside outside its hallowed catalogue of fundamental rights. There is no place for reading constitutional traditions into the EU, as it would have been the case in accordance with the classic “*Costa-Simmenthal* case law”. Instead, the EU is under an obligation to respect sources that are external to its own legal system. In that sense, Article 4(2) TEU is nothing short of being revolutionary, for it consists of the classic tenets of a traditional European supranationalism, leading to a truly constitutional supranationalism. Thirdly, for the very first time in the history of integration, there exists a situation of a jurisdictional overlap where one set of norms is integrated into another by way of a direct referral from one legal order to another. Article 4(2) TEU belongs to such a category, as it postulates that the constitutional norms of a Member State, which form part of its identity, are to be respected and protected by the institutions of the EU. The CJ must not simply continue the “business as usual” of vetting every argument derived from national law (as was the case in the past when autonomy reigned), since it is the Treaty itself that mandates respect for outside sources of law in the form of constitutional traditions. The CJ must learn to act in unison as it must look towards constitutional courts to learn about their traditions and invite them to join it in working out the meaning of European law in the light of those traditions. The big question is then how to reconcile the possible overlap of competences, how to mediate between the expectations of national laws and the exigencies of the EU legal order, and what role the respective (EU and national) courts should play in the process.

There is no doubt that the Court must lead the way, and execute, at least, a rudimentary check of what the constitutional courts present to it by way of constitutional traditions. That is an extremely delicate task as the Court partly treads on the national turf, even though it appears to be ascertaining the meaning of EU law. As a result, vetting a piece of national constitutional legislation must be carried out with great caution and a sense of appropriateness, all being hallmarks of the comity of equal courts, where each court knows its limits and recognises “*the other*”. The case law of the CJ is still in its infancy, and it would be interesting to see

how it evolves and builds on the basis of the *Sayn-Wittgenstein* precedent.³⁰ One might tentatively argue that the Court is in the process of carving out room for its minimal correcting intervention, should any doubts arise as to a true categorisation of a constitutional rule/principle as the expression of the constitutional identity. There are two strands of case law that seem to be taking shape now. And so, on the one hand, in *Michaniki*, the Court found an incompatibility between the Greek national law and EU law, despite the fact that the national law was of the constitutional status. In *Sayn-Wittgenstein*, on the other hand, the Court accepted, at face value, the argument that the invoked constitutional principle was a valid and proportionate counter-argument to EU law norms, and, as a result, had a good claim to prevail over the latter. Thus, it seems that it is the power of an argument and of particular significance of the constitutional norm for the overall scheme of the constitutional system that will be of primordial importance, and not the mere constitutional rank of the norm. Not all constitutional norms enjoy an argumentative force within the meaning of *Sayn-Wittgenstein* and make up the identity of the constitution, but only those that are argued properly, established in the case law of constitutional courts and put before the Court.³¹ Constitutional identities should be about constitutional essentials, and not constitutional peculiarities. The EU factors in national expressions as important values but refuses to assign these expressions with the status of constitutional trump cards. A constitutional disagreement is not ruled out altogether, but is made less likely and its internal dynamics are changed.³² Shared constitutional space is inclusive and is inhabited by various actors with competing (and often

³⁰ For possible “routes” and directions, see interesting reflections by M. Safjan, ‘Between Mangold and Omega: Fundamental Rights Versus Constitutional Identity’ (2012) 3 *Il’Diritto dell’Unione Europea* 437.

³¹ See in detail: L.F.M. Besselink, ‘National and Constitutional Identity Before and After Lisbon’ (2010) 6(3) *Utrecht Law Review*; as well as L.F.M. Besselink, ‘Respecting Constitutional Identity in the European Union: An Essay on ECJ (Second Chamber), Case C 208/09, 22 December 2010, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*’ (2012) 49 *Common Market Law Review* 671.

³² G. Davies, ‘Constitutional Disagreement In Europe and the Search for Pluralism’ Eric Stein Working Paper 1/2010.

clashing) pretensions. EU law is not qualified by the constitutional identity but rather the process becomes more diversified and proceduralised.

Constitutions must assert their voice and join the debate, and constitutional scholarship must enter and navigate the uncharted waters of translation from one vocabulary into the other with Article 4(2) TEU serving as an important signpost. As a result, one gets a vigilant constitutionalism and a strategic dialogue in their purest form, both centred around a discursive model of law and a dispute regarding the law's meaning. This case law shows that a new equilibrium among the constitutional courts of Europe is marked by an overlap, interconnectedness, inclusion and tolerance as opposed to a once-dominant and unproblematic logic of hierarchy, autonomy and separateness. It remains to be seen how the Court of Justice will construe the proportionality test in future cases, for those will ultimately determine the scope of constitutional discretion left to the national constitutional courts.³³

V. The Polish Constitutional Court and the comity. A dream, forlorn hope or ... reality?

The pertinent question then arises as to why and how this should all matter to the Polish Constitutional Court (also referred to as: the Constitutional Tribunal of the Republic of Poland).³⁴

³³ What is crucial is the search for an accommodation in a shared constitutional space, exchange, tolerance and acceptance of the other. It seems that, while the expression of the constitutional identity and the question of substance (what properties can be ascribed to national identity in order for the state's expression to be recognised as such identity) should be a matter for Member States (here Member States are understood not only as constitutional courts but also legislative organs), the final legal categorisation of the constitutional identity *within*, and its consequences *for*, the legal order of the EU, should be left to the Court of Justice as the ultimate interpreter of EU law. For more on the division of work in the reconstructing of the constitutional identity, see: G. van der Schyff, 'The Constitutional Relationship Between the European Union and Its Member States: The Role of National Identity in Article 4(2) TEU' (2013) 37 *European Law Review* 563, in particular pp. 572-577.

³⁴ For an in-depth presentation of the argument, see T.T. Koncewicz 'Trybunał Konstytucyjny wobec prawa europejskiego' (part I) – (2012) 2 *Przegląd Sejmowy*, available at <<http://orka.sejm.gov.pl/przegląd.nsf/0/E4C185D6BFB8423BC1257A0C00395202/%24File/ps109.pdf>>, and part II – (2012) 3 *Przegląd Sejmowy*, available at <<http://orka.sejm.gov.pl/przegląd.nsf/0/39E3A68D109C139EC1257A3F00477C06/%24File/ps110.pdf>>.

Every constitutional court has always been, and will be, a political actor with ambitions, self-understanding and preferences.³⁵ However, it is crucial to understand that today a constitutional power play and struggle are also taking place on the European stage. It is of fundamental importance for constitutional courts to shift discourse from grand strategies and constitutional rhetoric to actual application. The real world of EU constitutionalism is defined by the latter. Constitutional dialogue in the era of post-national law must put a premium not on *what* the courts say, but on what *they do*, *how* they play and argue out their differences. For our analysis to be meaningful, the consideration of both of these worlds is essential, since EU law is more about action than words. Law never functions on its own but through the actors' actions.³⁶ The Court marked its arrival on the European stage with a few strong judgments in which it laid out its views on EU law, its place within the Polish legal system and the relationship between Polish and EU law.³⁷ Its case law thus far stands for a classic manifesto of defensive constitutionalism marked by an inward-looking approach and disengagement. Only occasionally is it interspersed with conciliatory gestures which are relegated to mere decorum at crunch time when the Court's role as the guardian of the Polish Constitution and the "inalienable national core" (the term introduced *obiter*

³⁵ The constituent power of the courts raises fascinating questions of the relationship between the courts and the political institutions. See Editorial, (2010) 6 European Constitutional Law Review 174, and an analysis from the institutional perspective, J. Komárek, 'Institutional Dimension of Constitutional Pluralism' Eric Stein Working Paper 3/2010.

³⁶ A. Kozak, 'Niedoceniona wspólnota – prawnicy a integracja europejska' in J. Kaczor (ed), *Teoria prawa europejskiego* (Wrocław 2005).

³⁷ For a general and worthwhile overview, see: B. Banaszkiwicz, 'Prawo polskie a prawo Unii Europejskiej w orzecznictwie Trybunału Konstytucyjnego' (2005) 12 Europejski Przegląd Sądowy 49, and a more recent monograph by K. Wójtowicz, *Sądy konstytucyjne wobec prawa Unii Europejskiej* (Warszawa 2012). A useful recapitulation of the case law is provided by the Office of the Polish Constitutional Tribunal in its *Summaries of Selected Judgments of the Polish Constitutional Tribunal Concerning EU Law* (Trybunał Konstytucyjny, Warszawa 2006), as well as in the annual information on the case law published by the said Office (see: *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2006 r.*, (Trybunał Konstytucyjny, Warszawa 2007), pp. 48-51; *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2009 r.*, (Trybunał Konstytucyjny, Warszawa 2010), pp. 80-81. The information is also available at <www.trybunal.gov.pl>

dicta in the “Lisbon judgment”) are at stake. For most part, European law is seen as a source of constitutional disempowerment.³⁸ Hence, the primacy of EU law, in the Court’s view, applies only to sub-constitutional law, and not to the Constitution – the supreme law of the land both in the sphere of application (the Court speaks of “precedence of application”) and the hierarchy of law (the Court speaks of “precedence of binding force”). Supranationalism is a concept alien to the Polish Constitution and finds no basis therein. As a result, any such attempt to categorise the institutions of the EU is rejected flatly. Upon accession, EU Member States remain sovereign entities.³⁹ The Polish Constitution does not authorise delegation of competences to the EU to such an extent as to render the Republic of Poland unable to function as a sovereign and democratic State. Sovereignty is the guarantor of democracy, and the Polish Constitutional Court sees itself as the guardian of both.⁴⁰ The primacy of European law is scoffed at and seen at most as a Court-of-Justice-invented principle lacking a Treaty basis.

Seen from this perspective, the Court is a good constitutional court when understood in the traditional parlance. However, in doing so, it turns a blind eye to the evolution which constitutional courts undergo. Most

³⁸ For publications in Polish urging the Court to radically rethink its methods and reasoning, see: T.T. Koncewicz, ‘W poszukiwaniu “europejskiej wyobraźni konstytucyjnej”’, *Rzeczpospolita* (Warszawa, 13 November 2012), available at <<http://prawo.rp.pl/artykul/951217.html>>; and more recently ‘Trybunał Konstytucyjny w Europie’, *Rzeczpospolita* (Warszawa, 10 March 2014), available at <www.prawo.rp.pl/artykul/757643,1092817-Koncewicz--Trybunał-Konstytucyjny-w-Europie.html>.

³⁹ For a critical overview of the understanding of EU law by the Polish Constitutional Court, see T.T. Koncewicz, ‘Trybunał Konstytucyjny wobec prawa europejskiego ...’, *op. cit.*

⁴⁰ For a more in-depth analysis, see D. Piqani, ‘Constitutional Courts in Central and Eastern Europe and Their Attitude Towards European Integration’, 2 *European Journal of Legal Studies* available at <www.ejls.com>; W. Sadurski, ‘Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?’ The Hebrew University of Jerusalem Faculty of Law Research Paper 7/10; ‘Constitutional Courts in Transition Processes: Legitimacy and Democratization’, Sydney Law School Legal Studies Research Paper 53/2011 and ‘European Constitutional Identity?’ Sydney Law School Legal Studies Research Paper 37/2006; K. Kowalik-Banczyk, ‘Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law’ (2005) *German Law Journal* 1360; D. Leczykiewicz, ‘Case Note on the Judgment of 27 April 2005 of the Polish Constitutional Tribunal’, (2006) *Common Market Law Review* 1187.

recent rulings on the constitutional review of EU law,⁴¹ and in particular the one on the Lisbon Treaty,⁴² show that the Court is becoming more and more the constitutional “Odd Man Out”. The situation is further aggravated by a noticeable imbalance between the writings of Western authors and Polish literature on the subject. The scope and breadth of the former is almost beyond comprehension. They keep up with the demands of time, analyse constitutional changes accordingly and subject them to multidimensional reconstruction. Diversity, deference, a post-national perspective, the decline of sovereignty discourse, accommodation, the power of dialogue, a shift away from constitutional absolutism and classic supranationalism are all keywords shaping the current debate. On the other side of the spectrum lies the Polish constitutional doctrine which is marred by conceptual blindness, dominated by all-powerful arguments from constitutional uniqueness, hierarchy, and sovereignty. It lacks the tools and resolve to tackle the problems and reality as they really are. There is not even an attempt to put the Constitutional Court and its EU-related case law in the context of the European-wide debate. Polish constitutionalists choose the comfortable world of the Constitution and want to stay within it.⁴³ This is important since the Court should be able to feed off the doctrine. A pro-European interpretation is as far as we can go. Case law is analysed in an extremely dogmatic fashion with certain axioms which are non-negotiable. Constitutional theory is state-centred and sovereignty-dominated. Such academic exercise is fruitless, since it is not ready to go beyond limits, break new ground, or at least consider going beyond hollow presuppositions and confront them with alternatives, whether better or worse. Without such attempts we are condemned to passivity and the text of the Constitution interpreted from the inside, never outside.

⁴¹ Case SK 45/09 (English translation available at <<http://trybunal.gov.pl/en/news/judgments/>>). For an analysis, see T.T. Koncewicz, ‘Invalidity of EU Law Before the Polish Constitutional Tribunal: Court of Old Closure(s) or/and New Opening(s)’ in M. Bobek (ed), *Central European Judges Under the European Influence* (London 2015).

⁴² Case K 32/09 (English translation available at <<http://trybunal.gov.pl/en/news/judgments/>>).

⁴³ The word “constitutional” is like an anathema when used in conjunction with “European law”.

The uneasiness of the Court faced with claims about the primacy of EU law is best demonstrated in the telling and subtle interaction between *result* and *reasoning*.⁴⁴ To alleviate fears of its European partners, the Court plays constitutional rhetoric. There are conciliatory gestures (pro-European integration as a constitutional requirement, friendliness of Polish law-makers towards EU law, acceptance of the idea of cosmopolitan and multi-centric character of Polish law and of the common axiology of EU and Polish law). Yet, all this cannot mask the fact that the Court abandons these gestures at crunch times, and its role as the guardian of the Polish Constitution is at stake. The danger of conflict is, therefore, always there, since the Court is afraid of giving too much ground. Yet, the dominant supreme-source-of-law approach translates then into the image and self-conception of the Court: inflexibility and (a clear-cut, once-and-for-all definition of relationships between the courts. This approach precludes an argumentative approach to the normative conflict as the interpreter is left with no choice but to give effect to the higher-ranking norm. The constitutional landscape is dominated by the domestic point of reference always provided by the text of the Constitution which, when all is said and done, reigns supreme, notwithstanding all the nice words and gestures.

While every constitutional court in EU Member States has a crucial message to convey for European constitutionalism, the Polish Constitutional Court is not at present able to convey this message, since only a constitutional court which can play at “European constitutionalism”, while at the same time managing its own constitutional ego and ambitions, will be a “good court”. The Court’s imperative is to take part in this process offensively and proactively, instead of shielding behind the Constitution. It is evident on the basis of its EU-related case law that the Polish Constitutional Court is actively seeking to retain its influence and relevance as a meaningful actor in European affairs. To do so, however, it must speak and not remain silent, argue and break new ground, not just protect its home turf. The Court must also understand that it has a crucial role to play in supervising the integration together and in collaboration with

⁴⁴ For an in-depth and crisp analysis, see W. Sadurski, “So Lange Chapter 3”: Constitutional Courts in Central Europe – Democracy – European Union’, EUI Working Paper 40/2006.

the Court of Justice. When its voice is heard, the Court will act accordingly and shape its jurisprudence so as to take into account the concerns. In the end, these concerns might be upheld (nod to diversity) or discarded (nod to uniformity) but never will they be ignored. There is no zero-sum game; every actor, be it a constitutional actor or the Court of Justice, is positioned to win in this never-ending constitutional disagreement. Every court should rest assured that its voice was heard and given due consideration, even though the end result did not go the way the constitutional court desired it would. The importance of this discourse lies elsewhere: in building trust with every participant of the constitutional exchange so that next time today's losers will come out on top and that no result is ever prejudged.

The Polish Constitutional Court must learn to defer, step back and show confidence in the developments taking place in European law. A good constitutional court should not only criticise and supervise but admit that there are better-placed venues for protecting certain interests. This has nothing to do with the judicial ego (a way of thinking typical for defensive constitutionalism) and everything to do with the common sense and reason of judges. Restraint becomes a virtue just as much as activism. The latter played a fundamental role in putting the Union Court on its fundamental rights case-law track, the former might acknowledge that the Union Court is ready to take centre stage. This process works both ways though, and the Court of Justice defers at times to the constitutional courts and acknowledges their claims and concerns. Pushing the limits of European integration against the constitution is like building castles on sand. Only working hand in hand will prove effective. Therefore, the Court of Justice must see constitutional courts as partners and interlocutors. Raising doubts from the perspective of the constitution does not have to be *passé*. Constitutional courts could teach the Court of Justice useful lessons in the protection of rights, the interpretation of proportionality or the shaping of the desirable contours of judicial review. It all boils down to framing good arguments and putting them forward. From this perspective, the Constitutional Court is becoming more and more isolated. The world is running away from it. Its European jurisprudence is marked by fear, defensiveness, an inward-looking approach and disengagement. Europe is

seen as a source of constitutional disempowerment. One can see all of this in the traditional understanding of democracy and sovereignty, the latter being the guarantee for the former, with the robust *so-lange* principle and the traditional understanding of supremacy as the building blocks. The Constitution is above the EU as a non-negotiable paradigm. EU primacy is not given a pluralistic reading, which narrows down the scope for dialogue in a spirit of pluralism. For the Court there is a Treaty basis for supremacy – it is only a case-law based assertion lacking in constitutional foundations. All in all, the Court sets itself clearly on a collision course with its Luxembourg counterpart, since it is only a matter of time until these two jurisdictions clash. The conflict itself would not be such a bad thing (since, as pointed out before, constitutional disagreement is the very heart of vigilant constitutionalism). Rather, it is the lack of a common language and a point of reference that will doom this endeavour of courts talking past each other, engaged in a monologue rather than a dialogue. The great conceptual challenge for the Polish Court would be then to build its mandate and prestige on the basis of dialogue, and craft good arguments aimed at new audiences beyond traditional domestic audiences, instead of a safe haven of hierarchy. The Court falls short of understanding that the more all national experiences are taken into consideration, the easier it is for the CJ to accomplish the task of adjudicating based on the common European values. The Court fails to recognise that at the heart of the vigilant constitutionalism lie trust and a sense of appropriateness. Broekman rightly notes that “the issue is then on the *trust of performance* [...] rather than in *questions of legality*” [emphasis in the original].⁴⁵ The Court does not understand that a nuanced constitutional power play and struggle are taking place on the European stage. The Court’s imperative should be to take part in this process actively, instead of shielding behind the Constitution. Its case law shows that the Court is actively seeking to retain its influence and relevance as a meaningful actor in European affairs. The problem is that in the process it misconstrues the tools it chooses. The Court must speak

⁴⁵ The remark was with regard to the CJ, but it goes equally for every actor. See, M. Broekman *A Philosophy of European Union Law. Positions in Legal Space and the Construction of a Juridical World* (Leuven 1999) 266.

and not remain silent,⁴⁶ argue and break new ground, not just protect its home turf. When its voice is heard, the CJ will act accordingly and shape its jurisprudence so as to take into account these concerns. In the end, they might be upheld (nod to diversity) or discarded (nod to uniformity) but never will they be ignored. There is no zero-sum game: every actor, be it a constitutional actor or the CJ, is positioned to win in this never-ending constitutional disagreement. In this way, “vigilant constitutionalism” for the Court would be about reconstructing circles of coherence, building understanding and finding common ground among reasonable and acceptable divergences within the coordinate judicial web. All actors agree and acknowledge their differences and their influence on the interpretation of shared commitments, and accord such possibility to others. As a result, vigilant constitutionalism extends beyond national territory by way of jurisprudence of mutual respect, peer review and supervision, without pretence to bringing into existence a new overarching entity.

Comity and vigilant constitutionalism as envisaged here give a chance to take the Polish Constitutional Court out of its constitutional comfort zone. This calls on the Court to do without simplistic, antagonistic and hierarchical concepts along the lines of “primacy – subordination”, and opens up possibilities for a more nuanced and less black-and-white vision of the integration process. The Constitutional Court must understand its function through complementarity and non-exclusiveness. Each level of legal protection (national, European or conventional) aims to compensate for the deficiencies of the other, and not replace it with its own mechanism. It is disturbing that the Court presently has nothing to offer to the legal community. It satisfies itself by cross-referencing other constitutional courts without entering into any meaningful dialogue. One is caught thinking whether these references are mere decorum. In proceeding this way, the Court misses the most important point about

⁴⁶ I would stress here though that dialogue is understood here not as saying something for the sake of saying. My point is that the Court should let its voice be heard when it really has something important to say. A constructive dialogue can proceed not only by words. Sometimes one can be silent and yet convey one’s message. I am grateful to Professor J.H.H. Weiler for highlighting this aspect during the EUJ-and NYU seminar entitled ‘Changing Landscape of Polish Public Law’, on 28-29 October 2013.

comparative constitutionalism, to which it seemingly aspires: comparative constitutionalism is not about mere citations to others. It is about readiness to change, absorb, and acknowledge that other courts have something important to say. It involves a constructive critique and comparative reasoning. Mutual influence of others implies not only automatic reception, but also rejection. The said Court is not ready to criticise, object, reformulate, and then to present its own vision of European integration, the place and role of the state, the importance of citizens or the reconceptualisation of national constitutions. The decisions of others should be used as an inspiration to contribute to the ongoing constitutional debate, even take it to the next discursive level, and should not be a source of simple repetitions and borrowings. Unfortunately, the case law of the Court is devoid of any inventiveness. The Court not only devalues its own standing but makes a mockery of comparative reasoning and “dialogue”. As a result, its current EU-related jurisprudence is conveniently relegated to footnotes, while others steal the centre stage for at least trying to be more than just witnesses to “what Karlsruhe said”.⁴⁷

The future of European constitutionalism is a future in which constructive and strategic negotiation and bargaining over constitutional disagreements will be an integral part. It does not augur well for any court if its jurisprudence is commented in the footnotes as repetitive, old-fashioned or unable to provide an impetus to reinvent itself. This is the case of the said Court, whose recent EU-related jurisprudence was noted only for the fact that a member of the Polish Parliament stormed out of the courtroom. Automatic “constitutional borrowing” is the norm. The Court poses as the younger brother of its German counterpart, mimicking what others said and lacking any fraction of inventiveness and courage to speak in its own voice. With regard to the three lines of potential conflict described in

⁴⁷ M. Wendel, ‘Lisbon Before the Courts’ (2011) 7 *European Constitutional Law Review* 108. His comparative analysis is instructive to show how the Polish Constitutional Court loses touch with the world and is relegated to the footnotes. The only point of note in the Lisbon ruling was the procedural treatment of the absence of one of the petitioners, who was said to have “stormed out of the auditorium” during the hearing (footnote 70; available at: < <http://www.idee.ceu.es/Portals/0/Publicaciones/Lisbon-before-the-Courts.pdf>>). Unfortunately, in all other aspects it “was all Karlsruhe”. Compare this with the constructive contribution made by the Czech Constitutional Court in its “Lisbon rulings”.

the introduction, I have suggested the following. Firstly, there is no more space for national courts to insist on jurisdiction with regard to subjecting EU law to fundamental rights review. The level of protection of rights at the EU level is equivalent to that granted to them at the domestic level. Secondly, there are grounds to believe that the Constitutional Treaty is likely to provide sufficient protection against EU acts that are *ultra vires*. If future practice turns out to support that assessment, national courts should refrain from asserting a subsidiary role in policing the jurisdictional boundaries between the EU and its Member States. Thirdly, with the democratic deficit remaining – perhaps inevitably – intact, national courts may have legitimate reasons to set aside EU law when it collides with *specific* national constitutional rules that form an essential part of a Member State's constitutional identity. The constitutional legislator (but not national courts as interpreters of abstract principles) should in the present state of European constitutionalism continue to be able to override EU law.

Unfortunately, all this remains for the time being in the sphere of constitutional conjectures. The Polish Constitutional Court shies away from constitutional debate and places itself on the side of constitutional absolutists. The Court is alien to the idea that the post-national law sees constitutional courts as true ambassadors of their legal orders. It is for those courts to preserve their integrity but also, and in addition, to develop it with due regard to the outside world which is becoming more and more internalised. It is as much a challenge of changing minds as it is of adapting laws. The mind is becoming more and more externally-oriented, calling into question the long-standing habit of looking inward for legitimacy. Today legitimacy for judicial power comes not only from within systems but is also a consequence of systems interacting, learning and changing. Judges usually see their legal order above all the others and consider themselves at the centre of the legal universe. They are solely to protect their own legal systems from outside encroachments. EU law questions this state of affairs rather dramatically and demands that account be taken of perspectives different from one's own. Comparative constitutionalism as the hallmark of the vigilant building of a European constitution goes beyond simple references to others. To join, however, means to give up the passive spectatorship, and voice one's concerns critically and constructively as an actor

so as to allow for true migration of constitutional ideas.⁴⁸ A constitutional court that is vigilantly-oriented is not satisfied with simple borrowing from others, but feels compelled to build on these outside influences and learn from them. It is a true sign of constitutional tolerance to be ready for both: holding a difficult dialogue and stepping back when necessary. The landscape is characterised by the diversity of legal sources, various sites of new governance as a by-product of Europeanisation, privatisation and bureaucratisation, the plurality of the sites of legal expression and the *prima facie* equality of authority claims; the relationship between legal orders is already more horizontal than vertical, heterarchical than hierarchical.⁴⁹

The challenge facing the Polish Constitutional Court going forward would be to find the right balance between the domestic perspective of constitutional distinctiveness and the European perspective (and to make bridges between the two). The Court should be ready to recognise its political function and build on its “*political jurisprudence*” to find compromise solutions that go beyond simply declaring one party to be the winner.⁵⁰ By way of (hopefully tentative!) conclusion then: “*Polish constitutional chain novel to be continued*”...

⁴⁸ In this vein, see T.T. Koncewicz, ‘The Polish Constitutional Court and European Law. Actor or Spectator?’, available at <<http://britishlawcentre.co.uk/wp-content/uploads/2014/04/WARSAW-POLISH-Constitutional-Court-in-Europe-PLAYER-or-Spectator-Koncewicz.pdf>>.

⁴⁹ D. Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance’ University of Michigan Law School Public Law and Legal Theory Working Paper 229/2011.

⁵⁰ I argue here that the concept of ‘political jurisprudence’ as elaborated by M. Shapiro could help the Polish Constitutional Court better understand, and come to terms, with its role as a political player which both shapes the contours of European constitutionalism and keeps it under constitutional check. Of special explanatory relevance here would be M. Shapiro’s understanding of courts as institutions engaged in a process of incremental policy change that is in his own words: “lines of precedent that do not reflect fluctuations around a locus of principle, but as the record of series of marginal adjustments designed to meet changing circumstances” [emphasis added]. This is exactly what we should expect of the Polish Court moving forward. See M. Shapiro, ‘Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?’ (1965) 2 *Law in Transition Quarterly* 134, 142; and his ground-breaking *Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York 1964).

VI. Roadmap: constitutional identity – dialogue – imagination

What is the next step(s) then on this constitutional road? There is not one easy answer to this question.

In the past, the argument from the constitution was seen as a danger to the very foundations of EU law. This fear of heteronomy was at the centre of the *Simmenthal-Internationale Handellsgesellschaft* case law. Today's European constitutional disagreement is no longer about the recognition of national constitutional elements but, first and foremost, also about giving constitutional mandate to them. The result is never set in advance but is always subject to negotiation, and each court must always be ready to step back.⁵¹ The EU recognises the relevance of the constitutional law of its Member States. National constitutional claims are elevated to valid constitutional claims in the realm of EU law. National law does not simply operate next to EU law but within it. The comity of circumspect courts calls on constitutional courts to open up and absorb a novel kind of reformative interpretation of a legal system, in response to changing social conceptions of justice, and a new set of judicial virtues.

What is desperately needed for discourse on European constitutionalism to move forward is not only a predictable and formally correct analysis but also a legal interpretation that imbues European dialogue with constitutional imagination. Such an interpretation should be about constitutional imagination understood as a “bundle of impression and images, which can be found, not merely in statutes and cases, but in a myriad texts and treatises”.⁵² Constitutional imagination in the comity is not about good adjudication *here and now*, but demands from constitutional courts the art of anticipation, reconciliation of divergent interests and a true constitutional synthesis *in the days to come*. Only such constitutional reconstruction can respond to the exigencies of today's world. It is in this sense that EU and domestic law, interconnected now more than ever, must set themselves on the road towards a new version of “*Van Gend en Loos 2*”, this

⁵¹ G. Martinico, ‘A Matter of Coherence in a Multilevel Legal System: Are the “Lions” Still “Under the Throne”?’’, Jean Monnet Working Paper 16/08.

⁵² The term borrowed from I. Ward, ‘A Charmed Spectacle: England and Its Constitutional Imagination’, (2000) 2-3 *Liverpool Law Review* Volume 235.

time bringing together vigilant constitutional courts. At the very least this constitutional journey should continue with one crucial caveat in mind: tolerance for “*the other*” and “*otherness*” coupled with a constant catering for the other’s constitutional relevance. At its very core, European constitutionalism accepts that not all values are shared and such disagreement forms its part and parcel. The conflict seen from a hierarchical perspective is unsolvable. The comity recognises thus that EU law is different from national laws. It recalibrates the constitutional conflict and frames it in discursive terms. Each system must learn from the other, change, and compete. It cannot hide behind a simplistic argument, dictated by hierarchy, but, rather, it must engage in a meaningful dialogue that accepts otherness and is ready to retreat. Constitutional pluralism becomes a framework for a reconciliation of the contradictory claims and pretensions of the Court of Justice, on the one hand, and a platform for vindicating the constitutional courts of EU Member States, on the other. In this way, it caters to the pride and relevance of each actor.⁵³

Discursive constitutionalism has two faces – external and internal. They form two sides of the same coin but should nonetheless be distinguished for the sake of clarity. The former includes the dialogue and constitutional disagreement at the EU level. Of equal importance is the latter aspect. The capacity of national courts to affect the uniform enforcement of EU law is limited. A national court may disagree with the way the CJ has interpreted an abstract right or principle, but it cannot impose its own interpretation in the name of national constitutional law. The decision of the court should be merely declaratory. Its effect would be to signal to the political branches

⁵³ That does not mean that hierarchical models and reasoning are matters of the past. The evolving European Constitution is a collective, dynamic and pluralistic enterprise. It calls for never-ending feedback from, and communication with, national courts and their traditions. The EU is a new legal order, and yet, at the same time, it is not self-sufficient. Instead, it depends on national traditions from which it has grown, and on whose basis it strives to build. It is not in opposition to national systems, but rather at an intersection of those systems that the EU has a chance to prosper. Without a contribution from national traditions, the EU would be cut off from its very source of inspiration and guidance. The national enrichment of the EU must not stop. Therefore, it remains imperative that national legal systems and traditions speak up and spread their message. It is incumbent on the respective constitutional courts to be a mouth-piece for those national systems and a catalyst for change and adaptation at the EU level.

that a constitutional value is negatively affected. The burden would be then on those branches (if they agree with the national court) to amend the constitution to support that interpretation, against the CJ, and only after that successful amendment would the national interpretation override that of the CJ. There would thus be an internal dialogue in the Member State, triggered by the domestic court's decision, about the extent to which there is truly an aspect of national identity at stake that requires the introduction of a constitutional exception to the application of EU law (as interpreted by the CJ). The effective and uniform enforcement of EU law is at stake in these situations, but we should not exaggerate this concern. Apart from the fact that these situations are exceptional, we should bear in mind that the uniform and effective application of EU law is not the only principle to be taken into account. Trade-offs between the ideal of effectively establishing a supranational rule of law and the principles of democratic governance may be necessary.⁵⁴ Any potential loss along the dimension of effective and uniform enforcement of EU law is likely to be insignificant when seen in the context of European constitutional practice as a whole. The EU Treaties contain a whole range of opt-out clauses that allow national actors, under narrowly circumscribed substantive and/or procedural conditions, to deviate from EU law. As a matter of EU law, the uniform application of the same standard is not paramount and is easily overridden in many core areas of the Common Market. Every court should rest assured that its voice was heard and given due consideration, even though the end result did not go the way the constitutional court desired it would. The importance of this discourse would lie elsewhere: in building trust and confidence with every participant of the constitutional exchange so that next time today's losers will come out on top and that no result is ever prejudged.

At the heart of the novel concepts of constitutionalism and comity lie trust and a sense of appropriateness. It is worth recalling *in extenso* one of very few philosophical interpretations of the rivalry between

⁵⁴ A powerful argument in favour of the constitutional voice at the level of Member States was presented by A. Albi, 'From the Banana Saga to a Sugar Saga and Beyond: Could the Post-Communist Constitutional Courts Teach the EU a Lesson in the Rule of Law', (2010) 47 *Common Market Law Review* 791.

the constitutional courts, on the one hand, and the Court of Justice, on the other. M. Broekman precipitously writes that:

the main issue is the question whether the ECJ or the highest courts of the Member States have final determination. The political issue is whether the Union depends on Nation State legal systems or is a legal entity in its own right. Concerns about the quality of performance of the ECJ if that Court were the decisive instance for the Member States are at the background. The issue is then on the *trust of performance* of the ECJ rather than in *questions of legality*.⁵⁵ [emphasis in the original]

What becomes the thorny issue is, indeed, the trust in performance of the CJ rather than simple questions of legality. European Constitutionalism and the comity, as conceived in my analysis, are about a nuanced constitutional power play. Each court's imperative should be to take part in this process actively, instead of shielding behind its constitution. All national constitutional experiences are necessary to shape common values shared throughout Europe. It is only through careful examination of all the historical experiences of the European countries that a common heritage can emerge. These considerations are important because the defensively-minded Polish Constitutional Court does not seem to appreciate at present that the more all national experiences are taken into consideration, the easier it would be for the CJ to accomplish the task of adjudicating based on the common European values; whereas the more national experiences are missing in this process, the more the Court runs the risk of imposing a specific cultural tradition on the whole of European society as if it were part of the common constitutional background. How could the Court of Justice determine issues of common human rights without taking into account the traditions of all Member States? If one or more experiences are missing, the Court's work is more difficult and potentially misleading. For these reasons, much as the CJ may not allow

⁵⁵ M. Broekman, *A Philosophy of European Union Law. Positions in Legal Space and the Construction of a Juridical World* (Leuven 1999) 266.

the constitutional conversation to die down, for this to happen, it needs critical and active partners – constitutional courts.

This brings me to the final part of my argument. The constitutional court aspiring to be “good” in the 21st century should not only criticise and supervise but also admit that there are better-placed fora for protecting certain interests. This has nothing to do with the judicial ego (way of thinking typical for defensive constitutionalism) and everything to do with the common sense and reason of judges operating within the novel judicial comity. A great conceptual challenge for European constitutional courts lies exactly here: in building their mandate and prestige on the basis of dialogue and in crafting good arguments aimed at new audiences beyond traditional domestic audiences, instead of a safe hierarchy. A hierarchy is good from an internal perspective but legal systems have long outgrown it. The “hierarchy talk” is highly divisive from the external perspective of pluralistic systems which look for ways to coexist and cooperate, and not simply cancel each other out. Each system stakes its own claim to constitutional distinctiveness and restraint becomes a virtue just as much as activism. This works both ways though, and the Court of Justice defers at times to the constitutional courts and acknowledges their valid claims and concerns. Pushing the limits of European integration against the constitution would be like building castles on sand. Only working hand in hand will prove effective. Therefore, the Union Court must see constitutional courts as partners and interlocutors. Raising doubts from the perspective of the constitution does not have to be *passé*. Constitutional courts could teach the Court of Justice useful lessons in the protection of rights, the interpretation of proportionality or the shaping of the desirable contours of judicial review. It all boils down to framing good arguments and putting them forward. The conflict itself would not be such a bad thing. Rather, it is the lack of a common language and a point of reference that will doom our ambitious endeavour. Instead of a constructive dialogue, we would have courts talking past each other, engaged in a monologue.

A constitutional court engaged in a dialogue aimed at diffusing conflicts-to-be, rather than solving them, can be said to be a good constitutional court in the world marked by interdependence, learning, and respect for “otherness”. Such a court understands that defensive constitutionalism

and a strict state-centred approach are all matters of the past. A good constitutional court must understand that being faithful to its own constitution is no longer a decisive factor in the overall assessment of its mandate and performance. European constitutionalism is not an enemy of national constitutionalism, but it is rather its constructive and critical interlocutor, and *vice versa*, and the disagreement takes place within an unprecedented judicial comity. It would be the ultimate sign of constitutional tolerance to be ready for both: holding a difficult dialogue and stepping back when necessary. The parameters of this “dialogic game” must be set down clearly and all actors must know in advance how far they can take their respective jurisprudence and systemic claims, without breaking down the fragile equilibrium of European constitutional space in *statu nascendi*. By constitutional threats and promises that make up constitutional politics, each actor of the comity disciplines the European project and takes it further, since it elaborates on respective foundational documents as a credible barrier for others. As a result, there will be a legitimate expectation that the lines thus drawn will be noticed and respected by all parties involved. This process constitutes a sort of two-way traffic, since the lines and barriers accepted by others are always the result of bargaining between equals, and never the result of high-handed defensive constitutionalism in which, for example, a constitutional court speaks to the world, but never listens to what kind of message the world might have for the constitutional court.

European constitutionalism in the 21st century sees constitutional courts as true ambassadors of their respective legal orders, and as institutions involved – to a greater extent than has ever been the case – in “mega-politics”, understood as core political controversies that define (and often divide) whole polities.⁵⁶ Such recalibration is as much a challenge of changing minds as it is of adapting laws. It is here that constitutional identity as a Treaty concept poses a formidable challenge for the constitutional and

⁵⁶ The term ‘mega-politics’ is taken from: R. Hirschl, ‘The Judicialization of Politics’ in K. E. Whittington, R.D. Keleman and G.A. Caldeira (eds), *The Oxford Handbook of Law and Politics* (London 2008) 123. He points out that the judicialisation of “mega-politics” includes the very definition – or *raison d’être* – of the polity as such and notes the growing reliance on courts for contemplating, for example, the definition of the polity as such *vis-à-vis* European supranational polity (p. 128). I would argue that the reconstruction of national identity falls squarely into this category.

supranational courts of the EU. To tackle this challenge head-on, these courts desperately need a legal interpretation that imbues European dialogue with constitutional imagination. New keywords should be the following: *adaptation*, instead of subjugation; *learning*, rather than imposing; and *incorporation*, in lieu of “one-way traffic”. All this becomes imperative with the advent of a kind of constitutional litigation that is centred not so much around fundamental rights but rather around constitutional features of domestic legal systems.⁵⁷ Constitutional imagination is not about solving cases “*here and now*”, but about anticipating the next step, building strategies for the future and accommodating itself within the broader community *in the days to come*. Constitutional imagination is never decided by a single decision but rather is built over time. Only such constitutional reconstruction can respond to the exigencies of today’s world and ensure that the translation of constitutional identity from a national register into EU vocabulary will be an enriching process for both. Taking its cue from the opening quotation from Kapuściński’s novel, the emerging comity of courts must work on the assumption that courts learn from each other’s decisions, and not only see others (as was the case in the past) as sources of inspiration. The perspective of “the Other” should help us contribute to the ongoing constitutional debate, learn from it and, last but not least, change one’s ways and methods of thinking. Only then will we have a chance of truly, and not merely mythically, embracing “*the Other*”, adjusting as this constitutional journey goes on, and – as Thor Heyerdahl, the true champion of *The Other*, wisely advised us – of grasping the strings ourselves, rather than waiting idly for someone else to grasp them for us!

⁵⁷ G. van der Schyff, ‘The Constitutional Relationship ...’, *op. cit.*

FÉDÉRALISME, IDENTITÉ COMMUNAUTAIRE ET JUSTICE DISTRIBUTIVE. QUELQUES REMARQUES SUR LES PROBLÈMES CHOISIS

L'atelier 17 porte sur la question de savoir comment les communautés de différents types réalisent l'objectif de la solidarité sociale et de la justice distributive. Cette problématique est liée avec l'idée de solidarité dans la philosophie juridique et politique, l'idée qui, en commençant par la thèse que le devoir de la solidarité est naturel pour un homme (Samuel Puffendorf), jette un pont vers la solidarité des communautés sociales aussi bien spontanées qu'organisées d'après les formes légales, devient de plus en plus présente en droit positif, y compris constitutionnel, et dans la jurisprudence. Et sur ce fond on a posé la question sur le rôle du droit constitutionnel.

1. Le droit constitutionnel peut y jouer le rôle essentiel (sous réserves dont on parle plus loin): d'une part, comme la base légale de ces communautés et les relations entre elles et d'autre part, aussi comme inspiration pour des différentes formes de la réalisation de l'esprit de solidarité ainsi que la création de ses garanties sur tous les plans d'organisation de la société. Presque dans toutes les constitutions démocratiques on peut trouver des principes montrant la solidarité et la justice parce que ces deux notions sont fortement liées entre elles. La solidarité sociale a pour but d'accomplir la justice et dans les sociétés contemporaines – surtout de la justice sociale comprise non seulement comme « justice qui donne à chacun la part équitable qui lui revient » mais aussi assurant les conditions respectables (dignes) de l'existence.

¹ Professeur, La Faculté de Droit et d'Administration de l'Université Łazarski; prof. em. de l'Institut d'Etudes Juridiques de l'Académie Polonaise des Sciences, Varsovie, docteur honoris causa de l'Institut Juridique de Saint - Petersburg.

Quand à l'époque du début de la transformation démocratique en Pologne on a introduit, en 1989, à l'ancienne Constitution de période communiste, un nouveau principe de l'Etat de droit² c'est avec sa partie inséparable de définition qui est devenu la justice sociale : « La République de Pologne est un Etat démocratique de droit mettant en œuvre les principes de la justice sociale ». Et le même principe a formé le fondement de la nouvelle Constitution de 1997.

L'objectif de la solidarité et de la justice est exprimé par des Constitutions de différents moyens. Dans la Constitution polonaise il y a recours au principe suivant: « La République est le bien commun de tous les citoyens » et plus loin « L'économie sociale de marché fondée sur la liberté de l'activité économique, sur la propriété privé et la solidarité, le dialogue et la coopération entre les partenaires sociaux, constitue le fondement du système économique de la République de la Pologne » etc.

La Constitution française se réfère au principe universel largement connu: *Déclaration de droit de l'homme et des citoyens* du 27 octobre 1789: « Les hommes naissent et demeurent libres et égaux en droit. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune » ainsi qu'à *Préambule* de la Constitution du 27 octobre 1946 qui déclare: « La Nation proclame la solidarité et l'égalité de tous les Français devant les charges qui résultent des calamités nationales » et elle introduit tout le catalogue des droits sociaux sur lesquels basent la solidarité sociale et la justice distributive. Ce qui en suit, la Constitution de 1958 dans art. 1 définit l'Etat en tant que social (« La France est une République indivisible, laïque, démocratique et sociale ») et en plus elle présente le quintessence de ses valeurs en forme de la devise: « Liberté, Egalité, Fraternité ».

La Loi fondamentale de la République Fédérale Allemande indique que la RFA est « ...*ein demokratischer und sozialer Bundesstaat* » (une République démocratique et sociale) où « la dignité est inviolable » et « l'ordre

² L'interprétation de ce principe a permis au Tribunal Constitutionnel polonais d'approuver que les éléments (principes) de l'Etat de droit se trouvent dans la Constitution et les considérant comme les normes constitutionnelles en vigueur, Tribunal en vertu de la clause de l'Etat de droit a jugé dans le cas d'inconstitutionnalité des lois, bien que la Constitution elle-même n'ait pas compris *expressis verbis* de ces normes, (voir : M. Kruk, *Progres et limites de l'Etat de droit, la Pologne*, Pouvoirs 118-2006)

constitutionnel dans chaque *Land* doit correspondre aux principes de l'Etat de droit républicain, démocratique et social ».

Dans les premières paroles de la *Préambule* la Constitution de l'Espagne déclare: « La Nation espagnole en se dirigeant par le désir de statuer la justice, la liberté et la sécurité ainsi que la multiplication des biens de ceux qui le constituent (...) annonce sa volonté (...) de vie commune conformément au juste ordre économique et social » et dans l'art.1 confirme que « l'Espagne se constitue sous la forme de l'Etat de droit social et démocratique qui protège comme les valeurs suprêmes de son ordre légal la liberté, la justice, l'égalité et la pluralité politique ».

De cette manière on peut citer des Constitutions suivantes parce que dans chacune on trouve plus ou moins directes références à la solidarité et la justice. Et dans certaines Constitutions actuelles, comme exemple citons la Constitution actuelle polonaise où le rôle particulier dans ce cadre jouent aussi les droits de l'Homme. Ils sont traités comme une catégorie particulière de droit qui se distinguent des droits du citoyen traités comme ceux qui sont propres à l'individu en sa relation avec l'Etat pendant que les droits de l'Homme servent à l'individu à seul titre d'être Homme. Le catalogue des droits de l'Homme contient l'ensemble de droits et libertés dont la partie importante est formée aussi par des droits sociaux basés sur le principe de la justice distributive. Le signe caractéristique de cette approche est devenu l'accès de ce principe dans la Déclaration de Conférence du Droit de l'Homme (Vienne 1993), celui où la pauvreté est traitée comme manquement (infraction, offence) du droit de l'Homme.

Mais la déclaration constitutionnelle de ces principes généreux de solidarité et de justice ne peut pas cacher le réalisme politique. Il ne doit pas nous satisfaire que l'affaire est résolue de la manière positive par la seule proclamation, parce que l'essentiel, le noyau du problème est toujours l'efficacité de ces principes.

La jurisprudence qui interprète les principes constitutionnels et particulièrement la jurisprudence constitutionnelle peut donner de la signification réelle aux toutes les garanties constitutionnelles. Cette jurisprudence qui est exécutée surtout pendant le contrôle abstrait dû à sa valeur générale et pas limitée aux affaires concrètes et individuelles mais éliminant le droit opposé contre ces principes. Un bon exemple propose la jurisprudence du

Tribunal Constitutionnel polonais relatif à la relation entre l'économie sociale de marché et le principe de la solidarité qui – d'après le Tribunal – devra en effet créer le modèle économique fondant la base de l'ordre social³.

Mais une question se pose: cet ordre social respectant la solidarité et la justice peut-il être assuré suffisamment par le droit constitutionnel (même si les tribunaux gardent la Constitution)? Dans la littérature et pendant les débats politiques qui sont dernièrement fréquents en Europe on indique « les ennemis » de la solidarité et de la justice distributive qui étaient (sont?) surtout l'individualisme et le libéralisme (ou bien néolibéralisme compris surtout dans le contexte économique). Ce n'est pas une bonne place dans cette petite esquisse pour chercher les considérations philosophiques de l'antinomie de la solidarité et du libéralisme et proprement dit des effets du libéral *laisser faire* pour la solidarité sociale. La crise économique qui pendant ces dernières années a touché les Etats européens et a causé la situation plus difficile pour une grande partie de la société (stratification des couches sociales, le chômage, la pauvreté, la manque de chances), elle a incité aussi la discussion sur la justice distributive, la fonction sociale de l'Etat, des devoirs auprès des personnes plus faibles économiquement, du modèle économique surtout néolibéral. Dans le journalisme polonais on trouve récemment un texte très engagé et émotionnel de l'historien d'idée connu et du philosophe Marcin Król qui vérifie l'opinion d'il y a plusieurs années sur la prépondérance du libéralisme politique et du néolibéralisme économique après cette époque de « l'économie socialiste ». L'auteur qui au début de la transformation démocratique avait participé à l'introduction de l'économie du marché, a intitulé sa confession actuelle d'une façon très expressive: « Nous étions vraiment stupides »⁴. Il écrit donc: « Dans les années 80 l'idéologie du néolibéralisme nous a infecté et j'en ai bien mérité (...) Mais cet enthousiasme s'est éteint très vite en moi. J'ai remarqué que dans le libéralisme commençait à dominer un facteur de l'individualisme qui tour à tour repousse les autres valeurs importantes et il tue la communauté ». L'auteur constate définitivement: « la chute de la solidarité sociale est dramatique ». Le diagnostic de Marcin Król n'a pas été accepté sans

³ K 17/00, OTK du 20.01.2001.

⁴ Gazeta Wyborcza, le 8-9 .02.2014, p. 12.

critique, mais il a commencé le débat public sur la solidarité, la justice et la communauté.

Pourtant cette discussion dans le milieu polonais n'a pas été unique. Dans les textes publiés dans *Le Monde Diplomatique* entre 2006 et 2013 on a consacré beaucoup de remarques surtout dans le contexte de l'Union européenne en accusant « le marché commun (unique) » tellement avancé par l'Union pour faire pousser « le néolibéralisme européen » qui a fait tomber dans l'oubli l'Europe sociale⁵. Cette façon de voir la politique de l'Union européenne n'est pas unique et même fréquente de percevoir la politique communautaire mais elle attire l'attention à la possibilité potentielle de la parution des menaces contre la forme réelle de solidarité aussi bien dans le cadre d'un seul Etat que dans la communauté supranationale.

En conséquence, les enjeux du droit constitutionnel deviennent plus difficile parce que dans les déclarations de l'égalité, fraternité, justice et solidarité comprises dans les Constitutions (et Traités) peuvent paraître des reproches qui indiquent que la politique réelle se dirige dans le sens contraire et elle facilite la chute de ces valeurs. Et il faudrait en résulter la conclusion que le droit constitutionnel devrait agir sur deux dimensions – d'une part, formuler les principes correspondant directement aux questions dont on parle, et d'autre part, définir les traits généraux du système (juridique, politique et économique) qui créent les conditions pour le fonctionnement réel de ces principes. Il ne suffit pas de répéter dans les configurations suivantes les déclarations de la justice sociale ou de l'Etat social mais il faut introduire des standards, des procédures et des garanties de la politique sociale convenable réalisée sous le contrôle judiciaire.

2. En ce qui concerne l'harmonisation de l'identité des acteurs formant une communauté politique, le droit constitutionnel peut agir de différentes manières, en fonction du caractère de la communauté et des objectifs qu'elle réalise.

Pour ce qui est des communautés organisées selon le critère du fédéralisme ou régionalisme, ce sont des Etats (fédérations, Etats régionalisés

⁵ Le recueil de textes choisis a été publié en édition polonaise, série *Le Monde diplomatique recommande*, a voir P. Wielgosz, *Koniec Europy jaką znamy*, Instytut Wydawniczy Książka i Prasa, Warszawa 2013.

ou Etat à entités autonomiques), qui disposent d'une Constitution unique (fédérale), d'une monnaie unique – et qui ont en conséquence la possibilité de mener une politique économique contribuant à atténuer les disparités du niveau de vie. Ces Etats ont en surplus une souveraineté, et donc une « identité » étatique (qui souvent s'apparente à une identité nationale). Cela ne garantit pas l'idéale réalisation des objectifs, mais les instruments juridiques et politiques sont plus efficaces et plus faciles à mettre en œuvre. Dans beaucoup d'Etats fédéraux pourtant pas dans tous, on a pu distinguer, surtout dans l'histoire de leur étatsisme, une différence entre les parts (sujets de fédération) pauvres et riches ou bien d'une autre manière clairement distinctive par l'aspect économique, politique ou au niveau du développement etc. (la distinction symbolique « Nord – Sud » mais on pourrait aussi accepter « Est – Ouest » ou bien un autre) et même ayant des régions avec des nationalités mélangés, non homogènes. L'Etat commun s'est dirigé vers niveler ces différences par la politique centrale qui demandait la dislocation des moyens matériels ou d'autres démarches égalisant le niveau de ces territoires. Ces démarches n'ont pas demandé de la solidarité particulière « des riches » et « des pauvres » parce qu'elles avaient été exécutées grâce aux actions du pouvoir central dans le cadre de sa compétence pour mener la politique générale de l'Etat (et en même temps pour respecter les particularités d'après d'autres critères, par exemple ceux de nationalités, de religions ou de cultures).

Il en suffit que cette situation ne soit pas toujours stable et la structure fédérale malgré toutes les facilités qui en résultent ne résout pas le problème. On peut y donner l'exemple de l'Europe centrale, celui de la Tchécoslovaquie. Cet Etat est né à nouveau en 1919 en tant que l'Etat unitaire de deux nations: Tchèques et Slovaques (et avec d'autres nationalités). La Tchéquie – pays bien développé de point de vue politique et économique sous l'influence de l'Autriche et la Slovaquie – sous l'influence de la Hongrie, avec son économie des matières premières presque féodale, sans propres traditions politiques. Dans la période d'entre-deux-guerres la Première République unitaire, bien que démocratique, n'a pas satisfait les aspirations nationale de la Slovaquie parce qu'elle n'a pas reconnu sa différence nationale et son identité. Et après 1945 l'Etat socialiste ne l'a pas respecté non plus et les prétentions des Slovaques n'ont pas été accomplies

surtout dans le cadre de nationalité et d'étatisme bien que cet Etat leur ait donné une identité nationale et même une certaine autonomie. Mais sans liberté de décider de soi-même et sans compétences authentiques. Dans la période du « Printemps de Prague » en 1968 la Tchécoslovaquie s'est transformée en fédération de deux souveraines Républiques jouissantes des mêmes droits. Et en même temps un nouveau problème est apparu, d'un côté – payer un surplus à l'économie slovaque et de l'autre – cette aspiration non-accomplie de la Slovaquie vers son propre, véritable étatisme. Bien que la Constitution fédérale ait prévu toutes les garanties formelles de l'identité nationale et solidarité, en 1992 la République Tchèque et la République Slovaque se sont séparées. Cette action s'était accomplie parce que tout le système politique précédent n'a pas été démocratique, malgré toutes les « conjurations » sur la solidarité et l'identité et même la souveraineté nationale placées dans la Constitution non démocratique. Cet exemple montre une certaine perplexité du droit constitutionnel dans la situation où la signification considérable, décisive ont d'autres aspects tels que régime politique, intérêts économiques ou égoïsmes nationaux. En 2004 les deux Etats ont accédé en Union européenne et cet acte peut ouvrir tout un nouveau chapitre.

Cette histoire y citée ne signifie pas que là où le système politique est démocratique et il n'y a pas de ressentiments obstinés nationaux, les difficultés semblables doivent apparaître. Contrairement, pour un Etat fédéral il est plus facile de réaliser la politique de solidarité et de justice sociale aussi bien auprès des régions particulières qu'aux citoyens. Mais dans ce contexte, la même conclusion se répète que la proclamation des principes n'est pas suffisante, il est nécessaire d'assurer ces mécanismes qui les incorporent dans la vie.

3. En comparaison, les communautés politiques dont la structure est plus « souple », comme l'Union européenne, n'ayant pas de caractéristiques d'un Etat, non seulement disposent de moyens juridiquement et politiquement plus faibles, mais en plus doivent encore forger leur identité communautaire, souvent dans un certain conflit avec l'identité nationale et les intérêts spécifiques de leurs Etats membres, ainsi qu'avec leurs contraintes politiques internes (élections, opposition etc.). Ici, plus que

les mesures contraignantes directes, ce sont les principes fondateurs de la communauté reconnus en droit constitutionnel interne des sujets de la communauté, qui jouent un rôle prépondérant (ces principes s'appliquent d'ailleurs, également aux Etats fédéraux).

L'Union européenne – pour donner comme exemple des communautés d'Etats et nations différenciés – a été fondée après des siècles de l'idée utopique de la fédération européenne (« Etats Unis de l'Europe ») ou d'autre forme de l'union paneuropéenne⁶. Quand on a enfin réussi à réaliser cette idée, elle s'est apparue en forme de différentes communautés économiques: CECA, CEE (CE), CEEA (Euratom). Et conformément à cette forme, on a organisé leurs pouvoirs, composés principalement de représentants d'exécutifs nationaux et leur principal acte normatif a eu le caractère d'un acte du type gouvernemental – règlement. Les Constitutions nationales à l'époque « n'ont pas participé » en principe dans la réalisation de ce projet.

Et c'est la construction de l'Europe politique qui a engagé plus largement non seulement le droit constitutionnel des Etats membres mais aussi leurs citoyens (citoyenneté européenne, élection universelle et directe pour le Parlement européen, croissance de ses droits, subsidiarité) pour enfin essayer de créer « la Constitution de l'Europe ». Ratée. On a écrit beaucoup sur la Constitution européenne et les plus intéressantes paraissent ces considérations qui expliquent pourquoi cette essai n'a pas réussi. Il paraît, ne faisant pas ici d'analyses trop profondes, qu'en réponse il faut citer un élément dont on parle au sujet proposé dans l'atelier 17: les problèmes de l'identité. D'un côté, l'identité de l'Union dont « la Constitution », même si elle était essentiellement le Traité international, a attribuée le caractère de « l'entité constitutionnelle » réservé jusqu'à maintenant aux sujets souverains et dans la plupart appartenant à l'Etat; et d'autre côté, l'identité des Etats membres, leurs sens de l'identité nationale, souveraineté, indépendance et peut-être ... une pincée d'égoïsmes nationaux? La Constitution européenne pouvait menacer ces valeurs ?

⁶ Dans la littérature on indique les noms de célèbres écrivains, politiciens, poètes – auteurs de cette idée : Jiri z Podiebrand, Wiliam Penn, Leibnitz, Kant, Saint-Simon, Prudhon, Montesquieu, Wolter, Lamartine, Heine, Hugo, Coudenhove-Kalergi, Briande, Churchil, De Gasperi, Monnet, Schuman, Adenauer ... a voir L.Cartou *L'Union européenne (Traités de Paris – Rome – Maastricht)*, Dalloz, p. 3-38.

Toutefois, presque parallèlement un grand groupe de nouveaux Etats membres a accédé dans l'Union (2004) y compris la majorité décisive des Etats postsocialistes qui viennent de sortir du pouvoir autoritaire et difficilement transformant leur système juridique et économique en l'adaptant à *l'acquis communautaire*, ils ont vraiment eu besoin d'aide solidaire de toute Europe. Et surtout cette aide matérielle. Leurs citoyens ont eu aussi besoin de cette aide solidaire. Le scepticisme envers la Constitution européenne n'a pas résulté uniquement – comme on pourrait le croire – des égoïsmes nationaux peu ouverts aux partages solidaires des biens sociaux avec les partenaires plus faibles, mais des causes de nature plutôt différente (il faut négliger les suggestions que ce n'étaient que les intérêts économiques du capital qui a cherché des marchés de vente). Quoique la Constitution européenne n'ait pas créé *expressis verbis* l'Etat fédéral (on a rejeté la suggestion de lui donner le nom des *Etats Unis de l'Europe* comparé avec une certaine moquerie par Marine Le Pen à *l'Union Soviétique Européenne*⁷) elle a renforcé la structure politique de l'Union, entre autres par lui donner des attributs traditionnels et des symboles traditionnels d'Etat (Constitution, loi, ministre des affaires étrangères etc.) ce qui a été d'abord rejeté et après quelques corrections surtout dans ce domaine, accepté dans le Traité de Lisbonne.

Pour les traits les plus fortement accentués de l'organisation de l'Union qui forment ses principes fondamentaux, soulignés dans le Traité, il faut énumérer la conservation de l'identité nationale et constitutionnelle des Etats membres et en même temps la construction de sa propre identité politique basée sur les principes de liberté, démocratie, droits de l'Homme et Etat de droit, solidarité, droits et intérêt sociaux des citoyens, justice, subsidiarité, progrès économique et social, en un mot – tout le catalogue des principes et valeurs qui devraient favoriser les garanties de l'identité et de différence nationale mais aussi la solidarité entre les Etats membres et la justice entre les citoyens. Et bien sûr, la réalisation des buts de l'Union conformes à sa propre identité politique.

Ces principes, surtout la solidarité, ont été exposés deux fois dernièrement aux différentes épreuves. Premièrement, à la suite de la crise

⁷ Le Monde, 26.01.2012, l'Europe, p. XV.

économique, cette crise dans le cadre de la monnaie commune euro, et deuxièmement dans la situation de la crise ukrainienne. Dans les deux cas on a pu remarquer en cherchant des moyens de solution⁸ un croisement (pour ne pas dire – lutte) de différents comportements et intérêts: ceux des Etats membres particuliers ou leurs groupes contre l'intérêt communautaire ou l'intérêt d'autres Etats membres ou leurs groupes, les intérêts communautaires contre l'intérêt de l'un des sujets de communauté ou du sujet extérieur, les intérêts du business contre l'intérêt social, les intérêts des partis particuliers ou des gouvernements contre l'intérêt commun etc.

Le sens ou le devoir de solidarité n'est pas toujours commun à l'intérêt national, politique, économique ou financier des sujets définis. Et l'idée de justice sociale ne trouve pas toujours l'appui surtout devant la violation des intérêts de quelqu'un ou des possibilités économiques. Cette attitude différente est caractéristique au pluralisme des intérêts mais le plus souvent elle mène aux compromis qui paraissent meilleurs qu'un manque d'accord quelconque. Il faut y rappeler le cours de l'introduction des sanctions proposées par l'Union auprès de la Russie après l'annexion de la Crimée quand ces aspects politico-morales ont concouru avec de différents intérêts économiques⁹. Enfin, le compromis concernant ces sanctions n'a pas satisfait tous mais il n'y avait pas d'opposition à la question de conclusion avec l'Ukraine de l'accord préalable politique sur la future association avec l'Union¹⁰.

Le Traité de Lisbonne ainsi que les Traités antérieurs auprès l'action uniforme des Etats membres, présente aussi une solution différente, celle de coopération renforcée ou contrairement – une possibilité de restrictions de liaison de l'Etat membre avec des résolutions définies. La première solution n'a pas été encore appliquée mais beaucoup d'Etats critiquent fortement cette possibilité qu'ils traitent comme instrument de violation du principe de l'égalité et solidarité entre les membres de l'Union. La deuxième

⁸ Le texte présent est écrit en mars 2014.

⁹ Plusieurs pays membres avaient leurs propres raisons pour demander plus rigides ou, au contraire, plus souples sanctions et par exemple, Chypre dont les relations avec la Russie ont une essentielle signification pour son économie s'est réservée une éventuelle récompense des pertes par l'Union.

¹⁰ Signée le 22.03.2014.

solution présente comme exemple la restriction de la Grande Bretagne et la Pologne pour l'application une partie de la Charte des Droits Fondamentaux (en Pologne cette restriction est critiquée mais pas par toutes les options politiques).

Ces remarques peuvent-elles servir pour la conclusion à l'adresse du droit constitutionnel ? Il paraît qu'on peut répondre positivement à cette question bien que les Constitutions des Etats particuliers déclarent la politique de solidarité et de justice sociale, elles la ferment en principe dans le cadre des relations internes. Elles n'obligent pas les Etats au devoir de solidarité dans la communauté internationale. A vrai dire, il y a des Constitutions européennes qui – indépendamment de la déclaration de respecter le droit international – suite à leur appartenance à l'Union comprennent des clauses interprétées comme un sentiment particulier à la solidarité dans le cadre de l'intégration européenne. Par exemple, la Constitution de la RFA indique que « pour réaliser les principes de l'Europe unie la République Fédérale interagit au développement de l'UE », la Constitution de la Bulgarie statue que l'Etat « participe à la construction et au développement de l'UE », la Constitution de la France appelle à « l'exécution commune » des compétences définies, la Constitution de la Grèce mentionne « la coopération avec d'autres Etats », la Constitution des Pays Bas confirme que « le gouvernement soutient le développement international de l'ordre juridique », la Constitution du Portugal se rapporte entre autres à assurer réciproquement « l'espace de la liberté, de la sécurité et de la justice ». Les plus larges principes se trouvent dans la Constitution d'Irlande où l'on confirme « l'engagement en l'Union européenne dans laquelle les Etats travaillent en commun au nom de promouvoir la paix, les valeurs communes et la prospérité de leurs Nations » et dans la Constitution de la Lituanie qui exprime sa conviction que « sa dignité de membre de l'UE contribue à affirmer effectivement les droits et libertés de l'homme » et l'Union « apprécie l'identité nationale et les traditions constitutionnelles des Etats membres ».

La plupart des Constitutions des Etats membres consacrent d'attention surtout à la forme d'exprimer l'accord de transférer la partie de compétences ainsi que régler les questions organisationnelles liées à leur appartenance à l'UE. L'élargissement des principes constitutionnels par les devoirs

ou les engagements de l'Etat membre à l'Union dans le but de promouvoir et réaliser la solidarité et justice pourrait peut-être avoir la signification « didactique » à la politique présentée au sein de la Communauté. Il serait aussi une sorte de réponse des Constitutions nationales au principe TUE selon lequel « les Etats membres agissent en harmonie pour renforcer et développer la solidarité politique mutuelle » (art.13 point 2) qui peut être compris plus largement, non seulement pour la politique extérieure¹¹.

4. S'agissant de la réalisation de l'objectif de justice distributive, mais également de l'élimination des nationalismes et égoïsmes nationaux en préservant le sentiment de souveraineté, ce sont (peuvent être) les principes constitutionnels suivants :

- 1) Le principe d'égalité entre entités constituant la communauté. Le principe d'égalité est une des conditions fondamentales des relations interpersonnelles ; elle est connue et déclarée dans tous les documents constitutionnels et les déclarations internationales des droits de l'Homme. L'égalité est la condition de toute justice sociale au niveau universel. Pourtant elle paraît comme un principe méconnu dans les relations entre les sujets de différentes communautés, surtout entre les Etats membres de l'Union européenne. On rencontre les opinions disant que par égard du nombre des différences procédurales (vote par major, participation financière inégale des Etats (apport et partage), nombre inégal de représentants dans le Parlement européen etc.) on ne respecte pas le principe de l'égalité des Etats membres dans l'Union. Il est difficile de trouver ce principe exprimé *expressis verbis* dans les Traités et pourtant il paraît que ce devrait être un des principes fondamentaux.
- 2) Le principe de l'exercice commun des compétences attribuées à la communauté et donc de la définition commune des objectifs et moyens de les atteindre. Ce principe de « l'exercice commun des

¹¹ Cette situation ne devra pas empêcher le fait qu'en ratifiant le Traité chaque Etat membre s'engage à le respecter parce que l'emplacement du principe convenable dans la Constitution possède non seulement la signification juridique mais aussi morale et dans les pays qui reconnaissent la position suprême de leurs Constitutions auprès du droit européen possède aussi une signification essentielle juridique.

compétences » exprime clairement la Constitution de la France : « La République participe...à l'Union européenne, constituée d'Etats qui ont choisi librement... d'exercer en commun certaines de leurs compétences ». Cette formule permet de croire que les Etats membres ne transfèrent pas la souveraineté à un sujet tiers mais ils l'exercent ensemble. Cette exécution commune des compétences définies ne signifie pas l'envie d'abandon de la souveraineté mais plutôt un genre de « communautarisation » de la partie de droits souverains exercée avec d'autres Etats en basant sur le principe de mutualité.

- 3) Le principe de l'Etat démocratique de droit (dont le principe de la justice sociale) qui est le fondement des standards uniques d'un ordre juridique démocratique. Il concerne aussi bien les Etats unitaires, fédéraux et ceux de l'Union européenne à laquelle le Traité le répète à plusieurs reprises.
- 4) Le principe du respect des droits de l'Homme qui exige de toute la communauté de respecter les droits de tous les citoyens.

5. Le principe de subsidiarité à chaque niveau de la communauté. Par exemple, la Constitution de la Pologne de 1997 déclare déjà *expressis verbis* dans la Préambule « le principe de subsidiarité renforçant les droits des citoyens et de leurs collectivités ». Ce principe respecte et proclame le droit de l'Union européenne statuant dans le Traité de Lisbonne ses garanties sous la formes des compétences respectives des parlements nationaux.

- 1) Le principe de solidarité, de plus en plus souvent présent comme un des critères d'analyse judiciaire qui s'applique tant aux particuliers qu'aux communautés politiques : nationales, supranationales, sociales, territoriales et autres.
- 2) Le principe du dialogue social s'adressant aux partenaires sociaux, par exemple : Etat – employeurs – employés.
- 3) Les autres principes constitutionnels déjà mentionnés dans différents contextes comme le bien commun, la dignité naturelle de l'Homme, l'autonomie de l'individu, la société civile – ces principes-là devraient être traités comme directives dans la formation des autres règles juridiques et montrer la direction de fonctionnement

des institutions de l'Etat et sa politique. Et cette règle concerne aussi les autres formes de s'organiser pour les communautés civiques.

Ces principes (et encore d'autres) forment un certain *modus vivendi* de la vie sociale dans la communauté, exigeant le respect mutuel de l'égalité (dont l'égalité des chances) et de solidarité. Tous ces principes sont connus de droit constitutionnel et leur caractère juridique est fortifié par la jurisprudence, en particulier des juridictions constitutionnelles. C'est cette jurisprudence qui, dans nombreux pays, permet auxdits principes d'acquérir une signification concrète dans les relations avec les règles de droit plus détaillées qui concrétisent et développent ces principes. Comme une des plus essentielles conditions d'efficacité les principes constitutionnelles est le réel milieu social et politique dans lequel elles sont appliquées.

CONSTITUTIONAL MECHANISMS THAT MAY SERVE ESTABLISHING A FISCAL POLICY AND SETTLING ITS EXECUTION

I. Introduction

1. Fiscal policy is the use of government revenue collection and expenditure aimed at attaining social and economic objectives laid down by relevant public authorities. In practice, this is not always realised, since the electorate prefers politicians who promote increasing expenses or reducing tax burdens. Voters are not always aware of the existence and role of budget limitations. They are subject to the so-called fiscal illusion, i.e. they invent a false idea of possible choice scenarios. Additionally, on the level of individual citizens, we may observe a lack of co-responsibility for the state of the country's budget. Therefore, a rise or increase in budget deficit and – in consequence – a financial crisis, may become the results of a democratic choice.²

2. The literature on the causes and consequences of the recent global financial crisis is vast. The aim of the paper is not a theoretical analysis, but an attempt to present concrete legal constructions. It constitutes a review of selected constitutions and – sometimes – opinions expressed in the literature on the subject of mechanisms that may serve establishing a rational fiscal policy and settling its execution, in order to prevent and/or overcome financial crises:

¹ PhD, Adviser to the President of the Supreme Audit Office (Poland) [in the English translation of the Constitution of the Republic of Poland, the said Office is also referred to as the Supreme Chamber of Control: <<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>>]; <Jacek.Mazur@nik.gov.pl>.

² “Financial crisis” is used here as an umbrella concept which covers the crisis in financial markets that erupted in autumn 2008 after the collapse of Lehman Brothers.

- prudential and remedial procedures regarding the public debt and state budget deficit;
- estimating macroeconomic consequences of election manifestos;
- fiscal councils;
- National Statistical Institutes;
- Supreme Audit Institutions;
- granting the government a vote of acceptance for the execution of the state budget.

The description is not limited to provisions of constitutions, since it appeared – when drafting my paper – that some important regulations are included in ordinary laws only, while their potential recognition in the constitution may only be by a demand.

I hope that the workshop participants will provide more information on how these mechanisms function in the countries where they come from.

3. The paper concerns particular mechanisms, however it does not analyse constitutions of individual states as such. Maybe it is worth mentioning that in one country – in Iceland – the financial crisis has become the direct reason for the taking up of work on the developing of a new constitution.³

II. Mechanisms that serve the establishment and execution of a fiscal policy

1. Establishing prudential and remedial procedures regarding the public debt and state budget deficit

1.1. As Carmen Reinhart and Kenneth Rogoff put it, the phenomenon of financial crises – in particular a state's insolvency in the external

³ Re. the concept of the (still to be adopted) draft of the constitution of Iceland. – see e.g. Thorvaldur Gylfason: 'Constitutions: Financial Crisis Can Lead to Change', 19 July 2012 <<https://notendur.hi.is/gylfason/Iceland%20constitution%20Challenge%204%20Final.pdf>>.

aspect, as well as towards its own citizens – had been known for ages.⁴ However, only recently in individual countries have formal mechanisms limiting the level of maximum public debt and budget deficit begun to be established. A fiscal rule popularly named “debt brake” is defined in the constitutions and laws of several countries. It can be introduced under different procedures:

- by amending the constitution;
- by enacting a separate constitutional law (organic law);
- by enacting an ordinary law.⁵

In Brazil, the Constitution of 1988 provides for a possibility to regulate the issues of public debt and sets down a procedure under which this might take place.⁶

⁴ C.M. Reinhart, K.S. Rogoff *This time is Different. Eight Centuries of Financial Folly* (Princeton University Press 2009).

⁵ A great deal of information on EU Member States is provided in the working paper by Heiko T. Burret and Jan Schnellenbach (both Walter Eucken Institute, Freiburg) entitled ‘Implementation of the Fiscal Compact in the Euro Area Member States’, November 2013 <http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/download/publikationen/arbeitspapier_08_2013_engl.pdf>.

⁶ Items II and XIV of Article 48 of the Constitution of Brazil (<http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_3ed.pdf?sequence=3>) set that the National Congress, with the endorsement of the President of the Republic, is responsible for the regulation of the credit and public debt transactions, and specially the amount of the federal public debt related to government bonds. And Article 52, item VI, sets forth that it is the exclusive responsibility of the Federal Senate to set, as proposed by the President of the Republic, the global limits for the consolidated debt amount of the Federal State, states, Federal District, and municipalities. Simultaneously, the Fiscal Responsibility Law of 2000 (<[http://www1.worldbank.org/publicsector/pe/Budget Laws/BRLRFEnglish.pdf](http://www1.worldbank.org/publicsector/pe/Budget%20Laws/BRLRFEnglish.pdf)>) foresaw, in its Article 30, items I and II that, within ninety days after the publication of the mentioned supplementary law, the President of the Republic would submit global limit proposals to the Federal Senate and the National Congress respectively: (i) for the amount of the consolidated debt of the Federal State, states and city councils; and (ii) for the public debt amount related to government bonds.

Once the global limit proposals were sent to the three governmental branches, the text that mentions the Federal State was separated, having been approved only in the part concerning the indebtedness controls for states, Federal District, and municipalities, under the terms of the Federal Senate Resolution 40/2001. Yet, the limit proposal for the public debt regarding government bonds is still in process in the Federal Senate as a Bill initiated in the Chamber of Representatives (Bill 54/2009). Therefore, currently there is no indebtedness limit set forth for the Federal State. As for the states and the Federal District, the limit for the net consolidated debt is 2 (two) times the net current revenue. For municipalities, this limit is 1.2 (one point two) times the net current revenue.

In Poland, the Constitution of 1997 has established a ban on incurring loans and granting financial guarantees which would cause public debt to exceed 60% of GDP, and a ban on financing budget deficit by the central bank; further rules are specified by the Public Finance Act.⁷

In Switzerland, the Federal Constitution of 1999 was amended in December 2001 in order to introduce the debt brake.⁸

In Germany, the Constitution of 1949, usually referred to as the Basic Law, was amended in July 2009 to add the balanced budget provision. This will apply to both the federal government and the Länder (states). From 2016 onwards the federal government will be forbidden to run a structural deficit of more than 0.35% of GDP. From 2020, the states will not be permitted to run any structural deficit at all. The Basic Law permits an

⁷ The Polish Public Finance Act of 2009 includes:

- detailed prudential and remedial procedures regarding the state budget, local governments' budgets and also granting sureties and guarantees if public debt to GDP ratio exceeds 50%, 55% and 60%;
- obligation by the Minister of Finance to present a 4-year strategy for debt management in the public finance sector.

The above-mentioned strategy is prepared each year by the Minister of Finance, then submitted for approval by the Council of Ministers and finally presented to the Parliament together with the justification of the draft Budget Act. It includes, among others, items such as: the objectives and tasks of public debt management; the forecasts of macroeconomic indicators for Poland and international considerations in the time horizon covered by the strategy; an analysis of risk factors connected with public debt; the expected effects of implementing the strategy; and threats to the strategy implementation.

⁸ New Article 126 of the Federal Constitution of the Swiss Confederation <<http://www.admin.ch/ch/e/rs/1/101.en.pdf>> stipulates that:

1. The Confederation shall maintain its income and expenditure in balance over time.
2. The ceiling for total expenditure that is to be approved in the budget is based on the expected income after taking account of the economic situation.
3. Exceptional financial requirements may justify an appropriate increase in the ceiling in terms of paragraph 2. The Federal Assembly shall decide on any increase in accordance with Article 159 paragraph 3 letter c.
4. If the total expenditure in the federal accounts exceeds the ceiling in terms of paragraphs 2 or 3, compensation for this additional expenditure must be made in subsequent years.
5. The details are regulated by law.

See also "The Swiss debt brake: experiences and perspectives. Report of the Federal Council in response to the postulates of Graber Jean-Pierre (10.4022), Landolt (11.3547) and Fischer (12.3552)", Bern, 29 November 2013 <http://www.efv.admin.ch/e/downloads/finanzpolitik_grundlagen/schuldenbremse/Bericht_SB_e.pdf>.

exception to be made for emergencies such as a natural disaster or severe economic crisis.⁹

In Italy, the Constitution of 1947 was amended in April 2012 in order to introduce a balanced budget provision.¹⁰ New constitutional rules concerning public debt and budget deficit have recently been also adopted in Spain (September 2011) and Slovenia (May 2013).¹¹

In several countries those the issues have been regulated in the constitutional (organic) law (France – December 2012¹², Portugal – September 2011¹³, Slovakia – December 2011).

Another method is to regulate issues of public debt and budget deficit in ordinary law (Austria – 2011, Cyprus – 2012, Finland – 2012, Ireland – 2012, Latvia – 2013, the Netherlands – 2013).

⁹ See Article 109 (Budget management in the Federation and the Länder), Article 115 (Limits of borrowing) and Article 143d (Transitional provisions relating to consolidation assistance) of the amended German Basic Law <<https://www.btg-bestellservice.de/pdf/80201000.pdf>>; the Act promulgated on 13 September 2012 concerning the Implementation of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012; the Fiscal Compact (National Implementation) Act of 15 July 2013. See also F. Fabbrini, 'The Fiscal Compact, the "Golden Rule", and the Paradox of European Federalism' (2003) 36 B.C. Int'l & Comp. L. Rev. 1 <<http://lawdigitalcommons.bc.edu/iclr/vol36/iss1/1/>>.

¹⁰ See Article 81 (the fiscal rules of the central government), Article 97 (the general government) and Article 119 (the regional and local jurisdictions) <http://www.senato.it/documenti/repository/relazioni/libreria/novita/%20constitution_2012.pdf>. The details are stipulated in: 'Law 243 of 24 December 2012: Provisions for the application of the balanced budget principle pursuant to Article 81.6 of the Constitution' <http://www.pbo-dpb.gc.ca/files/files/Italy%20-%20Legge%20n%20243%202012_eng.pdf>. See also T. Groppi: 'The Impact of the Financial Crisis on the Italian Written Constitution' (2012) 4(1) Italian Journal of Public Law.

¹¹ The revised Article 148 of the Slovenian Constitution (<<http://www.us-rs.si/media/constitution.-en.14.11.%202013.pdf>>) stipulates that revenues and expenditures of the general government have to be balanced over the medium-term or generate a surplus, respectively. The public budgets have to be gradually adjusted such that the new budget rule is met from 2015 onwards. Further details shall be specified in an implementation law.

¹² *Loi organique n° 2012-1403 du 17 décembre 2012 relative à la programmation et à la gouvernance des finances publiques* <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORF-TEXT000026785259&dateTexte=&categorieLien=id>>.

¹³ Fiscal Framework Law (Law 91/2001) <<http://www.cfp.pt/wp-content/uploads/2012/10/1351707749.pdf>>.

2. The possibility of introducing official estimation and making the macroeconomic effects of election manifestos publicly known

2.1. In many countries, the election manifestos of political parties influence the state's fiscal policy. Those programmes may include general demands (such as joining or exiting international economic organisations, changing percentage rates, changing customs tariffs or introducing/abolishing limitations on the import/export of goods, the nationalisation/pri-
vatization of some sectors of the economy or certain enterprises), as well as – specific ones (e.g. a reduction of / an increase in taxes for selected groups of taxpayers, the increasing limitation of social benefits for specific groups, etc.). Sometimes it may be presumed that some promises may be formulated mostly with the intention to attract specific groups of voters. Election manifestos are not always clear and cohesive, which may impede estimations, nevertheless their introduction leads to important macroeconomic effects.

Due to the fact that complicated, multi-faceted social processes are involved, it is difficult to draw simple conclusions; however, it seems that, generally, an appropriate action in elections is when political parties and their candidates present clear and understandable election manifestos, which enable voters to actually compare and make a choice that is consistent with their preferences.

Lately in several countries (in the Netherlands and Great Britain, and somewhat differently in the United States), practice has been developed which consists in making estimations of expected macroeconomic effects of election manifestos before national elections (parliamentary or presidential elections). These valuations are conducted on a voluntary basis by independent institutions specialising in assessing economic and fiscal policies. As Frits Bos and Coen Teulings put it, particularly in the period of financial crisis and the instability of public finance, the assessment of election manifestos may constitute a tool for verifying unrealistic or incoherent promises made by politicians. It may help political parties not only in informing voters of the possible consequences of their programmes, but also – in formulating them better, taking into account objective budget restrictions, and after the election – in easing cross-party

discussion with regard to the forming of a government. It should also be taken into consideration that there may appear a risk of negative effects of such an assessment – should it turn out that alternative options are presented in a biased manner and the mode of assessment leaves too much space for games and subjective opinions.¹⁴

Have the workshop participants encountered the above-mentioned practice in other countries?

2.2. In the Netherlands, since 1986, for a few months before parliamentary elections, the Bureau for Economic Policy Analysis (CPB), a governmental agency for economic forecasts and analyses,¹⁵ performs – at the request of interested political parties – an assessment of expected effects of their election manifestos, e.g. what are the consequences of the platforms for the government budget, economic growth, employment, the purchasing power of the various types of households and the environment? CPB only evaluates a programme on request of a political party. Hence, parties can refuse to participate in the evaluation. Nevertheless, nearly all political parties request participation, as they do not want to give voters the negative signal that they have something to hide or that they fear such evaluation.¹⁶

¹⁴ F. Bos, C. Teulings: 'Evaluating election platforms: a task for fiscal councils? Scope and rules of the game in view of 25 years of Dutch practice' (2011) CPB Netherlands Bureau for Economic Policy Analysis (MPRA Paper No. 31536, posted on 14 June 2011; <<http://mpra.ub.uni-muenchen.de/31536/>>).

¹⁵ CPB was founded in 1945. It is fully independent in its work. It is publicly funded and constitutes part of the Ministry for Economic Affairs, Agriculture and Innovation. CPB provides (i) a macroeconomic forecast underlying the annual budget, (ii) a midterm review of the state of public finance at the start of each election cycle, (iii) cost-benefit analyses of all kinds of policy proposals (from education to infrastructure), and (iv) an assessment of the economic impact of the platforms of political parties before an election. In addition, research is carried out on CPB's own initiative, or at the request of the government, parliament, trade unions or employers' federations. See F. Bos, C. Teulings: 'The world's oldest fiscal watchdog: CPB's analyses foster consensus on economic policy' in G. Kopits (ed), *Restoring Public Debt Sustainability: the Role of Independent Fiscal Institutions* (Oxford University Press 2012). The scope and organisation of CPB are generally regulated by the Act of 21 April 1947 (*Wet voorbereiding van de vaststelling van een Centraal Economisch Plan*).

¹⁶ For a detailed description and analysis of the Dutch experience, see F. Bos, C. Teulings, *Evaluating election platforms ...*, *op.cit.* and the bibliography therein.

In the UK, since the election of 1997, the Institute for Fiscal Studies (IFS)¹⁷ has run research projects and produced a range of publications and observations including a specific focus on each general election. In the lead up to the last UK election (2010),¹⁸ this included briefing notes on the three main parties' proposals for dealing with the fiscal deficit¹⁹ as well as specific policy areas such as families and children,²⁰ pensions and retirement policy²¹ and more.

Practice in the United States is somewhat different: the Congressional Budget Office (CBO)²² does not directly assess election manifestos, however its estimates of budgetary costs and savings of some major policy proposals, e.g. of healthcare reform, play a major role in presidential and congressional elections.

2.3. The above-presented cases concern political practice and not the legal system. They have a major influence on the political and election systems; however, they are not legally regulated. Although in the Netherlands the assessment of expected effects of election manifestos is performed by a government agency, such activity is not defined in the law of 1947 but forms part of the generally defined scope of activity of the agency; the same goes for the US CBO, whereas the British IFS is not a government agency. The above-mentioned cases would, therefore, be difficult to analyse from the point of view of constitutional provisions or ordinary legislation.

The situation may change soon: in Belgium work is in progress to adopt a law which would introduce the assessment of expected effects of election manifestos by a designated state authority. A bill was adopted unanimously

¹⁷ The IFS is an independent economic research institute launched in 1971, funded by public and private grants. It produces academic and policy related findings on UK taxation and public policy (see <<http://www.ifs.org.uk>>).

¹⁸ <<http://www.ifs.org.uk/%20projects/323>>

¹⁹ <<http://www.ifs.org.uk/publications/4848>>

²⁰ <<http://www.ifs.org.uk/publications/4858>>

²¹ <<http://www.ifs.org.uk/publications/4861>>

²² The CBO is a federal agency within the legislative branch of the United States government and provides economic data to Congress. It was created by the Congressional Budget and Impoundment Control Act of 1974 <<http://www.cbo.gov/>>.

in April 2014 by the joined committees of the Belgian House of Representatives. The bill assumes that every political party represented in any of the chambers of the state or regional parliament would be obliged to present the main lines of its programme no later than 100 days before elections; parties which have no seats in parliament could only do so on a voluntary basis. These documents would be examined by the Federal Planning Bureau,²³ which should estimate the short- and medium-term impact of introducing the proposals of political parties on: public finance, the purchasing power and employment of groups with different incomes, as well as the environment. A final version of the estimation would be published no later than 15 days before the election date.²⁴

In that context, it is worth raising the following issues, which are important from the point of view of constitutional law:

- The Belgian Constitution of 1831 does not specify the status of political parties, or their role in the mechanisms of representative democracy; therefore, the adoption of a law which would impose certain obligations on political parties seems to be acceptable; the same applies to those countries whose constitutions clearly state that the mode of conduct of political parties is regulated by law.²⁵ Apart from that, there are, however, constitutions which underline the freedom of activity of political parties.²⁶ Therefore, one may suggest opening a discussion on how the introduction of the statutory

²³ Le Bureau fédéral du Plan (Federal Planning Bureau – FPB) is an independent public agency. It carries out analyses and provides forecasts regarding economic, social and environmental policy issues as well as the integration of these policies in the context of sustainable development <<http://www.plan.be/index.php?lang=en>>.

²⁴ “*Proposition de loi relative au chiffrage par le Bureau fédéral du Plan des programmes électoraux présentés par les partis politiques lors de l’élection pour la Chambre des représentants*” (DOC 53 0576/008). For the course of legislative work with links to documents (in French), <<http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=fr&cfm=/site/ww-wcfm/flwb/flwbn.cfm?lang=N&legislat=53&dossierID=0576>>.

²⁵ E.g. Article 11(3) of the Constitution of Bulgaria of 1991; Article VIII(4) of the Constitution of Hungary of 2011; Article 35(3) of the Constitution of Lithuania of 1992; Article 8(2) of the Constitution of Romania of 1991.

²⁶ E.g. Article 4(2) of the Constitution of France of 1958; Article 11(1) of the Constitution of Poland of 1997; Article 29(4) of the Constitution of Slovakia of 1992.

obligation to submit and evaluate election manifestos can influence the understanding of the place and role of political parties.

- A question arises regarding the risks connected with government bodies getting involved in delicate assessment processes that may influence election results. In this context, it is worth mentioning the judgment of the German Federal Constitutional Court of 2 March 1977, in which the Court decided against any engagement of the government in the election campaigns of political parties.²⁷

3. Fiscal councils

“The term Fiscal Council is generally used to describe an institution, funded by but independent of government, which provides public advice on fiscal issues”.²⁸ Although fiscal councils are generally not vested with the power to directly intervene in national fiscal policies, they might have considerable impact on fiscal outcomes through their influence on

²⁷ According to the case law of the German Federal Constitutional Court, the closer the publications come to the beginning of a heated campaign season, the less it is possible to rule out their impact on the election result. Therefore, the Government’s task and duty to objectively inform citizens also about past political facts, developments and achievements has to be overridden by the principle that, prior to elections, the formation of the will of the people should – as much as possible – be kept free from the exertion of influence by the Government. The obligation of the Federal Government to refrain from exerting any influence on election results, implied by the requirement of utter self-restraint and the prohibition of any public relations activities financed from public funds, e.g. in the form of performance reports, benefit or achievement reports. This is so because, in the heated campaign season, such publications usually have the character of campaign advertising material of a given political party; in other words, this is an exertion of influence by the Government, which is prohibited by constitutional law. However, this does not refer to neutral and informative publications that are necessary because of an urgent situation that has arisen (for more, see: 2 cf. BVerfGE (rulings of the Federal Constitutional Court) 44, 125, p. 153; 3 BVerfGE 44, 125, pp. 152 & 153). It is understood that in the heated campaign season (starting 5 months before the election) the federal government is not permitted to spend any budget funds on publications or performance reports serving electoral purposes.

²⁸ Definition by Professor Simon Wren-Lewis of Oxford University, quoted from his introduction entitled ‘What are Fiscal Councils?’, available at his website: < <https://sites.google.com/site/sjqwrenlewis/fiscal-councils> >.

the public debate.²⁹ A few countries have had such institutions for many decades. In recent years, in view of the global financial crisis and the deteriorating financial conditions and prospects of individual countries, such bodies have been established in other countries. They were established in particular in the EU Member States which had been burdened with supranational criteria regarding the fulfilment of annual relations of deficit and debt and the obligation to implement the directive on requirements for Member States' budgetary frameworks.³⁰

"These institutions are often described as 'independent'".³¹ Their independence, apart from professionalism and related freedom of expressing opinions, is considerably affected by their place in the system of state bodies and by specific legislation.

Some fiscal councils have been established pursuant to a constitution, for instance in Hungary (2011), or constitutional (organic) law, as in: France (2012), Portugal (2012), and Slovakia (2012); in Estonia and Finland, the functions of the fiscal councils are performed by supreme audit institutions, which are constitutional bodies. Most fiscal councils have been established on the basis of ordinary law: Australia (2011), Austria (2013), Germany (2010), Greece (2010), Ireland (2011), Italy (2012), Latvia (2013), the Netherlands (1947), Spain (2013), the UK (2011), and the United States (1974).

²⁹ L. Calmfors ('The Role of Independent Fiscal Policy Institutions', CESifo Working Paper Series No. 3367, pp. 14-15) distinguishes the following tasks for fiscal councils: 1) provision of 'objective' macroeconomic forecasts on which government budget proposals can be based; 2) estimating the cost of various government policy initiatives; 3) *ex ante* evaluation of whether fiscal policy is likely to meet its medium-term targets; 4) *ex post* evaluation of whether fiscal policy has met its targets; 5) analysis of the long-run sustainability of fiscal policy; 6) normative recommendations on fiscal policy <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1775797>. See also OECD Recommendation on Principles for Independent Fiscal Institutions, 13 February 2014 – C(2014)17/CORR1 <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=301&Instrum%20entPID=316&Lang%20=en&Book=False>>.

³⁰ Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ L 306/41 23.11.2011.

³¹ S. Wren-Lewis 'What are Fiscal Councils?' <<https://sites.google.com/site/sjqwrenlewis/fiscal-councils>>.

In Hungary, the Budget Council is an organ examining the feasibility of the state budget. It stems from introducing – into the constitution – rules aimed at limiting the public debt: apart from an extraordinary situation, the Parliament may not adopt a State Budget Act which allows the state debt to exceed half of the GDP. In addition, as long as the state debt exceeds half of the GDP, the Parliament may only adopt a State Budget Act which contains state debt reduction in proportion to the GDP. The main task of the Council is to examine the government budgetary bill from the point of view of those criteria and the adoption of the State Budget Act shall be subject to the prior consent of the Budget Council in order to meet the requirements set out in Article 36(4)-(5) of the Constitution.³² Another task is to make a periodical evaluation of macroeconomic performance: at least once in six months, the Budget Council should present its opinion on the planning and executing of the state budget and on the use of public funds; apart from that, at any time it may submit additional opinions on those issues and on the condition of the public finance.

4. National Statistical Institutes

National Statistical Institutes (NSIs) function in almost all countries of the world. They collect, gather, store and process statistical data, as well as announce, make available and disseminate the results of their research as official data which serve the purpose of informing the general public, state authorities and business entities about the economic, demographic and social situation as well as the natural environment.

Due to the fact that the results of statistical data constitute bases for further decisions, it is important to ensure an appropriate level of independence for NSIs, so that they are not subject to external influences.³³

³² Fundamental Law of Hungary of 2011 <<http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecent-version01102013.pdf>>.

³³ In Greece in 2005-2009, data on the size of the country's budget deficit were deliberately falsified. Having forecast a budget deficit of 3.7 percent for 2009, the Greek government was eventually forced to reveal the deficit of 15.4 percent. It was also condemned for fabricating and manipulating economic statistics (*Report on Greek government deficit and debt statistics*, European Commission; COM(2010) 1 final, 8.1.2010).

In this context, in 2012 the European Commission presented a draft regulation which gives the executives of NSIs in the Member States the freedom to decide on processes, statistical methods, standards and procedures, at the same time banning them from seeking and giving protection against receiving instructions from national governments and other bodies. The Heads of NSIs also should be granted considerable autonomy in deciding on the internal management of the statistical office. Furthermore, there must exist transparent rules for the appointment, transfer and dismissal of the Heads of NSIs, based solely on professional criteria.³⁴

Considering the growing importance of statistical data in the process of taking decisions on the fiscal policy, we could ask if it were not appropriate to mention the role of NSIs in the constitutions of particular states.

III. Mechanisms which serve the settling of the execution of fiscal policy

5. Supreme Audit Institutions

5.1. Supreme Audit Institutions (SAIs) operate in almost every country.³⁵ They are usually constitutional bodies. Their main aim is to conduct independent external audit of public administration's activities, finance, property and, primarily, implementation of the state budget. Through these activities, state bodies can be held accountable and parliaments can oversee governments. There are a handful of countries that have no SAIs, but these reflect a specific political situation or the process of the transformation of a political system (e.g. the Ukraine in the 1990s had no SAI for

³⁴ *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 223/2009 on European statistics*; Brussels, 17.4.2012 COM2012 167 final. The European Parliament in the term of 2009-2014 did not adopt the proposal; perhaps the work will be continued in its new composition after the elections in May 2014.

³⁵ The following passages draw on J. Mazur: 'The Polish Supreme Chamber of Control in Comparison with Supreme Audit Institutions of Other Countries' (2007) 61 *Iyunim. Studies in State Audit* (Jerusalem) 143-171.

several years).³⁶ Thus, the norm is that a democratic country has such an institution.

5.2. Apart from judicial rulings (which are only issued by the courts of audit), the basic tasks of SAIs are auditing and, in many cases, advising. Originally, SAIs dealt mainly with audits. The advisory function was a consequence of the evolution of state audit in the 20th century. Nowadays, advisory elements are present in a majority of SAIs, especially in performance audits. Moreover, in some countries advisory activities may, for example, comprise the preparing of opinions for the parliament (rarely for the government) on specific bills, especially those concerning accounting or other financial matters,³⁷ or the state budget bill (though very rarely), or sometimes other acts that involve a rise in public spending (e.g. in Belgium, Germany, Hungary, Italy, and Russia).

The scope of issues subject to audit determines the basic competence of an audit institution. SAIs began with audits of the implementation of state budgets. In the 1920s a new and constant tendency to broaden the scope of audit appeared. More types of entities and areas became subject to state audit: state-owned companies, companies operating with

³⁶ It is worth stressing that in the process of returning to democracy and to the rule of law, in the 1990s in a majority of the Central and Eastern European countries, independent audit institutions were restored or established: Hungary in 1989; Lithuania and Estonia in 1990; Latvia and Moldova in 1991; Albania, Belarus, the Czech Republic and Romania in 1992; Croatia and Slovakia in 1993; Slovenia in 1994; Bulgaria and Russia in 1995; and the Ukraine in 1997.

³⁷ For example, in the United States, the Comptroller General shall review provisions requiring financial audits of non-Federal entities that receive Federal awards that are contained in bills and resolutions reported by the committees of the Senate and the House of Representatives. If the Comptroller General determines that a bill or resolution contains provisions that are inconsistent with the requirements of the Single Audit Act, s/he shall, at the earliest practicable date, notify in writing (1) the committee that reported such bill or resolution; and (2) (A) the Committee on Governmental Affairs of the Senate (in the case of a bill or resolution reported by a committee of the Senate); or (B) the Committee on Government Reform and Oversight of the House of Representatives (in the case of a bill or resolution reported by a committee of the House of Representatives); sec. 2 of the Single Audit Act Amendments of 1996 (*Public Law* 104-156, July 5, 1996; p. 9; <https://www.whitehouse.gov/sites/default/files/omb/assets/about_omb/104-156.pdf>).

the use of public money,³⁸ NGOs financed from the state budget, self-governing bodies, social insurance institutions, foundations and associations (especially public associations). However, only a handful of SAIs are authorised to audit all the types of entities mentioned above.

Originally, SAIs carried out audits within the general meaning of the term, without further categorising audits into types. In many countries (or maybe even in most of them?) it is still so. After World War II, together with the appearance of performance audits and with the development of audit methodology, some SAIs began to differentiate between particular types of audits, especially regularity audits and performance audits.³⁹ This is an ongoing process and the situation varies from one SAI to another. Generally, it is possible to conclude that within the last 30 to 40 years, several SAIs have begun to differentiate between these two types of audits as well as have developed audit criteria.

The basic element of a regularity audit is financial audit; hence, these two notions are used interchangeably. Some SAIs perform financial audits in the form of attestation audits, i.e. they grant formal audit opinions (certificates). Attestation audits, also known as certification audits, concern the credibility of accounting transactions and the compliance of financial operations with the law. These audits are performed by examining a sample of transactions, frequently with the use of statistical methods.⁴⁰ Attestation audits are performed only by SAIs in a few countries, such as: the UK, the USA, Canada, the Netherlands, Denmark, Slovenia and Sweden.

³⁸ J. Kandutsch: 'State Audit of Public Enterprises in Austria' in B. Geist (ed), *State Audit: Developments in Public Accountability* (London 1981); L.T. Kulasingham, 'Accountability and Control of Public Enterprises' in A. Friedberg, B. Geist, N. Mizrahi, and I. Sharkansky (eds), *State Audit and Accountability* (Jerusalem 1991); H.G. Zavelberg, 'Reviews of Federal Activities in Private-law Enterprises by the Federal Court of Audit' in J. Thesing and W. Hofmeister (eds), *Financial Control in a Democracy* (Sankt Augustin 1995).

³⁹ According to Section 4 of the Lima Declaration of Guidelines on Auditing Precepts, "1. The traditional task of Supreme Audit Institutions is to audit the legality and regularity of financial management and of accounting. 2. In addition to this type of audit, which retains its significance, there is another equally important type of audit – performance audit – which is oriented towards examining the performance, economy, efficiency and effectiveness of public administration (...)" <http://www.issai.org/media/12901/issai_1_e.pdf>.

⁴⁰ See a description of the types of audits in: R. Allen and D. Tommasi (eds), *Managing Public Expenditure. A Reference Book for Transition Countries* (OECD, Paris 2001) 348-351.

Performance audits (value-for-money audits) encompass:

- audit of the economy of administrative activities in accordance with sound administrative principles and practice, and management policies;
- audit of the efficiency of the utilisation of human, financial and other resources, including examination of information systems, performance measures and monitoring arrangements, and the procedures for remedying identified deficiencies;
- audits of the effectiveness of performance in relation to the achievement of objectives in the audited entity, and audits of the actual impact of activities compared with the intended impact.

5.3. The 2008 global financial crisis had a major influence on the direction of the work of many SAIs, especially in the United States and the EU Member States. These countries used great means to stabilise financial markets and alleviate the negative effects of the crisis, *inter alia* by directly subsidising private units. Some countries tried to counteract a decrease in export and internal consumption by increasing public expenses. Also, in the countries which were not able to use significant means, special programmes were developed to prevent mass redundancies. Governments had to react fast to the challenges ensuing from the crisis, having little time to develop relevant strategies and programmes. Response time was a key factor in the effectiveness of measures – and has become one of the main criteria for the evaluation thereof – apart from correctness, economy, and efficiency.

The amount of public means spent in connection with the crisis and the specific mode in which this occurred, have attracted the attention of supreme audit authorities. Many SAIs took quick steps, adjusting audit plans to those challenges. The activities of individual SAIs were significantly different – depending on the character of the activities of the governments and the scope of their own inspection powers. For example, the SAIs in France and in the Netherlands inspected state aid for banks, the SAI in Great Britain – the entire state aid, the SAI in Denmark – the activity of the governmental agency which provides supervision over the financial sector; while the SAI in Poland – inspected the anti-crisis actions of the government and of the central bank, including efforts to

ensure the stability of the banking sector. In a few countries (e.g. in Germany) SAIs were granted additional competences to supervise government programmes for counteracting the effects of the crisis, including making current inspections, apart from traditional post-audits.⁴¹

5.4. From the moment of the crisis, many SAIs have begun to pay particular attention to the matters of financial stability. I shall present this on the example of the Austrian SAI (*Rechnungshof*). It executes tasks which serve financial stability by conducting many performance audits, by formulating recommendations and by verifying the closing of federal accounts. While choosing the audit topics, attention is paid to those areas which are of importance for financial stability (the pension system, social security, education, health care, subsidies); it conducts about 100 performance audits per year; in the course of audits, not only does it determine irregularities but it also formulates recommendations, therefore it is not only an audit body, but also – an advisory one. The inspections focus on matters connected with the crossing of financial flows and the comparability of accounting systems, with emphasis on the instances of the lack of clarity and accountability and on the quality of management and control systems. This way some gaps have been disclosed, namely: gaps in accounting systems at all levels (the level of the federation, states and communes); the lack of informative value and the comparability of those systems; differences in the manner of estimating property value; the different definitions of debt; the incomplete consideration of liabilities regarding future years; the non-recording of financial instruments; as well as differences in the period, scope and indicators of medium-term planning. The presentation of audit reports to the federal parliament, as well as to state and local parliaments, was an important impulse to initiate a discussion on the reform of the accounting system.

The SAI of Austria tries to draw attention to its recommendations regarding clarity and accountability, the current financial situation and future financial stability. For these purposes, it uses discussions in parliaments, press conferences, interviews, presentations for stakeholders, comments

⁴¹ In the case of Germany, the SAI's mandate has been extended, a special audit team has been set up to deal with the audit of the stabilisation of the financial market and numerous audits have been carried out.

provided in the course of its inspections, separate publications devoted to the assessment of the situation in individual sectors. This creates a public impact which eases the implementation of recommendations (more than 80% of about 2,500 of those get executed per annum).

According to Article 121 of the Austrian Constitution, the SAI draws up final federal budget accounts, which it submits to the Parliament. This is based on materials from the Ministry of Finance, verified in the course of an audit and supplemented by an analysis of financial planning and the level of debt. The document presents the execution of the state budget, indicating the most important aberrations, including – among others – tendencies regarding the budget amount, balance, budget deficit and debt, evolution of expenses, realising earlier obligations, execution of goals specified in the national stability programme, as well as medium- and long-term consequences of budget execution. This enables determining in what scope medium-term planning allows to maintain financial stability and whether the federal, national and local authorities fulfil obligations in this scope, as well as what changes occur in the areas of particular importance for the budget, such as pensions, social services, education, and health care.⁴²

5.5. The common character of SAIs and the fact that they are not political bodies create natural conditions for their cooperation. This cooperation consists mostly in exchanging information and developing recommendations, especially within the International Organization of Supreme Audit Institutions (INTOSAI). What has been created this way is a collection of technical standards that comprises the fundamental prerequisites for the orderly functioning and professional conduct of SAIs.⁴³ The basic document is “The Lima Declaration of Guidelines on Auditing Precepts” of 1977 (the Lima Declaration), which characterises, among others, the purposes, definitions and types of audits, relations between a given SAI and the parliament, the government and other state authorities, the scope of competences, the mode of drafting and presenting inspection reports (<http://www.issai.org/media/12901/issai_1_e.pdf>).

⁴² On the basis of information provided by the SAI of Austria.

⁴³ At <<http://www.issai.org/>>, one will find the updated collection of professional standards and best practice guidelines for public sector auditors, endorsed by INTOSAI.

The Lima Declaration postulates that the constitution of a given state shall specify:

- the establishment of a Supreme Audit Institution and the necessary degree of its independence, including adequate legal protection by a supreme court against any interference with the SAI's independence and audit mandate;
- the independence of the head and members of the SAI, and in particular, procedures for removal from office;
- the relationship between the SAI and the parliament, including the guarantee of a very high degree of initiative and autonomy, even when the SAI acts as an agent of the parliament and performs audits acting on the parliament's instructions;
- the SAI's competence to report its findings annually and independently to the parliament or any other competent public body; this report shall be published;
- the SAI's basic audit powers.⁴⁴

The postulates presented above refer to the supreme position of the constitution in the hierarchy of legal acts. If the SAI is to be treated as one of important state institutions, then the general assumptions underlying its legal status should be contained in the constitution. And vice versa: the lack of such provisions, and, what is more, the lack of any constitutional regulation legitimise the question whether, in a given country, the SAI has the character of an important state institution.

It seems that all new constitutions, adopted during the last 20-30 years, include provisions on SAIs. In the case of many older constitutions, such provisions were added, where necessary. In spite of this, in European

⁴⁴ On 22 December 2011, the 66th United Nations (UN) General Assembly adopted Resolution A/66/209, "Promoting the efficiency, accountability, effectiveness and transparency of public administration by strengthening Supreme Audit Institutions", in which it encourages Member States to comply with the rules set out in the Lima Declaration. The document recognises an important role of SAIs in promoting the efficiency, accountability, effectiveness and transparency of public administration and emphasises that SAIs may fulfil their tasks objectively and effectively only when they remain independent from the unit subject to inspection and they are protected from external influences.

countries, there are still no regulations concerning SAIs in the constitutions of Denmark, Iceland⁴⁵, Macedonia, Sweden, Switzerland and the UK.⁴⁶

Apart from that, a significant issue is to regulate, in the constitution, the most important matters regarding a Supreme Audit Institution. This requirement is met in various ways. For example, an analysis of the constitutions of certain EU Member States indicates that:

- relations between the SAI and the parliament as well as the degree and guarantees of its independence are contained in the Constitutions of: Austria, Greece, the Netherlands, Ireland, Poland, Portugal; and partially – Belgium, Spain; and to some extent – France, Luxembourg, Germany and Italy;
- the issue of presenting audit reports is regulated in the Constitutions of: Austria, Ireland, the Netherlands, Poland and Spain; and partially – Germany, Greece, Italy, Luxembourg and Portugal;
- essential audit authorisations are regulated by the Constitutions of: Austria, Belgium, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal and Spain.⁴⁷

6. Granting the government a vote of acceptance for the execution of the state budget

6.1. Depending on the general construction of the state system, in individual countries there are different forms of *ex post* examination and, sometimes, of the approval of the implementation of the state budget. Those mechanisms should be perceived as means of parliamentary control over the government: *ex post* scrutiny of the budget allows parliaments to

⁴⁵ The new draft Constitution of Iceland, drawn up in 2011, included an article on a SAI. See a proposal for a new constitution for the Republic of Iceland delivered to the Althing by the Constitutional Council <http://stjornarskrarfelagid.is/?page_id=2619>.

⁴⁶ Although Great Britain formally has no Constitution, particularly important Acts are traditionally treated as components of the material Constitutional Law, which traditionally is viewed as more stable. The collection of Constitutional Laws, nevertheless, does not include the 1866, 1921, and 1983 Acts which establish the position of Comptroller and Auditor General.

⁴⁷ See also J. Mazur: 'Legal Status of the Supreme Audit Institution: Application of International Standards vs. National Traditions' in *Diaphaneia & Anexartesia Ston Elegkho Toy Demosioy Khrematos. Timetikos tomos gia ta 170 khronia toy Elegktikoy Synedrioy*, Athena – Komotene 2004, pp. 559-582.

hold the executive accountable for the use of public resources and promote improvements in the management of the resources. This also creates favourable conditions for the transparency of the government's activity.

In a parliamentary system, the scope of auditing the execution of the state budget typically involves an examination of the public-sector accounts for reliability, accuracy, completeness and conformity with applicable rules/law as well as an assessment of the extent to which the budget was used for the purposes indicated when the budget was adopted. Many parliaments strive for combining the auditing of accounts with the evaluation of the effectiveness and efficiency of public spending, i.e. whether it delivered value for money and achieved the intended objectives. Those auditing mechanisms should contribute not only to the detection of irregularities in the execution of the state budget, but also to the improvement of the functioning of the state bodies in the future. Unlike other control arrangements which are oriented at selected (sometimes broad) areas of the government's activity, the essence of the examination of the implementation of the state budget is – or at least could be – the comprehensive evaluation of the fiscal policy of the state.

6.2. In many countries, *ex post* budgetary scrutiny also involves approval of the implementation of the budget, through approval of the accounts and/or the granting of discharge. The advantage of such a mechanism is that the assessment comes by force of law and therefore it is on a regular basis (once a year) and independently from the wish of a parliamentary majority.

The approval of the accounts and/or the granting of discharge may have different legal consequences. Putting it simply, we could assume that the positive outcome of the voting means that the parliament generally approves the execution of the state budget, it means it does not find any substantial irregularities. Under some state systems, failure to discharge involves the government's resignation, but this must result from a clear legal provision.⁴⁸ In case of no establishment of such effect, the failure to discharge may be examined only on a political or moral level.

⁴⁸ Such a solution – the government's obligation to hand in its resignation in the case of failing to obtain discharge – was introduced by the Polish Constitutional Act of 1992 on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government (valid till 16 October 1997).

6.3. The above solutions concerning the vote of acceptance for the execution of the state budget are included in the constitutions of many countries, e.g. Belgium⁴⁹, Denmark⁵⁰, Germany⁵¹, Italy⁵², Poland⁵³ and Portugal⁵⁴. In other countries the approval of the accounts is regulated in ordinary laws.

⁴⁹ Article 174 of the Constitution of Belgium of 1831: “Each year, the House of Representatives passes the law that settles the final accounts and approves the budget. However, the House of Representatives and the Senate fix, each for itself, their respective operating allowances annually. All State receipts and expenditure must be included in the budget and in the accounts” (quoted from the English translation available at: <https://s3.amazonaws.com/landesa_production/resource/2657/Belgium_Constitution_2012.pdf?AWSAccessKeyId=AKIAICR3ICCC22CMP7DPA&Expires=1434992353&Signature=o9XdPjO3SJYYydTPL-Ca4Uligdc%3D>).

⁵⁰ § 47 of the Constitution of Denmark of 1953: “(1) The Public Accounts shall be submitted to the Folketing not later than six months after the expiration of the fiscal year. (2) The Folketing shall elect a number of auditors. Such auditors shall examine the annual Public Accounts and ensure that all the revenues of the State have been duly entered therein, and that no expenditure has been defrayed unless provided for by the Finance Act or some other Appropriation Act. The auditors shall be entitled to demand all necessary information, and shall have right of access to all necessary documents. Rules providing for the number of auditors and their duties shall be laid down by statute. (3) The Public Accounts, together with the Auditors’ Report, shall be submitted to the Folketing for its decision” (quoted from the English translation available at: <http://www.wipo.int/wipolex/en/text.jsp?file_id=341212>).

⁵¹ Article 114(1) of the Basic Law of Germany of 1949: “For the purpose of discharging the Federal Government, the Federal Minister of Finance shall submit annually to the Bundestag and to the Bundesrat an account of all revenues and expenditures as well as of assets and debts during the preceding fiscal year” (quoted from the English translation available at: <<https://www.btg-bestellservice.de/pdf/80201000.pdf>>).

⁵² Article 81(4) of the Constitution of Italy of 1947: “Each year the Houses shall pass a law approving the budget and the accounts submitted by the Government” (quoted from the English translation available at: <http://www.servat.unibe.ch/icl/it00000_.html>).

⁵³ Article 226 of the Constitution of Poland of 1997: “(1) The Council of Ministers, within the 5-month period following the end of the fiscal year, shall present to the Sejm a report on the implementation of the Budget together with information on the condition of the State debt. (2) Within 90 days following receipt of the report, the Sejm shall consider the report presented to it, and, after seeking the opinion of the Supreme Audit Office, shall pass a resolution on whether to grant or refuse to grant approval of the financial accounts submitted by the Council of Ministers” (quoted from the English translation available at: <<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>>).

⁵⁴ Article 107 of the Constitution of Portugal of 1976: “The Budget’s execution shall be scrutinised by the Audit Court and the Assembly of the Republic. Following receipt of an opinion issued by the Audit Court, the Assembly of the Republic shall consider the General State Accounts, including the social security accounts, and shall put them to the vote” (quoted from the English translation available at: <http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf>).

IV. Reflections

The legal constructions presented above do not exhaust mechanisms that may serve the purpose of establishing a rational fiscal policy and settling its execution. But even this partial presentation enables me to suggest a few theses which may be subject to discussion during the workshop:

- The current financial crisis may change opinions on the role of the state in the economy. Perhaps we should agree with the opinion that the idea of the state as the “night guard” was negatively verified. It appears that the state should not only care for the legal order but it should also be a coordinator of activities in the economic-social sphere. This does not mean substituting the market mechanism but supplementing it. Therefore, we need adequate legal solutions, including constitutional ones;
- The financial crisis confirmed parliaments’ difficulties in taking on the role provided for them by constitutions; in the management of the crisis, the parliament’s role was largely confined to a *post hoc* scrutiniser rather than an active “real-time” participant. Particularly strange were situations when the parliament was used simply to validate decisions already made, even when a swift decision by the parliament was possible;⁵⁵
- It appears that the financial crisis stimulates a process of adopting similar constitutional regulations in different countries;
- Although it seems that no constitution uses such a term, the key constitutional notion may be ‘accountability’. The most concise definition of accountability would be: “the obligation to explain and justify conduct”.⁵⁶ In other words, accountability denotes a relationship between a person entrusted with a particular task or certain powers or resources, on the one hand, and the ‘principal’ on

⁵⁵ J. Black ‘Managing the Financial Crisis – The Constitutional Dimension’ (2010) LSE Law, Society and Economy Working Papers 12/2010, 30 <<http://ssrn.com/abstract=1619784>> .

⁵⁶ C. Pollitt: *The Essential Public Manager* (Open University Press/McGraw-Hill 2003), 89. See also M. Bovens: ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13(4) *European Law Journal*, 447-468; C. Harlow: *Accountability in the European Union* (OUP 2002); M. Busuioac: ‘European Agencies: Law and Practices of Accountability’ (2009) 15(5) *European Law Journal*, 599-615.

whose behalf the task is undertaken, on the other. A duty to be accountable can be discharged in different ways, but all accountability mechanisms operate according to the principles of “transparency”, “answerability” and “controllability”;⁵⁷

- It seems that present constitutional changes may induce to broaden the scope of the provisions of constitutions, since new areas may require a bit more casuistic regulation (it is impossible – as in the case of classic constitutional areas – to refer to established rules because there are still no such rules – they are under development).

Warsaw, 29 April 2014

⁵⁷ Definition is at the website of “U4 Anti-Corruption Resource Centre at the Chr. Michelsen Institute” <<http://www.u4.no/glossary>>.

THE SEPARATION VERSUS THE COOPERATION OF POWERS IN THE CONTEMPORARY DEMOCRATIC STATE

Abstract: In this paper, the authors will consider relationships between the two concepts: the separation and the cooperation of powers. At the beginning of the article various approaches to the doctrine of the separation of powers will be presented. The authors will argue that the understanding of this term must undoubtedly be reinterpreted. This is not only because the system of state organs goes beyond the classical threefold division but also due to a number of interactions emerging between state authorities. The authors will express the conviction that the concept of cooperation includes many elements of 'positive' influences involving a wide scope of instruments which lead to the participation of one organ in the activity of others as well as to the inspiration of one another. These cooperative instruments constitute an additional mechanism (apart from the checks and balances system) which enables to correct the mere separation.

In this paper, the authors will consider relationships between the two concepts: the separation and the cooperation of powers.

The notion of 'separation of powers' (*division of powers*) is defined in various ways in the scholarship and disputes on how it should be understood have continued. Among the definitions, M. J. C. Vile formulated a definition of the so-called 'pure' theory of the division of powers.³ It must be noted that in Vile's monograph it is a notion owing to which it is possible to follow the genesis of the theory.⁴ This 'pure theory' means

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³ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Indianapolis 1998) 14.

⁴ P. Mikuli, *Zasada podziału władz a ustrój brytyjski* (Warszawa 2006) 9 ff.

that, in order to keep political freedom, it is necessary to separate the state apparatus into the legislature, the executive and the judiciary, with each of these having a separate state function. At the same time, each of these branches of government must be restricted to the performance of its own function and it may not be authorised to interfere with the function of any other. This concept comprises the rule that no person may be a member of more than one branch of government. It is important to assign each group of state authorities mostly its own legal area of operation with only a limited possibility to interfere in the activity of the other groups.

Apart from the 'pure' theory of the separation of powers, there exists the theory of checks, which is also called the checks and balances system. It is rather a technical doctrine and it is used not only in the theories of the division of powers but also in the mixed system theory and the balance system.⁵ If we choose to adhere only to the 'pure' theory of the separation of powers and use the historical criterion, the combination of this 'pure' theory about the division with the system of checks will be regarded as an obvious distortion. In general, it can be said that the checks system means partial separation of functions, which allows each state authority to have partial control over the other authorities by means of the assigned legal instruments.

As a result of the combination of the 'pure' theory of the division and the checks system, the academic literature sometimes mentions the 'partial' theory of division after Vile.⁶ In such an approach, there is no strict separation of functions between the three branches of government, but there exists a set of rules and principles which protect against the concentration of powers in the hands of just one state authority.⁷ In this way, for example, in the United States this partial separation of functions is supplemented by a system of checks and balances.

In turn, the theory of mixed government (*status mixtus*) postulates the assurance of social and political balance to the state by mixing three forms of government – monarchy, aristocracy and democracy, where the state power is shared by the monarch, the nobility and the people, and the individual state authorities mutually participate in the fulfilment

⁵ *ibid.* 10.

⁶ *ibid.* 38.

⁷ E. Barendt, 'Separation of Powers and Constitutional Government' (1995) Public Law 609.

of their functions.⁸ The mixed government theory first appeared in antiquity in the works of Polybius and Aristotle, among others. The mixed government system did not provide for each state authority to be limited to the performance of competences of one kind of power. In this theory, state authorities were supposed to represent class interests, and not separate functions, such as legislation or execution.

By contrast, the theory of balanced constitution⁹ should be understood as a connection between the separation of powers and mixed government theories. In this system, in order to keep the social and political balance, the state power (especially the legislative function) is divided among the monarch, the nobility and the people, with the simultaneous, partial division of powers in the functional and organisational aspect together with a system of checks.¹⁰

The balance between the main social forces was the basis of the mixed government system and the balanced government system. Therefore, in both cases, the 'social separation of powers' was the most important. The two latter concepts for obvious reasons have a historical significance and cannot be related to the contemporary state; however, the social aspects of the separation of powers have significance in the description of the contemporary state mechanism. In this context, one may point to the political division of influences between the ruling party and the opposition. This kind of division may, to some extent, compensate the rapprochement of legislative and executive organs, which is characteristic for the parliamentary system of government. The ruling party, or a coalition, focuses on performing the legislative function by translating their political programme into legal acts, while the opposition concentrates on performing the control function upon the government.¹¹

Returning to the contemporary doctrine of the separation of powers, it must be remembered, however, that the system of checks also has its specificity and it can be understood in various ways. The separation of powers

⁸ R.M. Małajny, *Trzy teorie podzielonej władzy* (Warszawa 2001) 13.

⁹ M.C.J. Vile (n. 3) 58ff.

¹⁰ R.M. Małajny (n. 8) 14-15.

¹¹ This may be observed, for instance, in the United Kingdom, where the political division of influences within the state is strengthened by the system of two dominating parties.

doctrine began to diverge from its rigorous prototype as a result of introducing elements of mutual connections between state organs. Following the diversity of doctrines, the constitutional content of the principle of the separation of powers has been constructed in a variety of ways with the differences hinging on the specificity of the constitutional system.¹²

We are convinced that today it is absolutely necessary to introduce certain changes in the method of expressing and interpreting the idea of separation, due to the complexity of the contemporary system of various state authorities. Their operations do not fall within the traditional three-plane structure and such a standpoint is widely recognised by constitutional scholars.¹³ We especially mean the creation of specific law-protection bodies which cannot be regarded as judicial institutions, as well as many administrative agencies not subordinated, at least directly, to the government. In particular, a proliferation of the latter constitutes a characteristic feature of the contemporary state. These subjects possess mixed competencies – legislative, distributive-concessional and quasi-judicial. Their existence is sometimes reconciled with the separation of powers formula by stating that not every state institution must be qualified in the framework of this constitutional principle.

At the same time, we are of the opinion that the common element of the various concepts of the separation of powers is the review of the legal spheres of state operation (i.e. the functions of the state apparatus) and the discussion of the allocation of these spheres to various organs of the state. In this context, one may maintain that the modern explanations of the separation of powers principle must be based on the directive which prohibits the concentration of powers into one pair of hands, together with the exclusion of the arbitrariness of public power.¹⁴ For B. Ackerman,

¹² P. Mikuli (n. 4) 49.

¹³ See, for instance, M. Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Cheltenham-Northampton 2014) 94-113; Ch. Möllers, *The Three Branches. A Comparative Model of Separation of Powers* (Oxford 2013) 227-232.

¹⁴ See E. Carolan, *The New Separation of Powers. A Theory of Modern State*, especially ch. 5 (Oxford 2009). This author is convinced that the traditional separation of powers is incoherent and descriptively inadequate. At the same time, he argues that non-arbitrariness “organises society in such a way that the individual is normatively acknowledged, structurally advantaged and institutionally protected” (p. 205). In his concept of ‘electoral organs’ (i.e. democratically legitimised ones), the organs promote first of all social interests and are responsible for effective social actions, while individual interests should be protected mainly by the courts.

for instance, the new dimension of the separation of powers should consist of constrained parliamentarism, where various institutions and control authorities (together with constitutional courts) are perceived as the system of checks.¹⁵ In turn, N. Barber emphasises that the separation of powers in its modern incarnation is seen as a principle of institutional ordering, i.e. “demanding that its supporters consider the point of the state and the ways in which the constitution should be structured to achieve the state’s objectives”.¹⁶

We have already explained that the functional and organisational separation of state organs is currently limited by some relations between them. However, we have to remember that not all elements of relations between divided powers create a system of checks. The system of checks requires a partial distribution of functions within the separated branches of government so that every state organ can execute a partial control upon the remaining ones by means of proper legal instruments. The reciprocal restraining of state authorities aims at a relative balance within the state apparatus. Apart from checks, elements of ‘positive’ effects occur, which are referred to as cooperation elements that allow one state authority to influence the activities of another in an ‘inspiring’ (‘initiative-based’) or an ‘arranging’ (‘organisational’) manner.¹⁷ It must be noted that systemic checks comprise immanent features of counteraction (which allows distinguishing them from the above-mentioned elements of the cooperation).

One should consider to what extent the cooperative acts of state organs entrusted with various powers undermine the concept of their separation as such. In other words, the question arises as to whether there are any limits of such cooperation, after the encroachment of which talking about the separation would not have any sense. It should therefore be emphasised that the forms of cooperation between the branches of government can be treated as exceptions to the principle of the separation of powers, as a result of which they require detailed and unambiguous precision.¹⁸

¹⁵ B. Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 633-729.

¹⁶ N. Barber, ‘The Separation of Powers and the British Constitution’ (2012) 3 *Legal Research Paper Series* 18.

¹⁷ G. Kuca, *Zasada podziału władzy w Konstytucji RP z 1997 r.* (Warszawa 2014) 114.

¹⁸ *ibid.* 115.

This is certainly the reason why it is sometimes maintained in the literature that “the postulate of the cooperation was quite unknown in the doctrine for three centuries” and that “it does not have anything to do with the idea of the division of powers, which can be expressed only by three words: separation, check, counterbalancing”.¹⁹ We are of the opinion that the cooperation between the divided powers has several advantages to which some authors rightly refer:²⁰

- a) it reduces the side effects resulting from the separation of powers;
- b) it prevents competition between the powers;
- c) it ensures proper operation of the powers;
- d) it excludes the possibility of imposing views and ensures participation in the decision-making process.²¹

In this context, it seemed entirely rational for the Polish Constitutional Tribunal to remark that cooperation between the authorities of the Republic of Poland implies the obligations of: “mutual respect for the constitutional tasks and competences of state authorities, moreover – respect for the dignity of offices and their holders, mutual loyalty, acting in good faith, informing each other about initiatives, readiness for cooperation and arrangements, compliance with them and the diligent fulfilment thereof”.²²

The cooperation of powers should also be understood as reference to certain subjective attitudes of persons acting within particular state authorities.²³ Yet, the idea of the cooperation of powers may not be understood

¹⁹ A. Pułło, ‘Zasada podziału i równoważenia władz (Podstawowe dylematy debaty konstytucyjnej)’ (1998) III Gdańskie Studia Prawnicze 40 (the authors’ translation of the quotes).

²⁰ G. Kuca (n. 17) 116 and the Polish literature quoted there.

²¹ Some authors in Poland even warn against the limitation or elimination of cooperation between the different branches of government, stating that its lack might pose a risk of paralysing the state machine (R.M. Małajny, ‘Idea rozdziału władzy państwowej i jej interpretacje’ (2009) 1 Przegląd Sejmowy 104) or undermining the parliamentary system (J. Szymanek, *Arbitraż polityczny głowy państwa* (Warszawa 2009) 96).

²² The decision of the Polish Constitutional Tribunal of 20 May 2009 (no. Kpt 2/08), the Official Gazette of the Republic of Poland – Monitor Polski 2009, no. 32, item 478 (the authors’ translation of the quote).

²³ P. Sarnecki, ‘Funkcje i struktura parlamentu według nowej Konstytucji’ (1997) 11-12 Państwo i Prawo 24-35.

as an absolute obligation to take actions aimed at ‘making approved decisions’ or ‘reaching an agreement’ by cooperating state authorities.²⁴

As we have mentioned earlier, the cooperation is an exception to the principle of the separation of powers and requires an accurate specification. The cooperation shapes relations between state authorities assigned to one branch of government as well as relations between state authorities belonging to different branches. The cooperation is also universal, as it pertains to the functional aspect of ‘powers’ (i.e. functions they imply) and the organisational aspect of the ‘powers’, i.e. state authorities that exercise the functions (including even those situated outside the division). In this context, it should be noted that in constitutional texts the cooperation occurs relatively rarely in the construction of the separation of powers as such, but it does constitute a wider formula. Therefore, constitution-makers seem to prefer expressing this notion in preambles to constitutions,²⁵ giving the cooperation a more general dimension, and not limiting it only to relations between the three classical, separated kinds of powers.²⁶

The mechanisms of the cooperation can be characterised in the following way: a) they are of varied legal character (they can be considered both in the functional and structural aspects, and sometimes also in the personal sphere; b) they require the participation (at least indirect or implied) of at least two factors – ‘players’ (the action of one authority will not constitute the cooperation but rather a functional element of the division); c) sometimes their limits (‘range’) are designated by places, that is where system checks “begin”.

They can be classified in the following ways:

1. **‘I FOR YOU’**, i.e. cooperation as in helping another authority in some activities – this kind of cooperation involves mechanisms for inspiring action (initiative) with the least interference in the scope

²⁴ Z. Witkowski, ‘Dyrektywa “współdziałania władz” jako element ograniczający życie wspólnoty państwowej w świetle Konstytucji RP z 2 kwietnia 1997 r.’ in J. Wawrzyniak, M. Laskowska (eds) *Institucje prawa konstytucyjnego w dobie integracji europejskiej* (Warszawa 2009) 143.

²⁵ See, for instance, the preambles to: the Constitution of Poland of 1997, the Constitution of Spain of 1978, the Constitution of Hungary of 2011.

²⁶ For instance, the Constitution of the Republic of Poland of 1997 also uses the term ‘cooperation’ in Art. 25(3), defining relations between the State and the Church and other religious organisations.

of the substantive activity (the essence) of a given branch of government. As an example, one can point to the rights of executive authorities to file draft statutes to parliament, submitting various motions, formulating appeals, etc.). In the context of this kind of cooperation, one can also add arranging (organisational) mechanisms – these are, for example, the competences of parliament (and – sometimes – of the head of state or the judiciary) to elect judges to a constitutional court.

2. **‘I TOGETHER WITH YOU’**, i.e. cooperation as an action of one state authority together with another state authority. This is a slightly more deeply intervening mechanism of participation, allowing for making such action dependent on the participation of another authority in either an obligatory or optional manner. An example of the obligatory cooperation is a motion of one authority to appoint an official by another state authority. For instance, in Poland, it will be a motion of the President of Poland to the *Sejm* to appoint the President of the National Bank of Poland. What constitutes an example of the optional influence is introducing amendments in the parliamentary legislative procedure by the government or by the head of state as the proposer of a legislative motion.
3. **‘I INSTEAD OF YOU’** – cooperation as an action on behalf of another authority. This implies the most considerable interference in the function of a given branch of government, but it does not have an inhibitory nature, so it cannot be treated as a part of the checks system. This may include the competences of parliaments to announce the state of war, the competences of executive authorities (usually the head of state) to issue statutory instruments, and when it comes to particular officials, it will be, for example, the replacement of the head of state by the president of the parliament or a member/members of the government. This kind of cooperation may breach the very principle of the separation of powers, therefore its use requires particular care.

Sometimes, a proper institutional designation of the roles of all the participants of the cooperation is a necessary measure, including the designation of auxiliary roles in the case when the normal functioning

of the participants of these relations is disturbed.²⁷ This is extremely important, especially in order to take action of considerable significance and where complex rules of cooperation are supposed to be applied, or when a precisely specified form of the cooperation is necessary – for instance in the ‘I instead of you’ model.

Constitutional texts include an extended catalogue of the cooperation mechanisms which concern relations between the legislature and the executive, while in relations between these two branches of government and the judiciary those mechanisms are less common. Some of the cooperation mechanisms may also be derived from the nature of the two basic types of relations between the legislature and the executive, which are, by convention, defined as the parliamentary system (the parliamentary cabinet system) and the presidential one. Nevertheless, in the latter, which consists in the limitation of the reciprocal relations between all the branches of government, there are fewer elements of the cooperation. Some of the cooperation mechanisms can also be perceived as instruments of the so-called ‘rationalisation’ of particular systems while others are inherent elements of them.

The catalogue of instruments and procedures of cooperation between the different branches of government in modern constitutions may be reconstructed in the following ways:

1. In relations between the legislature and the executive:
 - a) calling presidential elections by the Parliament (see, for instance, Art. 85(7) of the Constitution of the Ukraine) or its Speaker²⁸ (Art. 128(2) of the Constitution of Poland of 1997);
 - b) electing the head of state by the Parliament as a reserved electoral procedure (see, for instance, Amendment XIV of the US Constitution);
 - c) authorisations in statutes for executive authorities to issue regulations and orders of various kinds (see for instance: Art. 38 of the Constitution of France; Art. 92 of the Constitution of Poland);

²⁷ Z. Ziemiński, *Problemy podstawowe prawoznawstwa* (Warszawa 1980) 500.

²⁸ In the Polish context, also referred to as ‘the Marshal of the Sejm’ in the English translation of the Constitution of the Republic of Poland (<<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>>).

- d) temporary discharge of the duties of the President of the Republic by the Speaker of the Parliament (see for instance: §83 of the Constitution of Estonia; Art. 89 of the Constitution of Lithuania; Art. 131 of the Constitution of Poland; Art. 132(1) of the Constitution of Portugal; Art. 57 of the Basic Law of the Federal Republic of Germany; Art. 98(1) of the Constitution of Romania).
2. In relations between the legislature and the judiciary:
 - a) election of all or several judges to the Constitutional Court by the Parliament (see for instance: Art. 94(1) of the Basic Law of the German Federal Republic of 1949; Art. 135 of the Constitution of Italy of 1947);
 - b) election of all or several judges to the Tribunal of State by the Parliament (see, for instance, Art. 199(1) of the Constitution of Poland).
 3. In relations between the executive and the legislature:
 - a) calling parliamentary elections by the head of state (see for instance: Art. 98(1) of the Constitution of Bulgaria; Art. 63(1)(f) of the Constitution of the Czech Republic; Art. 62(b) of the Constitution of Spain; Art. 107 of the Constitution of Slovenia);
 - b) summoning the first sitting of the chambers of the Parliament (see for instance: Art. 27(2) and Art. 39(1) of the Constitution of Austria of 1920; Art. 34(1) of the Constitution of the Czech Republic; Art. 109(2) of the Constitution of Poland);
 - c) summoning an extraordinary sitting of the chambers of the Parliament by the head of state (Art. 2(3) of the Constitution of the United States of America);
 - d) legislative initiative of the state's executive authorities (Art. 84(III) of the Constitution of Brazil; Art. 41(2) of the Constitution of the Czech Republic; Art. 39 of the Constitution of France; Art. 118(1) of the Constitution of Poland);
 - e) the government's power to introduce amendments to bills considered by the Parliament (see, for instance, Art. 119(2) of the Constitution of Poland);

- f) the government's power to classify certain bills as urgent (see, for instance, Art. 123 of the Constitution of Poland);
 - g) the right of the head of state to address the chambers of the Parliament (see for instance: Art. 98(1) of the Constitution of Bulgaria; Art. 18 of the Constitution of France of 1958; Art. 87(2) of the Constitution of Italy; Art. 1323(1)(d) of the Constitution of Portugal; Art. 84(18) of the Constitution of Lithuania; Art. 144(3)(8) of the Constitution of Poland; Art. 88 of the Constitution of Romania; Art. 2(3) of the Constitution of the United States of America);
 - h) the power of the state's executive authorities (presidents or governments) to issue statutory instruments i.e. regulations having the force of statute (see for instance: § 109 of the Constitution of Estonia; Art. 82(1) of the Constitution of Spain; Art. 234 of the Constitution of Poland; Art. 198 of the Constitution of Portugal).
4. In relations between the executive and the judiciary:
- a) appointing judges by executive bodies at the request of appropriate bodies (Art. 102 of the Constitution of Finland) or at the request of judicial councils (see, for instance, Art. 179 of the Polish Constitution);
 - b) appointing the presidents of courts by the head of state (see for instance: Art. 62 (f) of the Constitution of the Czech Republic; Art. 84(11) of the Constitution of Lithuania).
5. In relations between the judiciary and the legislature:
- a) confirming the validity of parliamentary elections and challenging the validity of those elections by supreme courts or constitutional courts (see for instance: Art. 101 of the Constitution of Poland; Art. 66 of the Constitution of Bulgaria; Art. 76 of the Constitution of Slovakia);
 - b) resolving disputes over competence between central constitutional state authorities by a constitutional court (Art. 138 of the Constitution of Austria of 1920; Art. 189 of the Constitution of Poland).

6. In relations between the judiciary and the executive:

- a) confirming the validity of presidential elections by supreme courts (see, for instance, Art. 129(1) of the Constitution of Poland) or constitutional courts (see for instance: Art. 149(1)(6) of the Constitution of Bulgaria; Art. 101(9) of the Constitution of Slovakia);
- b) the power of judicial authorities to confirm the incapacity of the President of the Republic to perform his/her duties (see, for instance, Art. 131(1) of the Constitution of Poland);
- c) settling disputes between central state authorities by the Constitutional Court (see the examples above and Art. 126(1) of the Constitution of Slovakia).

The contemporary cooperation, apart from the separation and the checks system, constitutes an important element used to achieve (or approach) – as Montesquieu wrote – the political freedom of citizens.²⁹ The cooperation, like the balance of powers, does not have to undermine the substance of the separation; on the contrary, the separation must be treated as a prerequisite of the appropriate cooperation and balance. One of the *ratio legis* of the cooperation is the need to secure the minimum of reciprocal links as the powers in their functional and structural sense constitute the emanation of the sovereign power of the people.³⁰ However, it should be remembered that cooperation which is too intensive may in practice turn the organisation of the state apparatus into the supremacy of one state authority, and thus create the fusion of powers.³¹ This would contradict the fundamental principles of constitutionalism stated by the Declaration of the Rights of Man and of the Citizen of 1789, where we read that: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all”.

²⁹ *De l'Esprit des Lois* (Amsterdam, Chatelain 1749).

³⁰ P. Sarnecki, ‘Ogólna charakterystyka państwowości w Konstytucji Rzeczypospolitej Polskiej’ in P. Sarnecki (ed), *Prawo konstytucyjne RP* (Kraków 2002) 41.

³¹ This was observed in the Polish literature by R.M. Małajny (n. 8) 104.

THE THREAT OF TERRORISM AS A CONSTITUTIONAL GROUND FOR THE LIMITATION OF INDIVIDUAL RIGHTS AND FREEDOMS IN POLAND

(in view of the judgment of the Polish Constitutional Tribunal
in the case K 44/07 – *RENEGADE*)

I

In the context of the threat of terrorism as a constitutional ground for the limitation of individual rights and freedoms in Poland, probably the most striking example of a judgment that addresses the issue is the one delivered by the Constitutional Tribunal of the Republic of Poland on 30 September 2008 (case K 44/07). This judgment concerns Article 122a of the Aviation Act of 3 July 2002 – challenged by the First President of the Supreme Court – which allows shooting down a passenger aircraft in the event of a threat to state security, and where the air defence command has found that the aircraft has been used for unlawful purposes, in particular as a means of carrying out a terrorist attack (*RENEGADE*). The said regulation was questionable due to the principle of specificity of law (Article 2 of the Constitution³), as well as the principles of the protection of human dignity (Article 30⁴) and

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³ “The Republic of Poland shall be a democratic state ruled by law and shall implement the principles of social justice” (this and the subsequent quotations from the Constitution of the Republic of Poland come from the English translation of the Constitution at: <<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>>).

⁴ “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities”.

human life (Article 38⁵), both interpreted in conjunction with the principle of proportionality of limitations to rights and freedoms (Article 31(3)⁶).

The Tribunal ruled that the challenged regulation did not pass the test of constitutionality.

First of all, it was underlined that there is a problem with a common legal definition of ‘terrorism’ and that this problem is inevitably linked with the principle of proportionality of limitations to rights and freedoms. The Tribunal noted that there is no universally accepted definition of ‘terrorism’. The term is generally understood as “unjustified or unlawful use of force or violence against persons or property, aiming at intimidation or coercion of a government or civil society, and in further perspective – aiming at the promotion of particular political, social or financial objectives”.⁷ Despite those definition problems, the Tribunal concluded that the assumption that terrorism and terrorist attacks in general aim at “the deprivation of life of the greatest number of people cannot be defended”⁸, for it may not be ruled out that for instance, in a given case, the target of such an attack may be property of considerable value, transport or industrial infrastructure, cultural treasures, or that the purpose of the attack may be to take hostages. The Tribunal also deemed that under the rule of the Polish Constitution it is impossible to categorise a threat of terrorism as one of the constitutional states of emergency. Furthermore, even imposing martial law or the state of emergency is not the constitutional basis for the limitation of rights laid down in Articles 30 and 38 of the Constitution.

⁵ “The Republic of Poland shall ensure the legal protection of the life of every human being”.

⁶ “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights”.

⁷ For more information on defining ‘terrorism’, see also the following:

<http://www.sagepub.com/upm-data/51172_ch_1.pdf>; <<http://www.azdema.gov/museum/famousbattles/pdf/Terrorism%20Definitions%20072809.pdf>>; <<http://www.transnationalterrorism.eu/tekst/publications/WP3%20Del%204.pdf>>; <<https://www.law.upenn.edu/live/files/139-setty33upajintill12011pdf>>; <<http://www.start.umd.edu/gtd/downloads/Codebook.pdf>>.

⁸ Quoted from the English translation of a summary of the judgment of the Constitutional Tribunal (K 44/07), available at: <http://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_GB.pdf>.

Then the Tribunal pointed out that the constitutional right to legal protection of human life has a double meaning. The legal protection of life guaranteed by Article 38 should be interpreted firstly as a prohibition on taking lives. Secondly, this principle also creates a positive obligation of the state to ensure the protection of life. The Tribunal indicated, however, that the right to legal protection of life is not – in its nature – an absolute right and it may be limited if this is necessary to protect other constitutional rights, freedoms or values, but in every case this should also comply with the general principle of proportionality. Still, the necessity of limitation has to be interpreted, in this case, in strict compliance with the criterion of “an absolute necessity”, as it is understood in the jurisprudence of the European Court of Human Rights on the basis of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Any limitation to the legal protection of human life must, in every case, be treated as the *ultima ratio* measure. The Tribunal also underlined that not every value enumerated in Article 31(3) of the Constitution may justify such limitation. In this context, the conclusion is that legal limitations to the protection of human life are never acceptable when imposed for the purpose of protecting interests which rank lower in the constitutional hierarchy, for example property rights or public morals.

In the above-mentioned context, the Tribunal gave reasons for its judgment, which may be summarised as follows. Firstly, the norm of Article 122a of the Aviation Act was not as precise as it should be according to Article 2 of the Constitution. Secondly, the mechanism prescribed by Article 122a of the Aviation Act was not adequate for the intended goal. The Tribunal stated that because of the duration of flight over Polish territory, the response time of military forces might be in many cases too short to take and execute a correct decision. Thirdly, it was ruled that the challenged regulation was not absolutely necessary to protect other constitutional values and that the passengers of a plane flying in the airspace of a given state enjoy the right to have their lives protected by that state. According to the Constitution, there are no legal grounds for any differentiation as regards human life. The legal protection of life in its positive aspect means that both persons staying on the ground and those on board a plane must be equally protected. Fourthly, it was stressed that it would be possible

to accept the destruction of an aircraft which has been used to carry out a terrorist attack if there were only terrorists on board. This would be unacceptable in the case of a plane hijacked with passengers and crew members aboard, because they are not aggressors but victims. Finally, in the opinion of the Tribunal, it was not justifiable under the Polish Constitution to create special legal theories of “suspension” or “modification” of civil rights guarantees in times of “the war on terrorism”. In the context of the relation between the challenged regulation and Article 30 of the Constitution, the Tribunal ruled that the application of the provision of the Aviation Act would result in the “depersonalification” and “reification” of passengers and crew members.

II

The above judgment is strongly linked with the main determinants underlying the principle of a democratic state ruled by law (applicable in Poland since 1989). That is because this principle is naturally linked with a wide range of constitutionally protected human rights and freedoms. In the Polish Constitution of 1997, there are three axiological principles which constitute the fundamental basis of this protection, namely, the principle of human dignity, the principle of individual freedom and the principle of equality. Those principles are the cornerstones of the Polish constitutional system, and state authorities are obliged to respect them, also by refraining from interfering in the protected realm.

Among the aforementioned triad of principles, the most important one – in the context of the protection of all human rights in Poland – is the principle of human dignity expressed in Article 30 of the Constitution. This principle is especially related to the legal protection of human life. Respect for human life and the principle of the protection thereof are two of the most essential grounds for the implementation of the human dignity principle.⁹ Both of those values – human dignity and the protection of human life – are permanent elements of the axiology of a democratic

⁹ See: the Constitutional Tribunal’s judgment of 23 March 1999, case K 2/98.

state ruled by law, because actually the concept of such a state in general implies respect for human dignity and the protection of human life.

The problem is that there is no single commonly accepted legal definition of 'human dignity'. There is no such definition in international law or in the Polish legal system. Nevertheless, the meaning of this term may be interpreted – though sometimes in a varied manner – with respect to European cultural heritage and philosophy. The classical definition of 'human dignity' suggests that the term means human subjectivity and autonomy in relation to the state and its authorities, as well as other members of society. The dignity of the human being implies the possibility of shaping personality and controlling behaviour by means of responsibility and legal accountability.

Despite the above-mentioned legal and philosophical problems with the definition of 'human dignity', it is possible to distinguish its several characteristic elements. First of all, there is no doubt that dignity is a transcendent, inherent and inalienable value of every individual by the mere virtue of the fact that s/he is human. Human dignity is not imparted by a decision of state authorities. Secondly, the consequence of this is that dignity is an absolute value and it may never be limited by any state (legislative, executive or judicial) authorities. Thirdly, 'human dignity' is a natural, original value, and must be situated outside of the positive legal system or even above it.¹⁰

Understanding 'human dignity' in that way determines human subjectivity and a substantial role of every individual in society and in the state. It is an inalienable right and, in consequence, it is enjoyed by every individual throughout his/her life and it is not reliant on any situation. Because of that, the individual may not be reduced to the category of 'a useful or pleasant commodity'. Nor can public authorities themselves create such legal or factual situations that are indeed situations undermining 'human dignity' or even depriving individuals of it altogether.

The principle of human dignity may also be analysed as a negative aspect of public authorities' obligation. In this context, the problem for authorities is to protect the sphere of the activity of every individual, and

¹⁰ The Constitutional Tribunal's judgments: of 4 April 2001, case K 11/00; and of 5 March 2003, case K 7/01.

not to interfere therewith in a way which may be recognised as contrary to the real possibility of exercising individual autonomy. Any violation of human dignity means that the individual is simply the subject of interference by state authorities. Such a situation is not permitted in a democratic state ruled by law, because in a democratic state ruled by law, the principle of inherent and inalienable human dignity occupies the central position in the axiological system, both in the individual and social dimension. This principle is also the cornerstone of the global and European legal system of human rights protection as well as of the constitutions of most European states.

III

As mentioned above, the principle of human dignity is expressed in Article 30 of the Polish Constitution of 1997, which is currently in force. According to its wording, the inherent and inalienable dignity of the person shall constitute a source of freedoms as well as human and civil rights. Human dignity shall be inviolable, and respect for and protection of that dignity shall be the obligations of public authorities.

An analysis of the wording of Article 30 allows a few fundamental points to be made, regarding the construction of the provision and functions it can be assigned as a normative principle. First and foremost, the constitutional law-making body has clearly determined the legal and natural character of human dignity, indicating that it constitutes an inherent and inalienable value. At the same time, human dignity is assigned a particularly significant function of being a source of the individual's rights and freedoms, whereby it becomes an axiological foundation for the entire constitutional order, at least as regards establishing the status of the person and the citizen.¹¹ What is particularly important is that the principle of human dignity in view of Article 30 of the Constitution is a source of all rights and freedoms, including the ones that are neither directly mentioned nor

¹¹ cf. L. Garlicki, *Komentarz do art. 30, op. cit.* 1. See also the judgments of the Constitutional Tribunal: of 27 May 2002, case K 20/01; or of 12 December 2015, case K 32/04.

specified in particular constitutional provisions.¹² Being the axiological foundation of the constitutional order, it serves as a directive norm and thereby a ground for interpreting and establishing the meaning of other constitutional terms in chapter II of the Polish Constitution of 1997.

On the other hand, the wording of Article 30 of the Constitution expresses normatively formulated human rights, which the state and its institutions are obliged to respect and protect.¹³ Human dignity is inextricably linked to subjectivity and autonomy, considered as the right to freely develop personal values, act accordingly and take responsibility for one's compliance with generally accepted norms and rules of social life. It is also understood as the benchmark of the constitutional system and a constant point of reference for building a relation between the state and the individual. Moreover, the inviolable principle of human dignity sets the limits of the state's interference in specific freedoms as well as human and civil rights. Under no circumstances may such interference lead, in consequence, to the violation of the 'inviolable' dignity of the individual, even only in subjective terms. According to the case law of the Constitutional Tribunal, the actions of public authorities may not lead to legal or actual situations in which the individual is deprived of his/her dignity.¹⁴

The principle of human dignity is strictly related to the legal protection of human life. Respect for and the protection of the right to life constitute two of the essential conditions for the realisation of the principle of human dignity.¹⁵ Both of these values are the foundation of European civilisation and they constantly determine the concept of humanism, not only

¹² The Constitutional Tribunal also draws attention to this aspect of human dignity in its judgments: of 25 February 2002, case SK 29/01; and of 7 February 2006, case SK 45/04.

¹³ In this dimension, the concept of 'human dignity' in Article 30 of the Constitution of the Republic of Poland refers to the interpretation of human dignity on the basis of the German constitutional order, which emphasises the inviolability of human dignity (Article 1(1) of the Basic Law for the Federal Republic of Germany (of 23 May 1949), which reads as follows: "*Die Würde des Menschen ist unantastbar*" ["Human dignity shall be inviolable"; quoted from the English translation by Professor Christian Tomuschat *et al.*, at: <<https://www.btg-bestell-service.de/pdf/80201000.pdf>>]).

¹⁴ Judgment of 4 April 2001, case K 11/00, *supra* n. 10.

¹⁵ cf. A. Preisner, 'Prawo do ochrony życia i do zachowania naturalnej integralności psychofizycznej człowieka' in L. Wiśniewski, *Wolności i prawa jednostki oraz ich gwarancje w praktyce* (Warszawa 2006) 134.

as to its previous aspects but also in contemporary terms. The doctrine of Polish constitutional law and related case law classify the right to life as the fundamental right of the individual which conditions the possession and realisation of other rights and freedoms. According to Article 38 of the Polish Constitution, the right to life is not only about a prohibition on taking lives, but it also encompasses a prohibition on establishing institutions in ordinary legislation which would allow the state to intentionally and purposely take lives.¹⁶ The creation of legal constructions with either a statutory or broad interpretation that would evaluate human life according to, for instance, quantitative criteria or the chance of survival will be considered as an indication of the violation of the right to life.

The issue of the legal protection of human life has been raised repeatedly in the judicial practice of the Constitutional Tribunal with close relation to the principle of a democratic state ruled by law.¹⁷ However, unlike the principle of human dignity, the right to life is subject neither to absolutisation nor to inviolability. As regards criteria for restricting the individual's rights and freedoms in the Polish constitutional system, the case law of the Constitutional Tribunal provides premises that justify limitations to the right to life and allow deprivation of life to become legal in a few instances. The first criterion is strictly formal and requires establishing if an interest that is going to be legally violated constitutes a constitutional value. The second assessment criterion consists in determining if the legalisation of the violation is justified in view of other constitutional values. Finally, the last assessment criterion is about establishing if the legislator, having legalised the violation of a constitutional value, complied with the principle of proportionality.

The principle of proportionality regarding limitations to the exercise of the individual's constitutional rights and freedoms is expressed in Article 31(3) of the Polish Constitution of 1997. Applying a number of conditions, the constitution-maker set limits for the state's interference in the range of freedoms as well as human and civil rights. Any limitation may be imposed

¹⁶ See P. Sarnecki, 'Komentarz do art. 38' in L. Garlicki *et al.*, *Konstytucja Rzeczypospolitej Polskiej. Komentarz, tom III* (Warszawa 2003) 6.

¹⁷ For instance, the judgments: of 28 May 1997, case K 26/96; of 23 March 1999, case K 2/98; and of 8 October 2002, case K 36/00.

only by statute, and only when necessary in a democratic state for the protection of its security and public order, or to protect the natural environment, health or public morals, or the rights and freedoms of other persons. There is a particularly important element of the principle of proportionality to be found at the end of the aforementioned provision. Namely, such limitations may not violate the essence of rights and freedoms. A clear, functional link between the necessity to introduce limitations to established rights and freedoms, on the one hand, and the realisation of constitutional values included in Article 31(3) of the Constitution, on the other, is an equally important component of the principle, also demonstrated in the case law of the Constitutional Tribunal.¹⁸ Interference in the rights and freedoms of the individual must be rationally and appropriately proportional to the objectives that justify such limitation. The method applied by the legislator to impose the limitation must also be evaluated. The definition of 'necessary limitations' adopted in Article 31(3) of the Constitution explicitly states that interference in rights and freedoms in every case must be the legislator's *ultima ratio* measure. Therefore, restrictions of rights and freedoms are possible only if other methods, less burdensome from the individual's point of view, do not guarantee the realisation of values and rights mentioned in Article 31(3) of the Constitution. The restrictions can be applied only to the extent that is indispensable for the protection of the said values and rights.

Limitations to the individual's rights and freedoms based on the principle of proportionality do not apply to the principle of human dignity as a subjective right. Even the most important public interest may not be used to justify any limitation imposed by the state on human dignity, regardless of the circumstances under which the state and its institutions function. According to Article 233(1) of the Constitution of 1997, a statutory limitation to the rights and freedoms shall not include human dignity even in times of martial law and states of emergency.¹⁹ The case

¹⁸ For instance, judgments: of 24 March 2003, case P 14/01; of 6 March 2007, case SK 54/06.

¹⁹ K. Eckhardt indicates that the freedoms and rights included in this provision may be restricted in a state of emergency on the basis of Article 31(3) of the Constitution, see *Stan nadzwyczajny jako instytucja polskiego prawa konstytucyjnego* (Przemysł – Rzeszów 2012) 212. Even if the opinion is apt as regards other freedoms and rights mentioned there, this rule surely cannot be applied to human dignity due to its inviolability.

law of the Constitutional Tribunal reiterates the position that human dignity is the only right which is protected absolutely, i.e. it is not subject to the principle of proportionality.²⁰

As far as the right to life is concerned, in the light of the principle of proportionality, the right may be restricted but only under special circumstances. These limitations must be based on premises verified in a particularly restrictive manner, especially as regards evaluating the necessity to introduce them. The interpretation of the admissibility of the state's interference in the legal protection of human life must oscillate around the "absolute necessity" developed in the case law of the European Court of Human Rights. In the light of Article 2(2) of the Convention, deprivation of life is admissible only if:

it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.²¹

Any limitation to the right to life shall be considered separately and treated as the *ultima ratio* measure. If the right to life of a particular individual, or a group of people, is in conflict with the analogical rights of other people, a symmetry of values between a sacrificed and saved life will be a decisive factor in resolving each dilemma about the state's possible interference in the individual's right to life.

ABSTRACT

The purpose of this paper is to analyse the question of the threat of terrorism as a constitutional ground for the limitation of individual rights and freedoms in Poland.

²⁰ See, for instance, the judgment of 5 March 2003, case K 7/01.

²¹ The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified by the Republic of Poland by the Act of 2 October 1992.

The paper is divided into three parts. The first one concerns comments on the judgment of the Polish Constitutional Tribunal of 30 September 2008 (case K 44/07), which is probably the most striking example of a judgment that addresses the issue. This judgment concerns the permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened. In the second part, the paper mainly focuses on interpretations – both doctrinal and judicial – of Polish legal norms concerning this matter. In particular, the study involves an analysis of Polish constitutional principles that impact those interpretations, i.e. the principle of a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland), the principles of the protection of human life (Article 38) and human dignity (Article 30) as well as the principle of proportionality of limitations to rights and freedoms (Article 31(3)). Finally, in the third part of the paper, the authors are trying to draw some theoretical and practical conclusions about the analysed question of the threat of terrorism as a constitutional basis of the limitation of individual rights and freedoms in the Polish legal system.

CREATING AN IDENTITY OF THE “EUROPEAN DEMOCRATIC SOCIETY”? – MARGIN OF APPRECIATION VERSUS THE ECtHR’S DYNAMIC INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. Introduction – the paradox of identity and human rights adjudication

An important part of all European states² self-identification, and in many cases one of the factors legitimising the state, is adherence to fundamental rights. The guarantee of the state’s right to have the final say as to the application of norms which can infringe on fundamental rights is also invoked by many states as a crucial element of the preservation of their sovereignty in the context of European integration.³ However, for the Council of Europe Member States – parties to the European Convention on Human Rights (hereinafter: the Convention) – the role of the ultimate standard-setter for human rights protection is played by the European Court of Human Rights (hereinafter: the ECtHR or the Court). Its jurisprudence is often treated as a main point of reference

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² For the sake of the present analysis, I understand the notion of ‘European states’ as the Member States of the Council of Europe, which all are also parties to the European Convention on Human Rights.

³ See among others, W. Sadurski, “‘Solange, Chapter 3’: Constitutional Courts in Central Europe – Democracy – European Union’ (2008) 14(1) *European Law Journal* 1-35 and the judgments of the Polish Constitutional Tribunal of 24 November 2010, case no. K 32/09 and 16 November 2011, case no. SK 45/09.

for national jurisdictions and an impulse for changes in human rights standards enforced by national authorities.⁴ Consequently, this international body exerts an important influence on the core element of states' constitutional identity.⁵

The aim of this paper is to show in what way the ECtHR approaches the outlined paradox. In the parts 2 and 3 of the paper, two doctrines adopted in the Court's jurisprudence will be outlined: the doctrine of the margin of appreciation and the doctrine of the living instrument. It will be shown that, whereas the notion of 'the margin of appreciation' is used in order to accommodate social, cultural and legal differences between the Council of Europe Member States, the notion of 'the living instrument' (and the dynamic/evolutive interpretation of the Convention) is aimed at the unification of human rights protection standards even in the most sensitive areas of jurisprudence. Then, the examples of changes in the Court's jurisprudence will be presented. The analysis will focus on cases concerning gender equality and the rights of sexual minorities. Finally, it will be claimed that the application of the living instrument doctrine as a tool for unifying and advancing the standards of human rights protection under the Convention assumes the existence of a certain dynamic identity common to all European states. Such an identity, as a rule, does not contradict, but actually complements and influences the constitutional identities of national states.

⁴ For a recent example of a shift in national jurisprudence caused by the ECtHR's jurisprudence, see the decision of the Constitutional Court of Hungary of 19 February 2013, no. 4/2013. On the cooperation between national courts and the ECtHR, see also: L. Garlicki, 'Cooperation of courts: The role of supranational jurisdictions in Europe' (2008) 6(3&4) *International Journal of Constitutional Law* 509-522; E. Bjorge, 'National supreme courts and the development of ECHR rights' (2001) 9(1) *International Journal of Constitutional Law* 5-31 and (in the context of the Polish Constitutional Tribunal) A. Paprocka, 'Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polsce – kilka uwag na marginesie orzecznictwa Trybunału Konstytucyjnego' in M. Zubik (ed), *XV lat obowiązywania Konstytucji z 1997 r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi* (Wydawnictwo Sejmowe 2012) 76-89, and the literature cited therein.

⁵ On the notion of 'constitutional identity' in various contexts, see: M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010).

2. The doctrine of the margin of appreciation

The doctrine of the margin of appreciation was first fully formulated in the ECtHR's jurisprudence in 1976⁶ and has since then constituted one of the main tools with which the Court approaches the problem of social, cultural and legal differences between the States Parties to the Convention.⁷ It is based on the assumption that although the Convention adopts universal standards of protection, it leaves to the states certain latitude as to the way in which those standards are applied in particular social, cultural and legal circumstances. The scope of this latitude (the scope of the margin of appreciation) depends on the matter in question and is always determined in relation to the circumstances of a given case.⁸ The Court analyses in particular the nature of the right in question and of the duty incumbent on the state. The margin of appreciation is wider in the case of rights which are more diversely approached by different societies (such as the freedom of speech and its permissible limitations in cases involving the protection of morals or rights and freedoms of others, the right to respect for family life or issues of gender discrimination)⁹ and much narrower in the case

⁶ Judgment of 7 December 1976, *Handyside v. the United Kingdom*, application no. 5493/72. For more on the origins of this concept, see: I. C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna* (Wolters Kluwer 2010) 63-66.

⁷ It is worth noting that the doctrine of the margin of appreciation was widely discussed during recent work on the reform of the Convention (for instance at the Brighton Conference). As a result, the Protocol no. 15 to the Convention (adopted in Strasbourg on 16 June 2013) introduced the notion of 'the margin of appreciation' (so far used only in jurisprudence and scholarly literature) into the Preamble of the Convention. According to its Article 7, the Protocol will enter into force three months after being ratified by all the States Parties to the Convention.

⁸ L. Garlicki, 'Wartości lokalne a orzecznictwo ponadnarodowe – "kulturowy margines oceny" w orzecznictwie strasburskim' (2008) 4 *Europejski Przegląd Sądowy* 5.

⁹ For numerous examples of the application of this doctrine, see e.g.: E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 *Heidelberg Journal of International Law* 243-256; R. St. J. Macdonald, 'The Margin of Appreciation' in R. St. J. Macdonald, F. Matscher, H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 85-122; S.C. Prebensen, 'The Margin of Appreciation and Articles 9, 10 and 11 of the Convention' (1998) 19(1) *Human Rights Law Journal* 13-17; P. Lambert, 'Les restrictions à la liberté de la presse et la marge d'appréciation des Etats au sens de la jurisprudence de Strasbourg' (1996) 26 *Revue trimestrielle des droits de l'homme* 143-156; as well as A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka* (Fundacja Rozwoju Uniwersytetu Gdańskiego 2008).

of rights involving absolute prohibitions against certain actions (such as the prohibition of torture or slavery).¹⁰ It is also wider when the Court assesses the way in which the states fulfil their positive obligations in comparison with the situations in which the states are obliged not to interfere with individuals' liberty.¹¹

In relation particularly to the rights as to which a variety of approaches exists in different societies, the ECtHR often justifies the application of the margin of appreciation doctrine by the lack of a common European approach to certain matters. For instance, with regard to cases involving restrictions of free speech, the Court emphasised that:

it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject.¹²

It also pointed out that:

it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (...); even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others.¹³

The Court then decided that national authorities are in principle better placed to determine whether given interference with the freedom of speech

¹⁰ P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19(1) Human Rights Law Review 5.

¹¹ P. Mahoney, 'Marvellous Richness...', p. 5.

¹² Judgment of 24 May 1988, *Müller and Others v. Switzerland*, application no. 10737/84, para 35.

¹³ Judgment of 20 September 1994, *Otto-Preminger-Institut v. Austria*, application no. 13470/87, para 50.

is justified by the necessity to protect public morals¹⁴ or religious sensitivities of certain groups of population.¹⁵ However, the further the consensus of the European States¹⁶ develops on the understanding of the scope of a given right and its possible limitations, the narrower the margin of appreciation becomes. Nonetheless, as long as the national authorities' actions stay within the said scope, the Court would not consider them as violating the Convention.

The doctrine of the margin of appreciation is considered a useful tool for the Court to accommodate differences between the Council of Europe Member States, eliminate tensions between national and supranational jurisdictions, and assure needed flexibility to the Court's jurisprudence.¹⁷ It is, however, also widely criticised for the same features. It is claimed that the application of this doctrine erodes the universal character of human rights protection,¹⁸ undermines the certainty of the ECtHR's jurisprudence¹⁹ and allows the Court to avoid taking a stand on sensitive issues.²⁰ It may be claimed that this criticism arises partly due to the way in which the doctrine of the margin of appreciation is applied in practice. Its convincing application should be based on identifying differences be-

¹⁴ In *Müller and Others v. Switzerland*, cited above.

¹⁵ In *Otto-Preminger-Institut v. Austria*, cited above. See also: the judgment of 13 September 2005, *İ.A. v. Turkey*, application no. 42571/98, para 25. Compare: the judgment of 26 April 1979, *Sunday Times v. the United Kingdom*, application no. 6538/74 para 59, where the Court stated that the "authority and impartiality of the judiciary" is a far more objective notion with regard to the application of which more extensive European supervision corresponds to a less discretionary power of appreciation by the state.

¹⁶ For more on the notion of 'European Consensus', see section 3 of this paper.

¹⁷ E. Brems, 'The Margin of Appreciation...', pp. 312-313; R. St. J. Macdonald, 'The Margin...', p. 122.

¹⁸ E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 844. In this text, the author makes also an interesting argument to the point that the application of the margin of appreciation doctrine in cases in which the conflict between a majority and minorities is highly inappropriate as it leads to failure to protect minority rights (p. 847). See also G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009) 120ff.

¹⁹ O. Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8(7) *German Law Journal* 731-732.

²⁰ B. Pastre-Belda, 'La Cour européenne des droits de l'homme – Entre promotion de la subsidiarité et protection effective des droits' (2013) 94 *Revue trimestrielle des droits de l'homme* 270-271.

tween the states, assessing their significance and deciding whether they are sufficiently important to justify the conclusion that there is no common standard of human rights protection in a given matter. However, the current case law of the ECtHR does not always provide sufficient clarity on the way in which the Court decides on the importance of differences between the states in various fields.²¹

3. The living instrument doctrine

The living instrument doctrine was first introduced by the ECtHR in 1978, in *Tyrer v. the United Kingdom*.²² Deciding on whether the corporal punishment of juveniles constitutes inhuman treatment or punishment prohibited by Article 3 of the Convention, the Court stated that: “the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions”.²³ It then noted that in the case before it, the Court could not “but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe”.²⁴

It then established the principle of evolutive (or dynamic)²⁵ interpretation of the Convention and indicated the main source of inspiration for establishing that such an interpretation is appropriate in a given case – the development of common standards between the States Parties to the Convention. Already at this stage of the development of its jurisprudence, the ECtHR indicated that the living instrument doctrine is aimed at the unification of standards even when it is contrary to local traditions and beliefs as to the appropriate application of the Convention.²⁶

In its later jurisprudence, the Court indicated that the principle of evolutive interpretation is legitimised by the provisions of the Vienna Convention on the Law of Treaties, which provides that a treaty should be interpreted

²¹ For more, see: A. Wiśniewski, *Koncepcja marginesu oceny...*, pp. 413-433.

²² Judgment of 25 April 1978, *Tyrer v. the United Kingdom*, application no. 5856/72.

²³ *Tyrer v. the United Kingdom*, cited above, para 31.

²⁴ *ibid.*

²⁵ When referring to the European Convention on Human Rights, those notions are used interchangeably.

²⁶ See especially *Tyrer v. the United Kingdom*, cited above, para 38.

in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose, and which indicates that when interpreting the treaty, one should also take into account any subsequent practice in the application of the treaty and any relevant international norms applicable between its parties.²⁷ The Court also emphasised that the evolutive interpretation of the Convention is necessary to ensure that the protection guaranteed therein is practical and effective.²⁸

The discussed doctrine applies not only to the substantive provisions of the Convention (declaring particular rights and freedoms) but also to those provisions which govern the operation of the Convention's enforcement machinery (such as Articles 25 and 46).²⁹

The doctrine of the living instrument can be used in two types of situations.³⁰ First of all, the need to interpret the Convention in the light of present-day conditions arises when, due to institutional or technical changes, a new (not envisaged at the time when the Convention was adopted) situation occurs and the Court is faced with the need to assess whether particular provisions of the Convention are applicable to this situation and

²⁷ Article 31(1) and Article 31(3) of the Vienna Convention of 23 May 1969 on the Law of Treaties. On the application of the Vienna Convention by the ECtHR, see e.g. L. Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56 *International and Comparative Law Quarterly* 217-232.

²⁸ See e.g. the judgment of 28 May 2002, *Stafford v. the United Kingdom*, application no. 46295/99, para 68. For more on the "practical and effective" doctrine, see: A. Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5(1) *Human Rights Law Review* 72-78.

²⁹ Judgment of 23 March 1995, *Loizidou v. Turkey (preliminary objections)*, application no. 15318/89, para 71. See also the judgment of 4 February 2005, *Mamatkulov and Askarov v. Turkey*, applications nos. 46827/99 and 46951/99, para 121 – in which the Court applied the doctrine of the living instrument to the binding force of interim measures issued under Rule 39 of the Rules of Court. However, the cases of its application to determine the scope of and possible limitations to rights are much more frequent (for numerous examples, see: A. Mowbray, 'The Creativity...', pp. 60-72).

³⁰ R. Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights', (1999) 42 *German Yearbook of International Law* 20.

with what effect.³¹ Secondly, the doctrine of the living instrument is used when the ECtHR is confronted with the type of situations which occurred also at the time of the adoption of the Convention or even were assessed in the Court's previous judgments, but the Court finds it appropriate to revise its previous opinion because of the social, cultural or legal changes that have taken place since then.³² In further parts of this paper, the latter type of situations will be analysed, as those situations are of crucial importance for the development of jurisprudence and the unification of standards binding on the states.

The application of the living instrument doctrine, resulting in the change of approach towards a certain problem, requires establishing that a significant development has occurred as to its social, cultural or legal context. This raises the question of methods that should be applied by the ECtHR to decide when to resort to the evolutive interpretation of the Convention. Although the Court incidentally mentions social and cultural changes which took place in the approach to certain social issues, such as marriage or homosexuality,³³ it does not, as a rule, refer to social or scientific studies,³⁴ but focuses mainly on a comparative analysis of the legislation

³¹ For instance, the creation of the European Union and the institutions thereof necessitated the change in the Court's approach towards the definition of bodies of power falling within the scope of the Convention (see the judgment of 18 February 1999, *Matthews v. the United Kingdom*, application no. 24833/94, para 39). An analogous situation can take place when new technical means are employed to enjoy or limit the rights guaranteed by the Convention (see e.g. the judgment of 28 March 1990, *Groppera Radio AG and Others v. Switzerland*, application no. 10890/84, para 60).

³² For instance, the shift of social attitudes towards the family and the respect for private life, followed by the relevant changes in domestic legislations, can persuade the Court to revise its jurisprudence on the content and possible limitations of the rights associated with private and family life. (see jurisprudence analysed in the next section of this paper). Similarly, a change in the approach of the states and international bodies to the problem of conscientious objectors resulted in deciding – contrary to the previous opinion of the European Commission on Human Rights – that the refusal to serve in the army falls within the scope of Article 9 of the Convention (judgment of 7 July 2011, *Bayatyan v. Armenia*, application no. 23459/03, para 41).

³³ See e.g. the judgment of 24 June 2010, *Schalk and Kopf v. Austria*, application no. 30141/04, paras 52 and 93.

³⁴ For an exception to this rule, see: the judgment of 11 July 2002, *Goodwin v. the United Kingdom*, application no. 28957/95, para 81.

of the Council of Europe Member States and international law.³⁵ The Court analyses changes that take place in the legal systems of the European states and developments in international law. It refers to both the adoption of international documents³⁶ and the development of the jurisprudence of other international bodies.³⁷

The analysis of the relevant legal developments is aimed at proving that in a certain domain there has emerged a European consensus³⁸ as to the required standard of protection. Such a consensus constitutes a basis for the Court to declare that the matter can no longer be left to the appreciation of the Contracting States, but becomes part of the standard required by the Convention. Contrary to the literal reading, in order to claim that the consensus has indeed emerged, the Court does not require unanimity between the states. In some cases, it is satisfied with stating that a majority of the European states have adopted certain solutions;³⁹ in others, it does not even require a simple majority of the states, but notes that the crucial element of establishing that the consensus emerges is a visible tendency towards new solutions.⁴⁰

Although the comparative method and the principle of evolutive interpretation could theoretically lead to both the heightening of the standard of human rights protection or the lowering thereof (in the case

³⁵ For more on the usage of comparative law by the ECtHR, see: Ch. J. Rozakis, 'The European Judge as Comparatist' (2005-2006) 80 *Tulane Law Review* 257-279.

³⁶ See e.g. the judgment of 13 June 1979, *Marckx v. Belgium*, application no. 6833/74, para 41.

³⁷ See e.g. *Mamatkulov and Askarov v. Turkey*, cited above, paras 40-53, and *Bayatyan v. Armenia*, cited above, para 105.

³⁸ For more on this notion, see: K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12(10) *German Law Journal* 1730-1745.

³⁹ E.g. the judgments of 9 January 2003, *L. and V. v. Austria*, applications nos. 39392/98 and 39829/98, para 47 and of 7 October 2010, *Konstantin Markin v. Russia* (Chamber), application no. 30078/09, para 49. Compare, however, the judgment of 16 December 2010, *A, B and C v. Ireland*, application no. 25579/05, paras 235-237, where the ECtHR stated that in spite of the adoption of certain solutions in a vast majority of states, they still enjoy a wide margin of appreciation. In this case, however, the Court justified this position by the exceptional sensitivity of a matter decided – the permissibility of abortion based on medical considerations.

⁴⁰ E.g. the judgment of 11 July 2002, *Goodwin v. the United Kingdom*, application no. 28957/95, para 84. This leads some authors to claim that the idea of European consensus is in fact the one of a hypothetical consensus used more as a tool to achieve evolution towards 'the moral truth' than the actual commonly accepted standard (G. Letsas, *A Theory...*, p. 79).

of the introduction of more restrictive regulations in the Contracting States or in international law), the Court clearly links the living instrument doctrine to a tendency to advance human rights protection. In *Demir and Baykara v. Turkey*, the Court noted that:

it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the *increasingly high standard* being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.⁴¹ [emphasis added]

This view corresponds with one of the goals of the Convention, expressed in its Preamble, namely “the maintenance and further realisation of human rights and fundamental freedoms”.

Moreover, as indicated above, the wording of cases employing the doctrine of the living instrument indicates that once the Court decides that certain matter became the subject of European consensus, it removes this matter from the scope of a state’s margin of appreciation. It consequently heightens the minimal standard of protection binding on the state.

4. Examples of the application of the living instrument doctrine

The way in which the living instrument doctrine is applied in order to unify human rights standards in the areas in which initially there were significant differences between the States Parties to the Convention is well illustrated by the development of the jurisprudence concerning gender discrimination and the rights of sexual minorities in the context of the protection of private and family life. Those areas are also a good example

⁴¹ Judgment of 12 November 2008, *Demir and Baykara v. Turkey*, application no. 34503/97, para 146. For more on this subject, see: H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System. An analysis of the European Court of Human Rights and the Court of Justice of the European Union*, (Intersentia, Cambridge 2011) 269-270, as well as K. Dzehtsiarou and C. O’Mahony, ‘Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court’ (2013) 44 *Columbia Human Rights Law Review* 339-340.

of socially sensitive issues in which the Court initially granted the states a considerably wide margin of appreciation, but then gradually decided that the states can no longer rely on social or cultural differences in order to justify discriminatory treatment of particular groups of population.⁴²

4.1. Legal status of transsexuals

The evolution of the Court's approach towards socially sensitive issues is well illustrated by the series of cases connected to the issue of transsexuality, namely the right of post-operative transsexuals to obtain legal recognition of their gender reassignment and – consequently – the possibility to enjoy certain rights as a person of their acquired gender (for instance: the right to marry).⁴³

In early cases – such as *Rees v. the United Kingdom*⁴⁴ and *Cossey v. the United Kingdom*⁴⁵ – the Court held that the Convention did not require the states to fully recognise gender reassignment and to allow post-operative transsexuals to marry the person of the same sex as the one indicated in their birth certificate. However, already in the *Rees* judgment, the Court noted that it was “conscious of the seriousness of the problems affecting these persons and the distress they suffer”⁴⁶ and emphasised the principle according to “which the Convention has always to be interpreted and applied in the light of current circumstances”.⁴⁷ It therefore noted that “the need for appropriate legal measures should (...) be kept under review having regard particularly to scientific and societal developments”.⁴⁸

⁴² It is worth noting that from the very early stage of the development of the living instrument doctrine, it was applied in cases concerning family status and discrimination (see e.g. *Marckx v. Belgium*, cited above, and the judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, application no. 7525/76). For more on the advancement of the ECtHR's jurisprudence related to discrimination, see: C. Danisi, ‘How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence’ (2011) 9(3-4) *International Journal of Constitutional Law* 793-807.

⁴³ For more on the problem of transsexuality in the jurisprudence of the ECtHR, see: K. Osajda, ‘Orzecznictwo ETPCz dotyczące transseksualizmu’ (2009) 5 *Europejski Przegląd Sądowy* 35-41.

⁴⁴ Judgment of 17 October 1986, *Rees v. the United Kingdom*, application no. 9532/81.

⁴⁵ Judgment of 27 September 1990, *Cossey v. the United Kingdom*, application no. 10843/84.

⁴⁶ *Rees v. the United Kingdom*, cited above, para 47.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

In *Cossey*, decided 4 years later, the Court examined whether there were reasons to change its approach to the issue. It acknowledged some legal changes, seeking to encourage the harmonisation of laws and practices in the field of gender-reassignment recognition, though it stated that there was still little common ground between the Contracting States in this area and therefore this still remained the realm in which the states enjoyed a wide margin of appreciation.⁴⁹ The Court indicated that the conclusion reached in *Rees* still remained “in line with present-day conditions”.⁵⁰ Similar reasoning was adopted in other cases decided in the 1990s.⁵¹ However, the Court repeatedly indicated successive developments of medical knowledge and social acceptance for transsexuals. In *Sheffield and Horsham*, it was stressed that although the ECtHR did not state that the violation of the Convention had occurred, the Court was dissatisfied with the lack of any legislative changes concerning the legal status of transsexuals in the United Kingdom. The Court indicated that the States Parties to the Convention should consider the necessity of the introduction of such changes.⁵²

The approach of the ECtHR changed in the judgment of the Grand Chamber in *Goodwin v. the United Kingdom*.⁵³ The Court acknowledged both the development of the scientific knowledge on transsexualism and changes in legal regulations concerning this problem in the States Parties to the Convention. It noted that there still was no consensus between the states as to the legal recognition of gender reassignment. However, it declared that it attached

less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals

⁴⁹ *Cossey v. the United Kingdom*, cited above, para 40.

⁵⁰ *ibid.*

⁵¹ Judgment of 22 April 1997, *X, Y and Z v. the United Kingdom*, application no. 21830/93, and the judgment of 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, applications nos. 22985/93 and 23390/94.

⁵² *Sheffield and Horsham v. the United Kingdom*, cited above, para 60.

⁵³ *Goodwin v. the United Kingdom*, cited above.

but of legal recognition of the new sexual identity of post-operative transsexuals.⁵⁴

The Court linked the right of every person to establish details of their identity as individual human beings to the values underlining the Convention (such as respect for human identity and human freedom) and stated that:

In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.⁵⁵

It then directly overruled its previous jurisprudence and stated that the matter did no longer fall within a Contracting State's margin of appreciation.⁵⁶ Consequently, the state's failure to recognise the status of post-operative transsexuals was held to violate the applicant's right to respect for private life (Article 8 of the Convention).

The Court considered also the right of transsexual persons to marry (Article 12 of the Convention). It noted that, since the adoption of the Convention, major changes had occurred in both the social understanding of the institution of marriage as well as the medical and scientific understanding of transsexuality. It established that, in the light of those developments, it was legitimate to claim that the refusal to grant the right to marry a person of an opposite sex (as to the one acquired as a result of gender reassignment) infringed the very essence of a person's right to marry.⁵⁷ The Court therefore stated that although the Contracting States could decide to introduce particular conditions under which a person claiming legal recognition as a transsexual would establish that gender reassignment had

⁵⁴ *Goodwin v. the United Kingdom*, cited above, para 85.

⁵⁵ *ibid.* 90.

⁵⁶ *ibid.* 93.

⁵⁷ *ibid.* 100-101.

been properly effected or could sort out formalities applicable to future marriages, it was no longer within the state's margin of appreciation to bar the transsexual from enjoying the right to marry under any circumstances.⁵⁸

4.2. Gender equality

The other strand of jurisprudence in which social changes influenced the standard of protection enforced by the ECtHR is related to gender equality. The Court analysed a number of cases concerning benefits granted to parents who decided to take a leave in order to take care of their infant. In many states, legal regulations provided that such benefits were available only to women, not to men who wished to exercise their right to parental leave.

In *Petrovic v. Austria*,⁵⁹ the ECtHR assessed a regulation which granted the right to parental leave only to women. The applicant – a father of a child born in the late 1980s – claimed that the refusal to grant parental leave allowances to men violated Article 14 (the prohibition of discrimination) read in conjunction with Article 8 of the Convention (the right to respect for family life). The Court however stated that although the advancement of the equality of the sexes is a major goal in the Member States of the Council of Europe and very weighty reasons would be needed to justify the difference in treatment, “the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law”.⁶⁰ It underlined that, at the end of the 1980s, there was no consensus as to whether parental leave allowances should be paid also to fathers and that the idea that the states should grant financial assistance to whichever parent decided to stay at home to look after the children was a relatively recent one.⁶¹

⁵⁸ *Goodwin v. the United Kingdom*, cited above, para 103. For more on this case and its background, see e.g. A. Campbell and H. Lardy, ‘Transsexuals – The ECHR in Transition?’ (2003) 53(3) Northern Ireland Legal Quarterly 209-252, and J. N. Erdman, ‘The Deficiency of Consensus in Human Rights Protection: A Case Study of Goodwin v. United Kingdom and I. v. United Kingdom’ (2003) 2(2) Journal of Law and Equality 318-347.

⁵⁹ Judgment of 28 February 1998, *Petrovic v. Austria*, application no. 20458/92.

⁶⁰ *Petrovic v. Austria*, cited above, para 38

⁶¹ *Petrovic v. Austria*, cited above, para 40. The Court directly stated also that even at the time its judgment was delivered (almost 10 years after the case was initiated, there was no common standard that would oblige the States Parties to grant parental leave allowances to fathers (para 42)).

It then held that the refusal to grant relevant benefits to the applicant did not violate the Convention.

More than a decade later, the ECtHR delivered two judgments in the case of *Konstantin Markin v. Russia* in which it clearly declared this approach outdated. Deciding on whether granting the right to parental leave only to female military personnel amounted to discrimination on the ground of sex, the Court (sitting as a Chamber) stated that:

(...) since the adoption of the judgment in the *Petrovic* case the legal situation as regards parental leave entitlements in the Contracting States has evolved. In an absolute majority of European countries the legislation now provides that parental leave may be taken by both mothers and fathers (...). In the Court's opinion, this shows that society has moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition. The Court considers that it cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (...). It follows that the respondent State can no longer rely on the absence of a common standard among the Contracting States to justify the difference in treatment between men and women as regards parental leave.⁶²

It then clearly referred to the emerging consensus between European countries as a reason to depart from the opinion expressed in its previous jurisprudence. It also very harshly criticised the reference to the traditional gender roles as a reason for the differentiation between men and women. The Court stated that:

To the extent that the difference [between men and women] was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to

⁶² Judgment of 7 October 2010, *Konstantin Markin v. Russia* (Chamber), application no. 30078/06, para 49.

amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation.⁶³

It then ruled out the possibility that the states could refer to their vision of the traditional roles of women in order to justify differences in their legal status.

The case was then referred to the Grand Chamber,⁶⁴ which agreed with the Chamber's ruling that the exclusion of male military personnel from the right to parental leave constituted a violation of the Convention (Article 14 in conjunction with Article 8).⁶⁵ It also further commented on the Court's role in the advancement of human rights and the traditional gender roles. The Court stated *inter alia* that since the Convention is a system for the protection of human rights, the Court "must (...) have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved"⁶⁶ and underlined that the advancement of gender equality is a major goal in the European states. Therefore, the Grand Chamber also clearly stated that "references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex".⁶⁷ The Grand Chamber explicitly gave preference to the European tendency towards gender equality over the social and cultural particularities of certain states.

4.3. Same-sex partnership – change in progress

The other strand of jurisprudence in which social attitudes and legal changes seem to influence the position of the ECtHR – though the impact of those changes has not yet resulted in a definite change of the standard enforced by the Court – is related to the rights of homosexuals.

⁶³ *Konstantin Markin v. Russia* (Chamber), cited above, para 58.

⁶⁴ Under Article 43 of the Convention.

⁶⁵ Judgment of 22 March 2012, *Konstantin Markin v. Russia* (Grand Chamber), application no. 30078/06.

⁶⁶ *Konstantin Markin v. Russia* (Grand Chamber), cited above, para 126.

⁶⁷ *Konstantin Markin v. Russia* (Grand Chamber), cited above, para 127. See also para 140.

In *Schalk and Kopf v. Austria*,⁶⁸ the Court examined the question whether the Convention grants the right to marry or to enter another legally recognised form of relationship to same-sex couples. The applicants – who had been living in a long-term homosexual relationship – alleged that their rights were violated, first of all, because they did not have access to marriage, and secondly, because no alternative means of legal recognition were available to them before the introduction of the Registered Partnership Act, which entered into force in 2010.

The first problem was analysed under Article 12 of the Convention (the right to marriage). The Court stated that the provision of the Convention guarantees the right to marry to “men and women” and that, at the moment of drafting the Convention, the right was clearly understood as referring only to the marriage in a traditional sense (as a union between partners of different sexes).⁶⁹ The Court noted that since the adoption of the Convention major social and legal⁷⁰ changes had occurred, but underlined that those changes did not result in a European consensus regarding same-sex marriage.⁷¹ It then stated that:

61. (...) the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.

62. In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (...) ⁷²

⁶⁸ Judgment of 24 June 2010, *Schalk and Kopf v. Austria*, application no. 30141/04.

⁶⁹ *Schalk and Kopf v. Austria*, cited above, paras 54-55.

⁷⁰ It noted especially the adoption of Article 9 of the Charter of Fundamental Rights of the European Union, in which the reference to the sex of spouses had been deliberately omitted.

⁷¹ It noted that at the moment when the judgment was delivered only 6 out of 47 States Parties to the Convention allowed same-sex marriages (*Schalk and Kopf v. Austria*, cited above, para 58).

⁷² *Schalk and Kopf v. Austria*, cited above, paras 61-62.

Although the Court did not directly refer to the doctrine of the margin of appreciation, the wording of the quoted paragraphs clearly indicated that the decision whether to allow same-sex marriage – and consequently the decision about the scope of the application of Article 12 of the Convention – was left to the appreciation of domestic authorities. It is also clear that this position was motivated by social and cultural differences between the Council of Europe Member States. Consequently, the Court decided that the lack of a possibility to enter marriage by same-sex couples does not violate Article 12 of the Convention. It also did not give any indication as to a foreseeable change in its approach.

The second problem (the right to another form of legal recognition of same-sex relationships) was analysed under Article 14 (the prohibition of discrimination) read in conjunction with Article 8 (the right to respect for private and family life) of the Convention. The Court noted that social attitudes towards same-sex couples have undergone a rapid revolution in many European states and clearly indicated that there was no longer a reason to exclude such stable relationships from the notion of ‘family life’ used in Article 8 of the Convention. The Court clearly departed from its previous jurisprudence in which it claimed that a long-term partnership between homosexuals did not fall within the scope of the right to respect for “family life” and that the states enjoy a wide margin of appreciation as to the legal recognition of such relationships and their legal consequences.⁷³ The Court noted however that the changes in the legal orders of the States Parties to the Convention were still ongoing. It stated:

⁷³ See e.g. the decision of 10 May 2001, *Mata Estevez v. Spain*, application no. 56501/00. See also the decision of the European Commission of Human Rights of 3 May 1983, *X and Y v. the United Kingdom*, application no. 9369/81. For more on the changes of jurisprudence towards homosexuals, see: S.L. Cooper, ‘Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights’ Jurisprudence on LGBT Rights’ (2011) 12(10) German Law Journal 1746-1763; G. Willems, ‘La vie familiale des homosexuels au prisme des articles 8, 12 et 14 de la Convention européenne des droits de l’homme: mariage et conjugalité, parenté et parentalité’ (2013) 93 Revue trimestrielle des droits de l’homme 65-96. On pre-2010 jurisprudence, see also: P. Johnson, “An Essentially Private Manifestation of Human Personality”: Construction of Homosexuality in the European Court of Human Rights’ (2010) 10(1) Human Rights Law Review 67-97.

The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where *States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (...)*⁷⁴ [emphasis added]

The Court therefore referred to the evolutive interpretation but noted that the current state of legal developments in the States Parties to the Convention does not allow it to declare that the lack of legal recognition of same-sex partnerships violated the Convention. The Court evoked the notion of 'the margin of appreciation', but – unlike in other cases – referred it not to the decision whether to introduce a certain legal regulation or not, but as to the timing of its introduction.

On the one hand, such reference may be explained by the circumstances of the case decided by the Court. At the moment of the delivery of the judgment in *Schalk and Kopf v. Austria*, the state had already introduced the law on same-sex partnerships, so the complaint of the applicants was related rather to the fact that the appropriate regulation had not been introduced earlier than to the lack of the existence thereof. On the other hand, however, the wording of the judgment and the strong emphasis on the ongoing changes – in both social attitudes towards same-sex couples and the legislation of the European countries – indicates that the ECtHR assumed that the standard in regard to the legal recognition of same-sex relationships changes and the States Parties to the Convention will be compelled to comply with the new standard in the foreseeable future. It may then be expected that in future cases concerning same-sex relationships, the ECtHR will examine the validity of the view adopted in *Schalk and*

⁷⁴ *Schalk and Kopf v. Austria*, cited above, para 105.

Kopf and – if the tendency indicated in this judgment is sustained – it will decide that the change in the European standard will have occurred.⁷⁵

5. Conclusions

From the very beginning of its existence, the European system for human rights protection has been based on the assumption that a certain catalogue of common values exists between the European States and that common standards within the scope of the protection of individual rights between those states can be achieved.⁷⁶ Consequently, the idea that the European States share a common identity – understood as a convergence of certain fundamental values and principles on which their legal systems are based – can be viewed as being at the very core of the Convention. It is also enhanced by reference to the notion of ‘a democratic society’ used in the text of the Convention and developed in the jurisprudence of the ECtHR.⁷⁷ Nonetheless, neither the sole recognition of the existence

⁷⁵ See also: W. Brzozowski, ‘Małżeństwa, życie rodzinne, związki osób tej samej płci – glosa do wyroku ETPCz z 24.06.2010 r. w sprawie Schalk i Kopf v. Austria’ (2011) 4 Europejski Przegląd Sądowy 45. Compare also the judgment of 7 November 2013, *Vallianatos and Others v. Greece*, applications nos. 29381/09 and 32684/09, in which the Court considered the possibility of denying homosexual couples the right to enter a legal relationship other than marriage which is available to heterosexual couples. Analysing current legal trends, the Court emphasised both the tendency to introduce same-sex partnerships and the fact that out of 19 states which introduced some kind of a legally recognised form of relationship other than marriage (e.g. a civil union or partnership), only in 2 this form was limited to heterosexual couples. According to the Court, such a restriction diverges from the European tendency and violates Article 14 in conjunction with Article 8 of the Convention. As much as the Court did not comment on the possibility of changing the approach taken in *Schalk and Kopf* as to the obligation to introduce a legal partnership, it did determine that in the case of its introduction, they would have to include also same-sex couples. Currently there are a few cases concerning the legal recognition of same-sex relationships pending before the ECtHR (see e.g. *Chapin and Charpentier v. France*, application no. 40183/07, communicated in April 2009, and *Orlandi and Others v. Italy*, application no. 26431/12 as well as others, communicated in December 2013).

⁷⁶ See: Preamble to the Convention.

⁷⁷ For instance in free speech cases, the Court consistently emphasises that such a society is characterised by pluralism, tolerance and broadmindedness (see among many others: *Handyside v. the United Kingdom*, cited above, para 49; judgment of 7 February 2012, *Axel Springer AG v. Germany*, application no. 39954/08, para 78). For more on the notion of a democratic society, see: S. Marks, ‘The European Convention on Human Rights and Its “Democratic Society”’ (1995) 66 *The British Year Book of International Law* 209.

of common values, nor the vague reference to the values of the democratic society solves the problem of delimitation between the content of the common ground between the States Parties to the Convention and their particularities rooted in different social, cultural or legal circumstances. It also does not answer the question to what extent the latter circumstances should at all influence the shape of human rights standards, which by their very nature can be regarded as universal.⁷⁸

The ECtHR does not give an abstract answer to those questions. Instead, in its jurisprudence, it creates tools to solve problems which arise in particular cases and to gradually advance standards of protection adopted towards all the states. The doctrine of the living instrument serves as such a tool. As its adoption requires establishing the existence of (or at least a tendency towards creating) the European consensus on certain issues, the discussed doctrine is aimed at a dialogue with the States Parties to the Convention.⁷⁹ However, the Court does not require unanimity between the European states in order to establish that a consensus has been reached, and this results in situations where changes of standards recognised by some states (in their internal law or by means of international agreements) can be used by the ECtHR as a reason to impose the heightening of standards on all Parties to the Convention. Such changes in the jurisprudence can be justified only by the assumption that the developments in human rights standards which occur in separate states are a part of one – common to all the states – development of the understanding of the scope and possible limitation of the rights guaranteed by the Convention. In this way, the development of jurisprudence based on the evolutive interpretation of the Convention can be considered as an element of the creation of a dynamic “European” identity common to all the states. Its content is limited to the issues of the protection of rights guaranteed by the Convention and, in this respect, it complements the constitutional identities of national states. As the development of standards at the European level should influence the states to guarantee the same level of protection at the national level, the substantive content of a European common identity should

⁷⁸ See especially G. Letsas, *A Theory ...*, *passim*.

⁷⁹ See e.g. Ch. L. Rozakis, ‘The European Judge...’, p. 270ff.

also impact the national ones. Moreover, it serves an important persuasive function which should contribute to the effectiveness of the implementation of conventional standards. In practice, however, its significance will be higher in countries which are prone to the unification and development of standards. By contrast, it can face obstacles in states in which moral convictions and legal trends oppose the implementation of standards established in the ECtHR's jurisprudence.

SECRET SURVEILLANCE, NATIONAL SECURITY AND JOURNALISTIC PRIVILEGE: IN SEARCH OF A BALANCE BETWEEN CONFLICTING VALUES IN THE AGE OF NEW TELECOMMUNICATIONS TECHNOLOGIES

1. The nature of the research problem

1.1. The purpose of this paper is to outline the problem of violations of professional secrecy that binds journalists, and in particular the confidentiality of journalistic sources of information, with regard to the use of special surveillance measures by police forces and intelligence services, especially the so-called mass surveillance measures.

1.2. The development of new technologies based on telecommunications networks and satellite communications has contributed to changes in the collecting, processing and transferring of data between different types of entities. Apart from fixed and mobile telephony – constituting the primary source of communicating information – there have also appeared electronic mail, Internet telephony (VOIP) and other Internet messengers, as well as satellite communication, which is becoming increasingly common. In practice, those forms of communication have basically replaced the traditional ones, such as letter correspondence. Nowadays, the Internet is no longer just a form of communication.² It is becoming increasingly important in the sphere of cloud computing, enabling universal and convenient access granted on demand to a shared pool of resources, including disc spaces and servers, or applications to edit texts, images and other

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² See e.g.: J. Zittrain, *The Future of the Internet and How to Stop It* (Yale University Press 2008).

multimedia.³ These solutions allow remote access to the resources stored in the cloud from anywhere in the world and from any device that has an Internet connection, without storing the data on hard/flash drives and without any physical contact with the drive.

1.3. Technological development is one of the factors that have contributed to a fundamental change in the operating model of police forces and intelligence services. The mass transfer combined with extraterritoriality of data stored in virtual space, migrating between servers located in different countries, and the possibility of editing data without leaving trace have caused police forces and intelligence services to take steps in order to keep up with the changing reality. The individual surveillance of certain persons – consisting in targeted wiretapping or the obtaining of a court order for the release of certain documents or other relevant objects, in the event of a suspicion of committing a criminal offence – has been replaced by the so-called preventive surveillance. This preventive surveillance is based on intelligence systems used for collecting, storing and analysing the content of messages transmitted via telecommunications networks, information stored on virtual discs or operations performed by applications offered by cloud computing. They operate not only to detect already committed criminal offences, such as espionage or terrorism, but mainly to identify threats and prevent their occurrence, since currently the focus has been shifted from threat detection to threat prevention.

The specificity of the functioning of individual systems for collecting and analysing data or even the mere fact of obtaining classified information is kept largely secret. In view of all the circumstances, the disclosure of surveillance would inevitably cause its ineffectiveness.⁴ In practice, the public obtains rudimentary knowledge about undertaken actions on

³ J.W. Rittinghouse, J. F. Ransome, *Cloud Computing: Implementation, Management, and Security* (CRC Press/INC 2010); S. Pearson and G. Yee (eds), *Privacy and Security for Cloud Computing* (Springer 2012).

⁴ See the judgment of the Constitutional Tribunal of Poland of 12 December 2005, K 32/04, part III, point 1.1.

the basis of laconic reports prepared by supervisory authorities. However, the public also receives additional information through the activities of whistle-blowers.⁵

It seems that the degree of misinformation of the public – even about applied forms of surveillance and related statistics – has exceeded the critical point. Not only in the countries of the former Soviet bloc, where after the World War II organised systems of surveillance were established, but also in countries with a well-established democracy, society does not agree to sacrifice its own freedom and privacy for the sake of an uncertain promise of safety. Reluctance towards the new methods of national security protection, involving interference in the private sphere, becomes more common, especially as the effectiveness of the so-called mass surveillance is criticised even by former senior members of the services who are well aware of the efficacy of such measures.⁶

1.4. Various forms of secret acquisition of information by police forces and intelligence services are provided for in legal systems all over the world. The most common forms are e.g. wiretaps and other technical means, enabling access to the content of messages exchanged by telephone and via the Internet. Typically, they are allowed by law in order to combat serious

⁵ A model example of parliamentary control over police forces and intelligence services is the reaction of the European Parliament to E. Snowden's disclosure of information on the massive collection of data by the National Security Agency (NSA) and its cooperation with Member States' agencies. As a result of Snowden's whistleblowing, the problem was examined. Therefore, the Commission on Civil Liberties, Justice and Home Affairs of the European Parliament carried out its own investigation and issued a working document of 11 December 2013 on the US and EU surveillance programmes and their impact on the fundamental rights of EU citizens. Then, on this basis, it adopted the European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)).

⁶ According to an open memorandum submitted to President Obama by Former NSA Senior Executives/Veteran Intelligence Professionals for Sanity (VIPS) on 7 January 2014, the massive collection of data does not enhance the ability to prevent future terrorist attacks; the authors stress that mass surveillance conducted by the NSA has resulted in the prevention of zero attacks and that billions of dollars have been spent on programmes which are less effective and vastly more intrusive on citizens' privacy than an in-house technology: <<http://consortiumnews.com/2014/01/07/nsa-insiders-reveal-what-went-wrong>>.

criminal offences. An approval of a court or another independent body is required for their use.⁷

For several years police forces and intelligence services have been benefiting from telecommunications data.⁸ The obligation to collect the data was imposed on enterprises providing telecommunications services in EU Member States by the Data Retention Directive 2006/24/EC,⁹ which was ruled null and void by the European Court of Justice (the ECJ).¹⁰ Generally speaking, the Directive required operators to retain certain categories of data (for identifying users and details of phone calls made and emails sent, excluding the content of those communications) for a period between six months and two years and to make them available, on request, to law enforcement authorities for the purposes of investigating, detecting and prosecuting serious crimes and acts of terrorism. On the basis of such data, it was possible to determine the flow of information within a group of communicating individuals, to reconstruct decision-making processes and even the hierarchy of criminal groups, or to finally identify which

⁷ See e.g. the following judgments of the ECtHR: 6 September 1978, *Klass and Others v. Germany*, application no. 5029/71; 2 August 1984, *Malone v. the United Kingdom*, application no. 8691/79; 24 April 1990, *Kruslin v. France*, application no. 11801/85; 25 September 2001, *P. G. and J. H. v. the United Kingdom*, application no. 44787/98; 29 June 2006, *Weber and Saravia v. Germany*, application no. 54934/00; 1 March 2007, *Heglas v. Czech Republic*, application no. 5935/02; 28 June 2007, *Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria*, application no. 62540/00; 10 February 2009, *Iordachi and Others v. Moldova*, application no. 25198/02; 2 September 2010, *Uzun v. Germany*, application no. 35623/05; 23 October 2012, *Hadzhev v. Bulgaria*, application no. 22373/04.

⁸ See F. Bignami, 'Privacy and Law Enforcement in the European Union: The Data Retention Directive' (Spring 2007) *Chicago Journal of International Law*; Duke Science, Technology & Innovation Paper No. 13, p. 233 *et seq.*; S. Stalla-Bourdillon, 'Privacy vs. Security – Are We Done Yet?' in S. Stalla-Bourdillon, J. Phillips and M. D. Ryan, *Privacy vs. Security* (Springer 2014) 59 *et seq.* On data retention in Canada, China, the UK, the US, Germany, Israel, India, Australia and Japan, see also papers published in: (2012) 2(4) *International Data Privacy Law*.

⁹ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

¹⁰ See the ECJ judgment of 8 April 2014 in the case of *Digital Rights Ireland and Seitlinger and Others*, C-293/12.

individuals communicate with each other in a particular place and time.¹¹ According to the ECJ, having regard to the growing importance of means of electronic communication, data which must be retained pursuant to that Directive give additional opportunities to national authorities for criminal prosecutions to shed light on serious crime and, in this respect, they are therefore a valuable tool for criminal investigations. Consequently, the retention of such data may be considered to be appropriate for attaining the objective pursued by that Directive. The fight against serious crime, and in particular against organised crime and terrorism, is indeed of the utmost importance, in order to ensure public security, and its effectiveness may depend, to a great extent, on the use of modern investigation techniques. However, as the ECJ stated, the Directive does not lay down any objective criteria by which the number of persons authorised to access and subsequently use retained data is limited to what is strictly necessary in the light of the objective pursued. Above all, the access of competent national authorities to the retained data is not made dependent on a prior review carried out by a court or an independent administrative body, whose decision would seek to limit access to the data, and the use thereof, to what is strictly necessary for the purpose of attaining the objective pursued, and whose intervention follows a reasoned request of those authorities, submitted within a framework of procedures for crime prevention or detection, or for criminal prosecution. Nor does the Directive impose a specific obligation on EU Member States to establish such limits. Furthermore, the period of retention is set between the minimum of 6 months and the maximum of 24 months, but it is not stated that the determination of the period must be based on objective criteria in order to ensure that it is limited to what is strictly necessary. The said Directive does not lay down clear and precise rules governing the extent of interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter of Fundamental Rights.

¹¹ See J. Xu, B. Marshall, S. Kaza, H. Chen, 'Analyzing and Visualizing Criminal Network Dynamics: A Case Study' in H. Chen et al. (eds), *Intelligence and Security Informatics* (Springer 2011); see also the judgment of the Federal Constitutional Court of Germany of 2 March 2010, 1 BvR 256/08.

Nowadays there is intelligence software for mass surveillance that enables officers to collect data from unidentified individuals and then to analyse that data in terms of programmed criteria (e.g. to select conversations or files containing tagged words from all the data by means of keywords). Programmes such as PRISM, Xkeyscore, MUSCULAR, Tempora and others¹² – which give intelligence services access to the resources of private providers of telephone or Internet services – will be discussed further below. In such cases, outstanding risks associated with the aforementioned preventive surveillance of citizens are rightly acknowledged, since such surveillance is targeted not against people suspected of illegal activity, but against anyone who uses new means of distant communication or tools for processing and storing data. Thus, it is not the act of committing a criminal offence which poses a risk that one will be subjected to surveillance, but the mere fact of using certain means of communication.

1.5. Technological development, on the one hand, and a change in the operational methodology of police forces and intelligence services, on the other, redefine the legal classification of privacy and journalistic privilege. The central problem with which legal systems are now being confronted is not the question of whether one can demand disclosure of the identity of informants from a journalist through a court order (a fundamental issue in the era of analogue communication), but rather – how the effects of interference in journalistic privilege with regard to the use of automatic tools for collecting and analysing data could be minimised. At this point, the following fundamental questions arise: When can we speak of a breach of journalistic privilege? Is downloading personal data stored in the cloud, including information subject to journalistic privilege, already a breach? Is only a direct data analysis which leads to identifying the journalist and his/her source considered to be an interference? Similar concerns are related to circumstances in which information is obtained by intelligence services. For example, the question arises of whether a breach of journalistic privilege

¹² See: Motion for a European Parliament resolution on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)), and the Report of 21 February 2014 by the Committee on Civil Liberties, Justice and Home Affairs.

will occur only after the journalist's refusal to provide the information, invoking journalistic privilege, or maybe a violation of journalistic privilege takes place whenever a given police force or intelligence service comes into possession of information generated and associated with the journalistic activity of a certain person. Finally, a further problem concerns entitlement to protection, and in particular whether that entitlement includes individuals engaged in citizen journalism (not working as professional journalists). To some extent, such dilemmas result from the shortcomings of legislative solutions implemented in the period of analogue communications. The solutions are not suitable for the mass processes of information exchange in the present age of digital communication.

1.6. Addressing all of the above-mentioned research issues is not possible at the moment. Therefore, I will only focus on three main questions. Firstly, do the existing case law of the European Court of Human Rights, based on the Convention on Human Rights and Fundamental Freedoms,¹³ as well as the case law of the Polish Constitutional Tribunal relating to journalistic privilege remain adequate for the evaluation of interference, consisting in the use of mass surveillance and new technologies? Secondly, what criteria should be taken into account in order to assess the necessity of interference in journalistic privilege caused by surveillance? Thirdly, I would like to refer to the case concerning the constitutionality of Polish provisions on the so-called operational surveillance and data retention. On 30 July 2014, the Constitutional Tribunal of Poland ruled¹⁴ that some provisions of Polish surveillance law were unconstitutional. The contested provisions *inter alia* did not sufficiently protect professional secrecy, especially in the context of lawyers, journalists or medical practitioners. For this reason, the provisions were declared inconsistent with the right to defence (Article 42(2) of the Constitution) and the freedom of expression (Article 54(1) of the Constitution).

¹³ Hereinafter referred to also as: the European Convention; the Convention.

¹⁴ See the judgment of 30 July 2014, ref. no. K 23/11 (available in the database of English translations on the website of the Polish Constitutional Tribunal: <<http://trybunal.gov.pl/en/news/judgments/>>).

2. The meaning of ‘journalistic privilege’ and the protection of the privilege in the light of the European Convention and the Polish Constitution of 1997

2.1. The use of information obtained from confidential informants is one of the most valuable tools for journalists, especially those involved in investigative journalism. By means of material submitted by informants, it becomes possible to alert the public about irregularities, fraud or criminal offences of those in power, which has remained carefully hidden. As the European Court of Human Rights (the ECtHR) explained, without such information provided by sources, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.¹⁵ Therefore, the protection of journalistic privilege from pressure exercised by the state – which would like to know the identity of informants for various reasons – is of particular importance. Hence, the protection of journalistic privilege is widely considered to be one of the cornerstones of a free press.¹⁶

The legal basis of journalistic privilege and its scope of protection under the European Convention and the Constitution of the Republic of Poland are outlined below. Neither the Convention nor the Polish Constitution *expressis verbis* stipulates journalists’ right to conceal the identity of their sources.¹⁷

A. The European Convention

2.2. The Convention does not refer directly to journalistic privilege. In its case law, the ECtHR has pointed out that the protection of the privilege

¹⁵ See the following judgments of the ECtHR: 27 March 1996, *Goodwin v. the United Kingdom*, application no. 17488/90, para 39; 20 May 1999, *Bladet Tromsø and Stensaas v. Norway*, application no. 21980/93, para 59; 25 February 2003, *Roemen and Schmit v. Luxembourg*, application no. 51772/99, para 57; 15 December 2009, *Financial Times Ltd and Others v. the United Kingdom*, application no. 821/03, para 59; 27 November 2007 *Tillack v. Belgium*, application no. 20477/05, para 53.

¹⁶ See the ECtHR judgment of 14 September 2010 in the case of *Sanoma Uitgevers B.V. v. the Netherlands*, application no. 38224/03, para 50.

¹⁷ However, such a right – as an integral element of press freedom – is clearly prescribed by Art. 38 (2)(b) of the Constitution of Portugal.

derives from Article 10(1) of the Convention.¹⁸ Hence, it is an element of the freedom of communication and dissemination of information, as well as of the freedom of the press (media freedom), embedded therein. The ECtHR's position on this issue seems to have stabilised by now. As the Court explained, the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away, depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, and must be treated with the utmost caution.¹⁹

2.2.1. Treating journalistic privilege as an element of the freedom of expression is justified, especially in the light of Article 10(1) of the Convention, which refers to the concept of 'the freedom to receive and impart information'. It seems that the concept of this freedom should be perceived not only in the positive dimension, as a possibility of sharing available information with others, but also in the negative dimension, as 'the freedom not to disclose information to other parties', or otherwise – as 'the freedom to remain silent'. The essence of journalistic privilege is the negative dimension (aspect) of the freedom of journalists²⁰ – the freedom not to disclose information to others, especially to state authorities, and a correlated right to ensure that no person obtains information against the will or without the knowledge of the person concerned. This point of view implies that journalistic privilege is a value protected under the Convention as an element of the freedom to receive and impart information. Taking this into consideration, an obligation to disclose information, as provided by law, each time implies a violation of Article 10(1) of the Convention, unless it meets the criteria of proportionality expressed in Article 10(2) of the Convention.²¹ On the other hand, journalistic privilege should be seen as a legal and ethical obligation of the journalist not to disclose the identity of his/her sources.

¹⁸ See e.g. the ECtHR judgments of: 27 November 2007, *Tillack v. Belgium*, application no. 20477/05, para 60; 16 July 2013, *Nagla v. Latvia*, application no. 73469/10, para 95.

¹⁹ See *Tillack v. Belgium*, para 65; *Nagla v. Latvia*, para 97.

²⁰ See the ECtHR judgment of 29 October 1992 in the cases of *Open Door and Dublin Well Woman v. Ireland*, nos. 14234/88 and 14235/88.

²¹ See I.C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna* (Warszawa 2010) 510 *et seq.*

Regardless of the fact that Article 10 of the Convention comprises also the freedom to disclose information on the authors of press releases or the freedom not to disclose information about the identities of journalistic sources, the protection of these values should be reviewed also in the context of other provisions, especially Article 8 of the Convention, which guarantees ‘respect for private life’ and ‘respect for correspondence’. Therefore, two of these provisions of the Convention should be seen as complementary safeguards.²²

2.2.2. Article 10 of the Convention does not only protect anonymous sources assisting the press in informing the public about matters of public interest.²³ It also guarantees the right not to disclose their identities in press material (e.g. by means of an anonymous article or an article signed with a pseudonym) forwarded in a letter to the editor.

A complex issue which has not been adequately resolved in the case law of the Strasbourg Court is whether journalistic privilege applies also to people involved in citizen journalism, in particular, bloggers and others occupied with non-profit editing of websites (such as Facebook, Twitter, etc.), where content is published in the public interest. It seems that there are no legal obstacles for non-professionals – they can benefit from the freedom of expression and invoke journalistic privilege. After all, in the light of the wording of Article 10(1) of the Convention, the freedom to impart information is not limited within the scope *ratione personae* and is vested in everyone, not just journalists. However, another issue concerns the extent of the margin of appreciation a given state has in introducing limitations to this privilege, which involve establishing a legal obligation to provide information or permitting the acquisition of information without the consent of the person concerned. In other words, to what extent can states construct the legal framework of journalistic privilege? It seems that narrowing the scope of the protection only to persons providing information on a permanent or professional basis, and as such acting as social watchdogs, should be regarded as justified. With this assumption, those

²² See the judgment of 22 November 2012 in the case of *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, application no. 39315/06, para 102.

²³ See the ECtHR decision of 8 December 2005 in the case of *Nordisk Film & TV A/S v. Denmark*, application no. 40485/02.

who only incidentally inform the public via the means of social communication could not demand the same protection as journalists. The reason for this assumption is, in particular, the need to ensure the effective protection of the values referred to in Article 10(2) of the Convention. If any person – even the one informing the public only accidentally – could invoke ‘the freedom to remain silent’ and demand legal protection, the protection of the values referred to in Article 10(2) of the Convention would, in fact, be illusory.

It is worth mentioning that the ECtHR did not hesitate to take into account the guarantees derived from Article 10(1) of the Convention, as regards the right to receive information about public affairs, in the context of social activities of non-governmental organisations. Such organisations play a similar role to the role of the media as public watchdogs and, therefore, can rely on the protection arising from Article 10(1) of the Convention, at least when it comes to access to public information.²⁴

2.2.3. The scope *ratione materiae* of the protection of journalists and their sources seems wide. It comprises not only the protection of the identity of a source (in a strict sense) but also the protection of data enabling the identification of that identity. Therefore, apart from the surname of a person, the protection also covers his/her address, voice and/or image. In the case law of the ECtHR – following the Recommendation of the Committee of Ministers of the Council of Europe²⁵ – it is assumed that when identifying information provided by a source, there should be regard for: the factual circumstances of acquiring information from a source by a journalist; the unpublished content of the information provided by a source to a journalist; and personal data of journalists and their employers, related to their professional work.

The substantive framework of the protection of journalistic privilege, expressed in the Recommendation and adopted in the case law,

²⁴ See the ECtHR judgments of: 14 April 2009, *Társaság a Szabadságjogokért v. Hungary*, application no. 37374/05, para 27; 25 June 2013, *Youth Initiative for Human Rights v. Serbia*, application no. 48135/06, para 20.

²⁵ See: Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information (adopted by the Committee of Ministers on 8 March 2000, at the 701st meeting of the Ministers’ Deputies).

if determined as a closed catalogue, would be insufficient. In the era of technological development, identifying a source is possible mostly through various analyses of the metadata of a communication process. The use of the telephone, the Internet, or other means of communication or transmission of information, always leaves an anonymous trace in the virtual reality, just like a fingerprint, enabling one to immediately identify a given person. Generally speaking, the analysis of metadata may lead to the identification of a person who created a file or persons who communicated with each other.

Taking this into consideration, it seems that in the digital era, it is necessary to redefine the scope of the protection of journalistic privilege and to include in that all data used in the process of communication, preparation, or gathering of information that would enable the identification of an informant or an author of a press release, even if such identification would require significant time and effort. Such data would comprise, *inter alia*, telecommunications data (e.g. telephone billing data, location data, and IP numbers) or metadata contained in the file source code (e.g. the address or geographical location of the place where the file was created, the data of the equipment which was used to create the file).

B. The Constitution of the Republic of Poland

2.3. In the Polish Constitution of 1997 – as well as in the European Convention – the protection of journalistic privilege is not explicitly stated. Nevertheless, this does not create an obstacle for the Polish Constitutional Tribunal to interpret the provisions of the Constitution broadly and in accordance with European standards. It is well-established in the Tribunal's case law that the normative content of the European Convention and the case law of the ECtHR may not be omitted in the process of applying the Constitution.²⁶ In fact, the standard of the protection of fundamental rights and freedoms is at least the same. The starting point for the Constitutional Tribunal is the assumption that the Convention sets out the minimal standards, and the Polish Constitution – as a normative act that is

²⁶ See the judgment of the Constitutional Tribunal of 20 November 2012, SK 3/12.

the supreme law of the Republic of Poland (Art. 8 of the Constitution) – could only set higher standards, not lower.

2.3.1. In the Polish legal system, the protection of the identities of journalistic sources derives from the freedom of the press (Art. 14) and the freedom to acquire and to disseminate information (Art. 54(1) of the Constitution), where the latter is closely related to the former.²⁷ Moreover, the said protection should be seen as related to the protection of privacy (Art. 47) and to informational self-determination (Art. 51(1) of the Constitution). This was also confirmed in the judgment of 30 July 2014 issued by the Constitutional Tribunal (ref. no. K 23/11). The Tribunal's approach regarding "the roots" of journalistic privilege is consistent with the one presented by the ECtHR.

Article 14 of the Constitution is one of the main systemic rules indicated in the first chapter of the Constitution, laying down the foundations of the legal order and legal system of the Republic of Poland. The provision reads as follows: "The Republic of Poland shall ensure freedom of the press and other means of social communication". By contrast, the freedom to acquire and to disseminate information is explicitly stated in Article 54(1) of the Constitution. This provision, included in the chapter on freedoms, rights and obligations of persons and citizens, has the following wording: "The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone".

While interpreting Article 14 and Article 54 of the Constitution, the Tribunal referred extensively to the ECtHR's assumptions as regards Article 10 of the Convention, thereby confirming significant convergences between standards on the protection of press freedom that arise from the European Convention and those derived from the Polish Constitution of 1997.²⁸

2.3.2. A special emphasis is given to the protection of information acquired, in the course of fulfilling professional duties, by persons holding

²⁷ See the judgments of the Constitutional Tribunal of: 4 April 2001, K 11/00; 30 October 2006, P 10/06.

²⁸ See the judgments of the Constitutional Tribunal of: 30 October 2006, P 10/06; 6 July 2011, P 12/09.

the so-called professions of public trust.²⁹ Apart from the profession of doctor or that of attorney, the profession of journalist is also regarded as one of public trust. Contacts between those professionals and other individuals are based on trust, not only as regards professional qualifications, but also when it comes to maintaining confidentiality. Hence, the protection of the confidentiality of “information acquired” (however, not the protection of “a person acquiring the information”) is an immanent requirement of a complex protection of trust, both in the individual and private dimension.

2.3.3. The Constitution guarantees the freedom to remain silent and the freedom not to disclose information, as elements of the freedom of expression. However, the Constitutional Tribunal does not consider journalistic privilege to be a privilege of journalists, as does the ECtHR. Journalistic privilege is not ‘a negative freedom of journalists’. On the contrary, the Tribunal has clearly pointed out that professional secrecy constitutes a legal and ethical obligation on the part of all professionals it binds, and not their privilege or right.

Therefore, from the constitutional point of view, it is acceptable to abrogate journalistic privilege, if this serves the legitimate objectives of a democratic state and is in accordance with the proportionality rule. Pursuant to Article 31(3) of the Constitution, the legitimate aims of a democratic state comprise protecting the following: national security and public order; the natural environment, health and public morals; as well as the rights and freedoms of other persons. Although Article 31(3) of the Constitution seems to be worded in a more general way than Article 10(2) of the Convention, standards for interference with journalistic privilege seem to be concurrent.

²⁹ See the judgments of the Constitutional Tribunal of: 22 November 2004, SK 64/03, part III point 3; 2 July 2007, K 41/05, part III point 7; 13 December 2011, K 33/08, part III point 6.4.

3. Surveillance and the scope of the protection of journalistic privilege

3.1. According to established case law, compelling journalists to give up their right of silence, and provide information on their sources or give access to journalistic information, interferes with journalists' freedom of expression.³⁰

3.2. The ECtHR has acknowledged that a search carried out in order to identify journalistic sources is more intrusive – from the point of view of the protection of journalistic privilege and the freedom of the press – than an official order to surrender documents or to provide information on the identities of journalistic sources.³¹ Consequently, in such a situation, a journalist is only a passive observer of a search carried out by public authorities in his/her home or workplace; whereas in the case of the judicial order, s/he could refuse to cooperate and decide not to reveal the identities of his/her sources.

In my opinion, an interference with journalistic privilege by means of secret surveillance should be recognised at least as equally intrusive as the search of a home or a workplace (or even more intrusive, from the point of view of respect for privacy and the freedom of the press). In the case of secret surveillance, journalists are not just passive observers, they do not even know about the use of secret measures or the acquisition and analysis of data that are subject to journalistic privilege.

Taking the above into consideration, requests for disclosing certain documents or the identities of journalistic sources, as well as the acquiring of such pieces of information by means of surveillance without journalists' consent, should be considered as interference with the protection granted by Article 10 of the Convention (the freedom of the press and the principle of journalistic privilege). The possibility of using these methods triggers a chilling effect not only on the right to respect for private

³⁰ See: *Goodwin v. the United Kingdom*, para 39; *Sanoma Uitgevers B.V. v. the Netherlands*, para 59; *Financial Times Ltd and Others v. the United Kingdom*, para 56.

³¹ See: *Roemen and Schmit v. Luxembourg*, para 47; *Tillack v. Belgium*, para 56; *Nagla v. Latvia*, para 95.

life and correspondence, granted under Article 8, but also on the freedom of expression and the freedom of the press, enshrined in Article 10 of the Convention.³²

3.3. Considering the importance of new technologies in the effective detection, prevention and combating of threats, it should be assumed that an absolute prohibition on using, for evidentiary purposes, information subject to journalistic privilege leads to difficulties in gathering evidence in the case of e.g. cybercrime, in the commission of which journalists may also be involved. Therefore, nowadays, the focus has been put on the establishment of appropriate procedural safeguards that would mitigate the risk of disclosing information protected by law, subject to journalistic privilege, which should remain undisclosed to functionaries of police forces and intelligence services.

3.4. As it has already been mentioned, only those who professionally or regularly provide the public with information, and might be considered as public watchdogs, may invoke journalistic privilege. A problem arises when a person under surveillance is not a journalist but a third party (e.g. the owner of a server or a computer on which a journalist's data are being stored). Analogous difficulties occur in the case of mass surveillance, which is not directly focused on revealing the identities of journalistic sources, as mentioned before.

3.4.1. The judgment in the case of *Weber and Saravia v. Germany* contains some guidance on requirements which are to be met by domestic legislation in this respect. In the judgment, the Strasbourg Court examined, *inter alia*, a breach of Article 10 of the Convention in the context of the usage of the so-called strategic monitoring with regard to a journalist. The

³² In the judgment in the case of *Weber and Saravia v. Germany* (para 144), the ECtHR held that the problem of surveillance of journalists and the disclosure of journalistic sources should rather be examined in the context of Art. 8 of the Convention, and the right to respect for private life and correspondence, which is expressed therein, than from the point of view of the freedom of expression from Art. 10 of the Convention. While in *TelegrafMedia*, the ECtHR explained that although questions raised by surveillance measures are usually considered under Art. 8 alone, in that case they were so intertwined with the Article 10 issue that the Court found it appropriate to consider the matter under Articles 8 and 10 concurrently.

applicant argued that the possibility of strategic monitoring³³ was in itself an interference with the freedom guaranteed by Article 10 of the Convention. The ECtHR held that there had been no violation of Article 10 of the Convention. The German provisions did not aim at revealing the identities of journalistic sources but at combating serious crimes. Such an interference cannot be described as “particularly serious”. In addition, there were numerous procedural safeguards ensuring the proportionality of the measures used, thus reducing the disclosure of journalistic sources to “an unavoidable minimum”.

The above-mentioned remarks lead to the conclusion that in order to evaluate whether there has been an interference with the freedom of the press that is incompatible with the Convention, it is necessary to assess if the purpose of obtaining information was to disclose journalistic sources. This reasoning is confirmed by the judgment in the case of *Telegraaf Media Nederland Landelijke Media BV and Others v. Netherlands*. The application in this case was brought by a Dutch newspaper and its two journalists. The applicants’ phones had been tapped and they had found themselves under investigation by secret services. The ECtHR held that there had been a violation of Articles 8 and 10 of the Convention. The use of secret surveillance measures against the applicants had not been ordered, nor had it been supervised by a court or an authority of comparable independence and impartiality. The applicants could only submit a complaint *ex post facto* against the usage of such measures. Such a possibility is not enough, because – in the case of revealing the identities of journalistic sources – when trust in journalists is betrayed, it cannot be restored.

3.4.2. Procedural safeguards that result in the protection of journalistic privilege – as implied by the above-mentioned Strasburg case law – must

³³ Under the Act on Restrictions on the Secrecy of Mail, Post and Telecommunications Act (also called the G10 Act): “Strategic monitoring is aimed at collecting information by intercepting telecommunications in order to identify and avert serious dangers facing the Federal Republic of Germany, such as an armed attack on its territory or the commission of international terrorist attacks and certain other serious offences. (...) In contrast, so-called individual monitoring, that is, the interception of telecommunications of specific persons, serves to avert or investigate certain grave offences which the persons monitored are suspected of planning or having committed” (para 4 of the ECtHR judgment).

include provisions on the participation of a court or an independent body. In *Sanoma Uitgevers BV v. the Netherlands*, the Strasbourg Court stated:

First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. (...) The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identities if it does not.³⁴

4. The Constitutional Tribunal's judgment of 30 July 2014

4.1. The constitutional problem in that case stemmed from different levels of interference with professional secrecy that were provided for in the Polish legal system. While in criminal proceedings – at the stage of prosecuting and trying – the legislature had guaranteed the protection of journalistic privilege, *inter alia*, by prohibitions on the use of certain material as evidence (specific evidentiary rules), it had not established similar guarantees for the procedures of secret obtaining of information in the course of pre-trial activities.

4.2. The statutory scope of the protection of journalistic privilege in Poland is as follows. According to Article 180 of the Polish Criminal Procedure Code (hereinafter: the CPC), a person bound by the obligation of professional secrecy may refuse to testify as a witness in criminal proceedings as to the circumstances which fall within the scope of this obligation. The right to refuse to testify may be exercised by the witness who is bound by the obligation of professional secrecy under provisions applicable to a particular group of professionals. In the case of journalists, that obligation arises from Article 15 of the Press Act. This protection fully

³⁴ *Sanoma Uitgevers BV v. the Netherlands*, para 90.

applies to documents held by journalists, which is determined by Article 226 of the CPC.

The statutory protection of professional secrecy is not absolute in character. The public prosecutor or the court may exempt a person from the obligation of secrecy (Art. 180 *in fine* of the CPC). Such exemption implies that there is no possibility for the witness to evade giving testimony because of the obligation of discretion.³⁵ Based on Article 226 of the CPC, that rule is also applicable to certain documents containing information protected by professional secrecy. The exemption from the obligation of professional secrecy is permissible only when it is necessary in the interest of the administration of justice, and when a given fact cannot be determined on the basis of other evidence (Art. 180(2) of the CPC). However, in the case of journalists, the legislature has also introduced an additional restriction on the admissibility of exemption from the obligation of professional secrecy, and thus, as a rule, it is absolute in character. A journalist may not be exempted from maintaining the confidentiality of data that permit the identification of authors of press material, letters to the editor, or other material of this nature, as well as the identification of persons who have provided information already published or submitted for publication, if they have invoked the right of non-disclosure of their data (Art. 180(3) of the CPC). Journalists are not entitled to rely on journalistic privilege if this information pertains to serious offences which include, among others, crimes posing a danger to the Republic of Poland (i.e. treason or espionage), the armed forces or people's lives, including terrorist crimes. In such cases, there is no effective right to remain silent and invoke journalistic privilege.

4.3. The Polish legal system does not provide for any procedural guarantees with a similar scope as those applicable in the procedure for exemption from the obligation of professional secrecy in the course of criminal proceedings, which could prevent breaches of professional secrecy by police forces and state security services. In particular, there is no subsequent judicial or prosecutorial supervision over the content of material collected

³⁵ M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym* (Warszawa 2007).

in secret. The legislature has neither excluded nor minimised the risk of police officers or functionaries of state security services becoming familiar – in the course of secret surveillance – with information which normally they would have no access to or would receive only due to an order of the court or the public prosecutor, issued in separate proceedings.

In the context of the current legal situation in Poland, the protection of journalistic privilege actually remains dependent on the manner of communication with informants. In the case of the use of a telephone or the Internet by a journalist, the scope of the said protection is significantly narrower than if the journalist talks to an informant face-to-face, and not via modern technologies of data processing.

This shows that the Polish legislator proves to be inconsistent in keeping up with technological changes, resulting from the spread of the Internet and distance communication technology. Despite introducing legislative solutions which enable police forces and state security services to use new technologies to combat threats to public security, no adequate guarantees of fundamental rights, including the freedom of expression, were established.

4.4. In the judgment of 30 July 2014, the Tribunal ruled the challenged provisions on operational surveillance – insofar as they did not provide for a guarantee that material containing information prohibited from being used as evidence should be subject to immediate, witnessed and recorded destruction, in the case where the court had not waived the requirement of professional secrecy – to be inconsistent with Article 42(2), Article 47, Article 49, Article 51(2) and Article 54(1) in conjunction with Article 31(3) of the Constitution.

In the Tribunal's opinion, the statute's aim was to ensure that procedural guarantees would be in place to eliminate unauthorised access to information by police forces and intelligence services; the said information should be safeguarded by the law, due to its content and the circumstances in which it was imparted. A certain model solution exists in the criminal procedure, as set out in Article 180(2) of the Polish Criminal Procedure Code. The said provision authorises a court to waive the requirement of professional secrecy, if this is necessary for the proper administration

of justice, whereas a given circumstance may not be determined in any other way, i.e. without compromising professional secrecy. A similar mechanism could be in place with regard to operational surveillance. At present, such a mechanism does not exist. The legislator did not provide for an obligation to verify – under the supervision of a given court – data gathered in the course of operational surveillance that may contain information subject to professional secrecy.

To sum up, the Tribunal's approach is stricter than that of the ECtHR. While the ECtHR requires independent and effective supervision over the ordering of surveillance, the Polish Tribunal requires judicial, or at least independent, review before and after the collecting of material, if such material contains information subject to professional secrecy. The court should have a power to abrogate journalistic privilege if this proves necessary.

5. Challenges for the legislator and practice

The nature of participation of a court or an independent authority in the procedure concerning the waiving of a journalist's obligation of professional secrecy is not as obvious as it seems at first glance. Namely, the question is whether permission of a court or an independent authority is, or is not, necessary for carrying out surveillance, and whether subsequently – after material has been collected – the court or the independent authority should verify the material and issue a decision abrogating journalistic privilege if the material contains information subject to journalistic privilege, or whether the *ex ante* permission for surveillance is enough as it comprises permission to abrogate the privilege.

However, despite the fact that the sole existence of independent oversight of the material collected in the course of secret surveillance has many advantages and enables a very wide scope of protection of journalistic privilege, in practice it might be unrealistic. Firstly, it is not always possible to assess, in the course of surveillance, whether collected material is subject to journalistic privilege. Secondly, one cannot lose sight of the technical limitations that may impact the actual possibility of exercising effective supervision over the material collected in the course of surveillance. This applies

mainly to telecommunications data, metadata files, as well as telephone calls and other forms of communicating information determined during untargeted surveillance. Phone numbers alone, calling lists or metadata of files – without proper IT tools and operational knowledge – are not enough to establish e.g. the identity of a source or relevant facts from a journalist's life. Therefore, it is not clear how and to what extent the court or the independent authority would assess whether the acquired material is subject to journalistic privilege and whether the abrogation of the privilege would be justified. Moreover, such records are usually massive datasets. A thorough analysis of the data and the granting of permission for the abrogation of the privilege seem almost impossible to be accomplished.

Therefore – in my opinion – in the digital era, the one and only necessary and feasible means of protecting journalistic privilege is judicial review at the stage of ordering surveillance (the first step). That is to say, permission granted by a court, or an independent authority, for the ordering of surveillance is sufficient to protect the freedom of the press. Indeed, this reasoning is confirmed by the above-cited ECtHR judgments in the cases of *Weber and Saravia* and *Telegraaf Media*.

LES DÉFIS POSÉS AUX MÉDIAS CONTEMPORAINS DANS LE DOMAINE D'INFORMATION DE L'OPINION PUBLIQUE (LES PROBLÈMES CHOISIS)

Les médias, d'une part c'est la notion populaire, d'autre part, ils ne sont pas univoques et par conséquent la définition est difficile à décrire précisément. Une chose paraît sûre : à part de la notion mentionnée, on utilise un nombre des expressions voisines ou qui se trouvent dans la sphère de la notion « média », aussi bien dans la langue courante, que dans la langue juridique. Je pense aux mots comme : la presse, les moyens de mass média, les moyens de l'information sociale, les nouveaux médias, etc.

Il paraît difficile de concentrer notre attention sur l'analyse profonde de la notion dans ce court article. Pour faire la référence au sujet, placé dans le titre, il nous faudrait plus de lieu. C'est à ce titre, je vais aborder seulement quelques problèmes de ce vaste sujet.

En rapport avec cela, j'accepterai, à l'usage de ce traité, la définition générale des médias (sans le dire à grands traits). Je comprends par cela tous les instruments, moyens et méthodes qui servent à la communication impersonnelle. En même temps il faut marquer que la communication aura le caractère public même quand l'expéditeur – au moins hypothétiquement – admettra et acceptera la réception officielle. En ce sens, on classera aux médias les textes écrits, ceux qui sont présentés traditionnellement par la radio et la télévision, aussi bien que les textes, inclus dans la presse, et ceux – inclus par quelqu'un à l'internet et des autres médias nouveaux. La lettre envoyée par la poste et les entretiens privés par téléphone ne seront pas classés aux médias. En observant les médias, du point de vue historique, il faut faire attention sur leur évolution, surtout dans les décennies dernières. Pour montrer mieux cela, il faut comprendre les médias autrement et inclure à cette notion tous les moyens qui fixent, transforment et

¹ Professeur, L'Université de L. Kozminski à Varsovie.

transmettent l'information entre les gens. On connaîtra ainsi des médias « morts », nommés aussi les médias de musée et ceux de « la découverte ». Il s'agit des anciens médias qui servaient à informer, comme : la plume de l'oie, le papyrus, le télégraphe, les cylindres du tourne-disque, etc... . Ce sont sûrement les moyens qui peuvent avoir leur usage, ayant en effet le caractère du violon d'Ingres, dans le cercle des gens peu nombreux.

Mais les connaisseurs des médias expriment leurs opinions que les médias populaires et usés en masse actuellement, comme : la radio, la télévision, la presse quotidienne, auront le même destin. Cependant, il y a des opinions contraires, qui soulignent la vivacité des médias mentionnés, malgré la compétitivité de la part des médias nouveaux, comme : CD, audio, vidéo, DVD, des jeux et la console et surtout l'internet avec ses services différents.

Il paraît que « l'histoire le montre, les médias ne disparaissent pas totalement, mais ils se transforment dans la complexité. C'est le principe de la « médiamorphose », qui était formulé par Roger Fidler en 1992 »².

La « médiamorphose » exige l'analyse complexe de l'évolution technologique des moyens de communication. On ne doit pas traiter séparément chaque forme de communication. De cette façon, on peut voir que les médias nouveaux ne se forment pas indépendamment et spontanément, mais naissent progressivement par la métamorphose des médias qui existaient avant.

C'est, peut-être pour cela, la formation des nouvelles formes de médias ne cause pas la disparition des formes plus âgées, mais leur évolution, dont le but est l'adaptation aux conditions nouvelles.

Ces considérations préliminaires pourront être sommées au sens optimiste et, dans aucun cas, il n'y a pas de danger de la chute de l'importance, ou même, la mort de différentes formes des médias (aussi celles, de masse), profétées par certains connaisseurs des médias. Il faut être plutôt conscient des changements (constants), de l'évolution des formes, des instruments et des méthodes de communication.

² Comp. Goban-Klas T., *Le futur des mass médias. Est-ce que les mass médias ont le futur dans : Le futur. Le monde – Europe – la Pologne*, no 1, 2008, p. 41.

II

Est-ce que les changements qui arrivent continuellement – d’une manière générale – dans le fonctionnement des médias n’influent pas sur la réalisation de leurs deux tâches principales :

- d’approvisionnement de l’information aux gens et aux sociétés,
- de formation des opinions publiques ?

En analysant le problème plus largement : est-ce que les médias sont et seront en état de répondre aux défis, lesquels sont créés par eux-mêmes et les mégachangements qui se passent dans le monde et qui ont le caractère politique, économique, social, idéologique et, à la fin, technologique ?

Je me rends compte que la réponse plus profonde à ces questions exigerait l’écriture d’une oeuvre plus large. Je vais signaler ici les problèmes – selon moi – les plus importants concernant les médias et le monde (qui nous entoure).

III

On ne peut pas écrire du rôle des médias et de la formation de l’opinion publique sans traiter le problème de la liberté de la parole, ou, (au sens plus large), de la liberté de l’expression, comme le fondement pour la liberté des médias.

La liberté de l’expression a pris déjà la signification importante, du point de vue de la loi, dans la deuxième moitié du XVIII^e siècle, c’est –à– dire, dès le début de la formation de la constitution moderne. Les actes de la loi au degré constitutionnel, à cette époque, règlent ce problème. L’article XI de la Déclaration des Droits de l’Homme et du Citoyen, résolue le 26 août 1789, constitue l’un des exemples premiers. Cette règle constate que « La liberté de transmettre les pensées et les opinions constitue la loi la plus précieuse de tous les droits de l’homme. Chaque citoyen possède donc la liberté de la parole, de l’écriture et de l’impression, en prenant la responsabilité pour l’abus, dans les cas déterminés par la loi. Cela vaut la peine de remarquer que cette règle (comme toute la Déclaration) est importante, non seulement du point de vue historique. La Déclaration du 1789 constituait le préambule à la Constitution française du 3 septembre

1791, ce qui a initié sa présence dans le constitutionnisme en France. La déclaration discutée actuellement constitue – comme on le sait – la partie intégrale de la Constitution de la V^e République Française.

La règle citée de la Déclaration de 1789 était la première présentation juridique de la liberté de l'expression en France. Plus tôt, ce sujet était entrepris sur le continent américain à un mois avant la proclamation de la Déclaration de l'Indépendance. A savoir, c'est le 12 juin 1776 L'Assemblée Constitutionnelle de Virginie établissait dans l'article 12 de la Déclaration des Droits : « La liberté de la presse est l'un des bastions de la liberté et ne peut jamais être limitée ; ce sont les gouvernements despotiques qui introduisent des limites ». La Constitution des États Unis déclare pareillement, mais réellement, ce n'est pas dans le texte primaire mais dans la I^e Correction, qui est entrée en vigueur le 15 décembre 1791. Elle proclame, dans la partie concernant la liberté de la parole : « Le Congrès ne peut pas établir des lois qui limitent la liberté de la parole ou de la presse ».

Les citations ci-dessus montrent que la liberté de l'expression peut être perçue d'une manière différente. La Déclaration française admet la possibilité de limiter cette liberté, mais seulement dans les cas déterminés par la loi. Les prescriptions constitutionnelles américaines octroient la dimension absolue à la liberté de la parole. Cependant on ne peut pas oublier que malgré l'entrée en vigueur de la I^e Correction, on a proclamé aussitôt les premières prescriptions qui limitaient la liberté de la parole et de la presse. On a fait cela à plusieurs reprises, surtout pendant les conflits militaires³.

En général, au début des régulations juridiques de la liberté de l'expression, ce sont en majorité des prescriptions du caractère plutôt laconique qui dominant. Le temps écoulé, quand des normes juridiques concernant la thématique mentionnée deviennent la partie indispensable des standards du pays démocratique, on parvient à l'élargissement remarquable et au précisement de ces régulations. Après la II^e guerre mondiale, la loi, déterminant la liberté de l'expression, devient incorporée aux documents internationaux du caractère universel, mais aussi local. Ces premiers documents, ce sont avant tout : La Déclaration Universelle des Droits de

³ Com. Biłgorajski A., *Les limites de la liberté de l'expression. Une étude constitutionnelle*, Varsovie, 2013, p. 19.

l'Homme et le Pacte des Droits Civiques et Politiques, qui étaient créés sous les auspices de l'Organisation des Nations Unies.

La Convention Européenne des Droits de l'Homme et des Libertés Fondamentales est l'exemple d'étendard des autres documents (régionaux). Ses résolutions sont appliquées et interprétées par le Tribunal Européen des Droits de l'Homme.

D'un côté, plusieurs constitutions se forment, peu après la IIe guerre mondiale, réglant amplement la thématique ici débattue. L'article 21 de la Constitution de la République Italienne constitue l'exemple parfait qui décrète : « Tous possèdent le droit de s'exprimer librement à l'aide de la parole, d'écriture et de tous les autres moyens de la propagation. La presse ne peut pas être soumise ni à la concession ni à la censure. La confiscation peut arriver seulement en vertu de l'acte motivé du pouvoir juridique en cas de la transgression des prescriptions, prévoyant l'indication à des personnes responsables. Dans des situations absolument inattendues, quand il n'avait pas la possibilité d'agir à temps par le pouvoir juridique, la confiscation de la presse temporelle peut être fait par les employés de la police judiciaire qui doivent avertir immédiatement le pouvoir judiciaire, jamais plus tard, que pendant 24 heures. Si le pouvoir judiciaire ne confirme pas la confiscation durant vingt-quatre heures suivantes, celle-ci sera traitée comme supprimée et privée de toutes les conséquences. La prescription constituant la norme de caractère général, peut établir que les moyens de financement de la presse périodique doivent être portés au savoir de tous. Les publications de presse, les spectacles et tous les autres événements qui s'opposent aux bonnes coutumes restent interdits. La loi détermine les moyens préventifs et qui peuvent suspendre la transgression de cette interdiction » .

Les Constitutions des autres pays qui se formaient après la Seconde guerre mondiale ne diffèrent pas excessivement de l'ampleur et de la précision des normes citées ci-dessus. On peut affirmer généralement que ces normes règlent le contenu de la liberté de l'expression d'une façon complète, la sphère des limites admissibles et des garanties élémentaires.

La lecture de la constitution montre, que la liberté de l'expression est la notion constitutionnellement traditionnelle et se trouve pratiquement dans toutes les lois principales dès le début de l'ère moderne du constitutionnalisme jusqu'à nos temps.

Cela vaut la peine de remarquer aussi que la liberté débattue se trouve aussi bien dans les constitutions des pays démocratiques que dans les pays qui ne les sont pas. Cela signifie que dans ces derniers, la liberté a le caractère fortement illusoire.

La sphère de la régulation constitutionnelle de la liberté de l'expression élargissait progressivement le contenu, comme aussi, le catalogue de ses garanties et limites.

Généralement, on peut constater que la liberté de l'expression c'est celle de la recherche, de la réception et de la propagation d'information et d'idée par tous les moyens et sans égard des frontières⁴.

IV

L'analyse du plan juridique de la liberté de l'expression peut – comme cela nous paraît – se délecter de l'optimisme. Pour que cet optimisme ait des principes plus solides, il faudrait – à mon avis – entreprendre l'essai initial de la réponse à la question concernant l'influence des processus, qu'on observe dans le monde des médias, sur la réalisation de la liberté de l'expression. Autrement dit, il s'agit de la réponse à la question si le phénomène qu'on a nommé « **la médiamorphose** » a influencé sur la liberté de l'expression ; est-ce que c'est une influence positive ou négative, ou les deux ? Enfin si « **la médiamorphose** » favorise ou menace la meilleure forme d'informer les gens et la formation de leurs attitudes et des opinions ?

Pour répondre, au moins partiellement à ces questions compliquées et difficiles, j'essaierai considérer brièvement les problèmes suivants, qu'on peut trouver dans le monde contemporain, qui ont – à mon avis – l'influence essentielle sur des questions qui nous intéressent.

- 1) **les médias et la société du risque;**
- 2) **les médias et la globalisation;**
- 3) **l'influence des médias électroniques sur la liberté de l'expression ;**
- 4) **le rôle, de ce qu'on appelle, du langage de la haine ;**
- 5) **les médias et le pouvoir.**

⁴ *Ibidem*, s. 32, 33.

Ad. 1) Il y a quelques décennies, donc dans le passé qui n'est pas tellement éloigné, il dominait la conviction dans des opinions des politiciens, des publicistes, mais aussi des gens, que le monde du futur sera en progression constante, en développement à cause de technologies plus nouvelles, facilitant la vie des gens et à cause des bénéfices, qui résultent du fonctionnement des principes de la démocratie et du marché libre sur le terrain de plus en plus vaste. Il y avait un facteur qui assombrait ce tableau clair; c'était généralement la crainte de la mondiale catastrophe nucléaire. En même temps on se rassurait de cela que la structure politique bipolaire du monde de cette époque-là, la confrontation de deux potentats nucléaires (les États-Unis et l'Union Soviétique) forme un barrage efficace contre la tragédie mondiale. On ne peut pas oublier, non plus que l'existence de ces deux « gendarmes », les plus puissants contreaçissait efficacement à la formation des conflits locaux, très dangereux pour le monde entier.

La situation a changé entièrement à la fin du siècle passé. La bipolarité était remplacée par la pluripolarité mais avec la clause suggérée par les États-Unis univoquement, lesquels devenant le vainqueur de la « guerre froide », constituent la puissance mondiale capable à l'intervention militaire dans tout le coin du monde et qui peut imposer sa vision constitutionnel, idéologique et politique. On s'est rendu compte rapidement que malgré la conviction des politiciens américains – ce ne sont pas tous les pays et les sociétés qui désirent contracter le modèle offert par les États – Unis. En plus, plusieurs erreurs commises par ce pays dont les méthodes d'activité pour exporter « american way of life », surtout dans les populations arabes, différentes mentalement, pratiquant une autre religion, représentant une autre civilisation, différente du modèle américain. Cela a provoqué le conflit entre les États-Unis (l'Occident) avec les fractions de sociétés islamiques, radicales. L'attentat terroriste sur les deux tours à Manhattan, qui avait lieu la première année du XXI^e siècle, est devenue presque le symbole de cette hostilité. Depuis cet événement toutes les prédictions optimistes et claires au sujet du futur de monde se sont obscurcies. Cela devenait de plus en plus évident – à mesure des attentats terroristes suivants et des autres événements – que le monde contemporain apparaît de plus en plus incertain et imprévisible. Ce n'est

pas sans cause qu'on a créé la nouvelle expression qui décrit le monde actuel – « **la société globale du risque** »⁵.

Cela pose une question comment les médias doivent - elles agir dans cette nouvelle réalité. Et, avant tout, si cette réalité influe ou devra influencer sur le principe de la liberté des médias ?

La réponse est positive, sans aucun doute, quoique cela ne doit pas barer le principe mentionné. La limitation de la liberté doit se lier, avant tout, avec la nécessité de garantir la sécurité de l'État et de ses citoyens.

Les média doivent informer et transmettre des opinions au sujet des événements actuels, mais sans accent sensationnel. Cela peut être difficile pour certains moyens de communication, surtout du caractère de tabloïde, mais ils doivent être respectés, dans leur propre intérêt à long terme. L'autre attitude pourra – même inconsciemment – aider les activités des terroristes et d'autres forces qui augmentent le sentiment du risque. Le Conseil européen a partagé cet avis dans son appel de 2005.

Il paraît que Janah Aleksander dans son livre : « Combattant le terrorisme » a traité concrètement et synthétiquement le problème des médias dans la société du risque :

a) les médias doivent aspirer à l'autolimitation ; ils doivent éviter la répétition des scènes violentes, de la description trop émotionnelle des événements extraordinaires, et d'éviter la glorification des terroristes ;

b) les politiciens doivent se retenir de tirer profit des attaques terroristes au but de promouvoir et populariser leurs propres intérêts ;

c) les journalistes, les politiciens mais aussi les citoyens doivent remarquer la nécessité constante de l'analyse objective et de la discussion au sujet de l'abus de la liberté de la presse, des médias ; toutes les mentions à propos de la nécessité, ou de l'obligation de limiter cette liberté sont traitées, surtout par les journalistes, comme l'attentat à la possibilité d'effectuer leur profession⁶.

⁵ Beck U., *La société du risque. En chemin en autre modernité*, Varsovie, 2002.

⁶ Selon : Goban-Klas, *La liberté journalistique dans les situations des actes terroristes, des cataclysmes, des catastrophes, des banqueroutes et des scandales, autrement dit, les médias dans la société du risque* ; en *Les aspects pratiques de la liberté de l'expression*; réd. scientifique Lis W., Husak Z. ; Toruń, 2011, p. 513.

Autrement dit, **les médias doivent être libres mais sans exagération.** Cependant on observe, pas rarement, la dérogation de ce postulat.

Ad. 2) C'est très difficile de trouver actuellement le propagateur de la thèse que le phénomène de la globalisation n'influe pas sur l'activité des médias. Il faudrait constater plutôt que les médias contemporains se sont devenus l'un des facteurs essentiels qui renforcent le processus de la globalisation.

La globalisation (la mondialisation) peut être définie de différentes manières. Ce phénomène possède déjà la littérature énorme et de grand nombre de partisans et d'adversaires. C'est le résultat de différentes manières de la compréhension du phénomène de la globalisation. Sans des considérations approfondies concernant ce sujet, je voudrais souligner seulement que la globalisation actuellement est caractérisée par des processus suivants : l'uniformisation des échanges de produits et de services (médiatiques aussi), l'écoulement libre du capital à l'échelle mondiale, la mobilité augmentée des gens (dans l'aspect international), la création des entreprises supranationales, géographiquement dispersées. Tout cela est possible à cause, entre autres, de la révolution technonogique dans les moyens de la communication massive.

La globalisation influe sur la liberté des médias positivement et négativement aussi. Parmi des côtés positifs on peut trouver, avant tout, l'accès à l'information, à l'échelle exceptionnelle dans l'histoire de l'humanité, la possibilité de la vérifier et la possibilité de nouer les relations interpersonnelles à l'échelle – pratiquement – de tout le globe. Parmi les côtés positifs il faut voir aussi des instruments traités comme les médias nouveaux qui sont subordonnés à la popularisation, restant largement accessibles, ce qui pourra être favorable à l'usage de l'information dans le processus de la démocratisation.

Mais il y a des conséquences négatives de la globalisation des systèmes médiatiques. Umberto Eco écrit à propos de certaines de ces conséquences, qui appartiennent sûrement aux plus importantes : « La globalisation de communication a repoussé via internet la notion de la frontière. Cette notion est vieille comme l'espèce humaine, franchement, comme toutes les espèces d'animaux. L'éthologie nous enseigne que chaque animal range la

zone autour de lui et de ses propres : c'est le terrain, dans le cadre duquel, il se sent sûrement et il traite comme ennemi chacun qui traverse cette frontière. L'anthropologie culturelle a montré que cette zone protectrice se change selon le modèle culturel : la proximité de l'interlocuteur pour certaines nations – sentie par les autres comme expression de la familiarité – constitue le symptôme de l'importunité et de l'agression »⁷.

L'intellectuel italien (mentionné au-dessus) attire notre attention non seulement sur le problème de la globalisation de la communication. Il constate que: « La suppression des frontières a provoqué deux phénomènes contradictoires. D'une part, il n'y a plus de communauté nationale, qui pourrait interdire, aux propres citoyens, la connaissance de ce qui se passe dans des autres pays; bientôt, on ne pourra pas empêcher aux gens, qui vivent sous la dictature n'importe laquelle, de s'informer en peu de temps, de ce qui se passe ailleurs ? D'autre part, le contrôle des activités des citoyens a été intercepté de l'état des autres centres gouvernementaux, lesquels, du point de vue technique sont capables (quoique pas toujours légalement) se renseigner à qui cette information était écrite, quels voyages étaient choisis, quels sont nos intérêts cognitifs et même, quelles sont nos préférences sexuelles (...). Le citoyen a un grand problème concernant la protection de sa vie privée contre les pirates informatiques qui ne sont plus nombreux que les brigands, qui autrefois pouvaient voler un voyageur ou un commerçant. Les « cookies » et les autres miracles de la technologie constituent le danger véritable, permettant ramasser des informations concernant chacun de nous »⁸.

L'un des symptômes les plus vifs de la globalisation dans les mass médias est l'internationalité significative du marché des médias électroniques et du secteur des médias nouveaux qui résultent de la vaste expansion du capital étranger à ce but. La pratique jusqu'à présent montre que tous les efforts entrepris par l'état de limiter l'afflux des capitaux (au moins également) au secteur de médias restent, en effet, inefficaces. Cependant, il faut souligner, que les investissements étrangers de capitaux dans l'espace de mass médias peuvent être traités comme la pénétration dans les structures nationales, la

⁷ Eco U. Rakiem, *La guerre chalereuse et le populisme des médias*; Varsovie, 2007, p. 95.

⁸ *Ibidem*, p. 97.

violation de l'identité culturelle des systèmes d'état de la communication de masse. On perçoit le plus souvent et le plus clairement le phénomène de la formation de l'image des médias et de la condition morale et professionnelle des journalistes contemporains par le capital, c'est-à-dire, par les propriétaires qui créent des corporations supranationales. Cela conduit aussi à la concentration d'un nombre majeur des médias dans les mains du moindre groupe des propriétaires qui peuvent limiter la liberté et le font souvent, dans le cadre de son groupe médiatique. On ne peut pas parler de la pleine monopolisation dans des médias, néanmoins sa concentration excessive constitue le danger potentiel: les groupes médiatiques trop forts peuvent menacer des structures démocratiques, parce qu'il y a la limitation des groupes médiatiques qui restent indépendants entre eux. Alors le marché est submergé par les titres différents, les auditions et les autres instruments médiatiques qui représentent en effet les mêmes opinions ou les avis, les notes pareils ou les informations du caractère semblable. Même s'il existe des autres journaux, périodiques ou les programmes de radio ou de télévision, c'est à cause de leur petite activité ou le manque des moyens pour l'autopublicité, etc – leurs informations pénètrent le cercle des destinataires sans importance.

La domination de grands groupes médiatiques de capitaux et non seulement à l'échelle d'un pays mais du monde, devient difficile pour les nouveaux groupes médiatiques qui entrent sur le marché. Les médias, en cherchant des clients (destinataires) se concentrent sur la distraction, la sensation et ce qui domine, c'est la pratique de populariser des formules prêtes et des schémas concernant la vision du monde, culturels, politiques. Parallèlement on observe la durée du processus de la disparition des opinions différentes, des avis, des notes; on observe que les valeurs de caractère local disparaissent, caractéristiques pour certain pays, pour sa partie, pour les milieux sociaux déterminés. La concentration des médias, résultant de la concentration des capitaux, ne sert pourtant pas mieux à la démocratie parce que le business (le marché médiatique le devient aussi) n'est pas l'institution démocratique. Donc, il ne faut pas s'étonner que la thèse est formulé dans la littérature, soulignant que la globalisation porte, en conséquence, le phénomène de « l'impérialisme culturel ». Il faut se rendre compte de cela que la lutte contre ce type de processus n'est pas

facile⁹. Malgré les activités de caractère juridique dans des pays différents, le processus de la globalisation renforce plutôt, qu'affaiblit. Il ne faut certainement pas ajouter que cela a des conséquences négatives, déterminées pour la qualité des informations et pour le processus de la formation des opinions de la société.

Ad. 3) Les médias influent sur la conscience de la société, forment leurs modèles de comportement, des modèles culturels, influencent la façon de la vie. En effet, c'était toujours. Mais la largeur et l'intensité de l'influence sur la population change, en dépendance de cela, quels moyens médiatiques sont usés par leurs utilisateurs. Autrefois ces moyens étaient relativement modestes, l'accès à eux était difficile. Je me réfère à la presse écrite. A cette époque (et aussi plus tôt) les moyens de la communication directe (comme les sermons dans les églises) jouaient le rôle des mass médias actuels.

Actuellement la situation est absolument différente. Les médias qui utilisent la technique électronique (internet et ses dérivées) ont pratiquement la possibilité d'influer sur toute la population. L'intensité d'influence médiatique est tellement haute qu'on peut parler de la formation (de cette façon) de la population nouvelle. Est-ce la société mieux informée représentant les opinions plus sublimées à propos de la réalité qui nous entoure – c'est plutôt douteux.

U. Schnabel, dans son livre « L'art de fainéanter. Du bonheur de ne rien faire » exprime expressivement son premier doute. Il écrit de cette façon : « Est-ce que vous avez aussi le sentiment que le chaos décide de notre vie ? Est-ce que vous vous sentez pareillement comme nous, les journalistes, quand chaque matin nous nous jetons dans le torrent d'information, lisant les centaines d'e-mails, quand nous plongeons dans le réseau en googlant et cliquant, téléphonant pendant la pause pour attraper la respiration et le

⁹ Comp. Jaskiernia A., *Les menaces pour la différence de la transmission médiatique au temps de la globalisation et les standards européens du contenu de la transmission* ; en *Le Conseil européen et les changements démocratiques dans les pays de l'Europe Centrale et Orientale dans les années 1989-2009*; la réd. scientifique Jaskiernia J.; Toruń, 2010, p. 603 et les autres.

soir nous nous posons la question : qu'est-ce qu'on faisait pendant toute la journée ? »¹⁰.

Cette citation décrit – je crois – la situation nommée dans les années 70 du siècle passé, « **le transbordement d'informations** ». Il faut le souligner que « le transbordement » de cette époque-là n'est pas le même que celui qu'on observe dans le monde contemporain. En rapport avec cela, actuellement c'est beaucoup plus difficile de filtrer les informations pour trouver seulement celles, qui nous restent indispensables.

Cette situation provoque le problème suivant : en restant dissipé par des informations qui écoulent partout, nous ne pouvons pas nous concentrer. Autrefois, on pouvait sans difficulté s'enfoncer dans la lecture pendant quelques heures. Maintenant après avoir lu quelques pages de cette lecture, la concentration s'affaiblit; enfin nous sommes impatientes, s'il ne faut pas jeter un coup d'œil à l'internet où (il y a, peut être, une nouvelle importante ?) Le psychologue américain Edward M. Hallowell nomme ce phénomène « **l'incapacité acquise de la concentration** »¹¹.

Ce phénomène, lié avec « le transbordement d'information » mentionné, mène à la formation de la société nouvelle, indiquée auparavant. Dans ce cas le mot « nouvelle » ne signifie point, « meilleure ou parfaite ». Il s'agit de la société qui consomme la grande quantité d'informations, mais qui n'est pas capable, en restant en état de « l'incapacité acquise de la concentration », de les transformer en science, en opinions cohérentes, en conceptions et de réfléchir profondément quand on est bombardé partout par des informations de la pesanteur et de la valeur différentes.

Il semble que P. Kozłowski résume justement les problèmes mentionnés : « Le dialogue est repoussé par le brouhaha, la science par les informations. (...) C'est peu vraisemblable que cette société puisse fonctionner longuement. Il est susceptible de l'assujettissement d'idée qui arrive de loin ou qui apparaît de près »¹².

¹⁰ Cité après Piotrowska A., *L'enfer on line*; en « Rzeczpospolita » (République) 22/23 février 2014, p. P2.

¹¹ *Ibidem*.

¹² Kozłowski P., *Les médias nouveaux et la société nouvelle*; en *Le futur ...*, op.cit., p. 88.

ad. 4) Du point de vue de deux tâches les plus importantes, mentionnées dans l'introduction de cet article, c'est-à-dire les tâches des médias publiques : d'informer la société et former ses attitudes, on ne peut pas omettre le problème **du langage de la haine**, qui a acquis les dimensions rares avec l'apparition des médias nouveaux (surtout l'internet) à grande échelle, (pratiquement dans la dimension globale)¹³.

Le Comité des Ministres du Conseil d'Europe a défini la question du langage de la haine, ce que souligne l'importance du problème. On constate dans ce texte que c'est «chaque forme de l'expression qui diffuse, foment, propage ou justifie la haine raciale, la xénophobie, l'antisémitisme ou d'autres formes de la haine basées sur l'intolérance manifestée en forme du nationalisme agressif ou de l'ethnocentrisme, de discrimination ou de la hostilité envers les minorités, les migrants ou les personnes provenant de la société des émigrants »¹⁴.

Comme j'ai déjà souligné, les médias nouveaux (surtout l'internet) rendent possible l'écoulement libre et vite de l'information et de la conception. Malgré des activités variées, des pays autoritaires et ceux où règnent la dictature, les technologies contemporaines facilitent le monitoring étant le garant du respect des droits de l'homme.

« Malheureusement, les mêmes technologies rendent possible l'intégration supra frontalières avec les milieux racistes, fascistes à l'échelle inconnue jusqu'aujourd'hui. En même temps la communication globale basée sur la loi locale assure l'impunité à ces groupes radicaux, parce qu'ils profitent des serveurs localisés dans ce pays où la propagation de la haine raciale n'est pas interdite »¹⁵.

Le problème du langage de la haine comme le défi pour la liberté des médias contemporains est difficile additionnellement pour des opinions univoques, parce que ce n'est pas seulement la loi locale qui est différente – mais en effet – ce serait difficile d'affirmer l'uniformité des opinions publiques et de la loi internationale.

¹³ Comp. Podemski K., *La globalisation du langage de la haine*; en *Le langage de la haine et la liberté de la parole. Les aspects légaux et sociaux*, sous la réd. de Wieruszewski R., Wyrzykowski M., Bodnar A., Gliszczyńska-Grabias A.; Varsovie, 2010, p. 207-219.

¹⁴ Comp. avec *Le langage de la haine, op.cit.*, p. 13.

¹⁵ Podemski K., *op.cit.*, p. 207.

D'un côté, c'est le débat public qui joue le rôle particulier dans la juridiction de Strasbourg, d'un autre côté, c'est l'article 17 de la convention européenne concernant la protection des droits de l'homme et des libertés principales qui constitue qu' « aucune résolution de la convention ci-dessous ne peut pas être interprétée comme l'attribution au pays n'importe lequel, au groupe ou à la personne, le droit d'entreprendre des activités ou de réaliser l'acte qui vise au but d'anéantir des droits et des libertés qui y sont mentionnés ou, de les limiter au plus grand degré selon la convention prévue ».

La formule citée peut, d'un côté, causer des doutes s'il faut tirer la motion que les déclarations du caractère antisémite ou raciste doivent mener aux actes de violence faits sur la population juive ou étrangère, du point de vue racial. Ce doute peut être additionnellement appuyé par l'argument qui indique, que l'interdiction des déclarations citées au-dessus ne mène point à la réduction significative ou totale des dégâts, comme : les violations ou la discrimination au fond national, religieux, racial ou n'importe lequel.

En rapport avec cela on évoque les données grâce auxquelles on peut comparer les actes de la force dans les pays européens et aux États-Unis. Dans les premiers, les déclarations racistes sont interdites et leurs auteurs sont punis, recevant de hautes amendes, ou sont privés de la liberté. Aux États-Unis le Tribunal Suprême rejette la possibilité d'interdiction des énonciations racistes, xénophobes, etc, seulement à cause de cela que ces déclarations peuvent potentiellement provoquer les destinataires (de ces énonciations) à commettre des délits. L'existence de différents standards européens et américains dans ce domaine, ne mène point aux statistiques plus profitables, ni sur le premier, ni sur le deuxième territoire¹⁶. Sans aucun doute, cela vaut la peine de faire attention indubitablement et de réfléchir sur les méthodes de la lutte contre le racisme, le totalitarisme ou le nazisme.

Malgré que le phénomène du langage de la haine existe toujours, il y a des gens qui le traitent comme peu dangereux. On trouve la preuve de

¹⁶ Biłgorajski A., *Le langage de la haine et la liberté de la parole (l'expression pendant la discussion)*; en *Le langage de la haine...*, op.cit., p. 193-195.

cela dans l'article intitulé « Le langage ignoble »¹⁷. Les auteurs de cet article constatent que l'expression « le langage de la haine » était associée avec le racisme, l'intolérance ethnique, religieuse ou avec la relation négative envers les minorités sexuelles. Selon leurs opinions – en traitant les médias nouveaux comme un instrument – dernièrement nous trouvons dans les textes publiés beaucoup de grossièreté, d'insinuation, d'épithètes, de haute tension d'hostilité dans le langage politique qu'ils ont nommé « **le langage ignoble** ». Ils présentent les exemples des expressions usées dans le cadre de ce langage (publiés sur les portails sociaux ou les twitters), qui ne sont pas convenables pour les introduire dans les médias publiques. Malheureusement ces expressions prennent le caractère publique grâce à l'accès de masse des expéditeurs et des destinataires aux nouvelles technologies. Le but de l'usage du « langage ignoble » est la tendance « d'enfoncer dans la terre », d'anéantir chacun qui ne partage pas les opinions déterminées. En rapport avec cela, l'usage de l'épithète le plus brutal et offensant, paraît le meilleur. Le danger qui résulte de ce genre d'informations politiques consistent généralement en cela que ces informations dégénèrent cette sphère de la vie publique. La séparation des mots usés des pensées des expéditeurs et des destinataires de ces expressions n'est pas possible. L'action de la deshumanisation des ennemis politiques que se passe actuellement dans la sphère du langage peut (et dans certaine mesure doit) se transmettre sur le terrain réel, dans les activités concrètes.

« Le langage ignoble », connu avant l'apparition des technologies médiatiques avait l'étendue assez bornée (on peut le dire, privée), aujourd'hui en effet a pris le caractère publique. L'un des défis futurs pour les médias contemporains est de limiter des influences du langage ignoble, surtout dans le contexte du principe de la liberté de la parole.

Ad. 5) Le problème des relations entre les médias et le pouvoir devient, surtout dans les décennies dernières, le plus abordé dans des travaux du

¹⁷ Comp. avec Janicki M., Włodyka W., *Le langage ignoble*; en « Politique », n° 8, 19-25 II 2014, p. 14-16.

caractère scientifique et aussi dans le publiereportage¹⁸. M. Castells, dans son livre, analyse amplement le phénomène de pouvoir, sa nature dans la société contemporaine du réseau de la communication de masse. Si on voulait concerner tous les problèmes abordés dans la monographie mentionnée, il faudrait écrire encore un livre – aussi ample que celui de M. Castells. Mais ce n'est pas nécessaire à l'usage de ce traité. Mais il faut noter au moins un problème abordé par l'auteur cité. Il s'agit d'un complément essentiel de la conception du pouvoir d'état, faite par M. Castells. Il part du principe juste – du point de vue historique – que le monopole est, en général, l'instrument principal du pouvoir pour appliquer la force. Mais, il ajoute : « la capacité de l'application efficace de la violence ou de faire peur, dépend de la vaccination des barrages dans les esprits des individus et des collectivités »¹⁹. La guerre à l'Iraq constitue un bon exemple de l'activité, qui selon M. Castells est possible grâce à la campagne de la désinformation menée sous la devise rusée de la lutte contre le terrorisme, après l'attaque sur les Deux Tours en 2001 par le pouvoir américain avec G. Bush en tête. Cette campagne de la désinformation avait pour le but de s'emparer des esprits des Américains et obtenir l'appui pour la croisade suivante, de facto anti-arabes et anti-islamistes²⁰.

Le conflit concernant l'Ukraine (l'année 2014) témoigne de l'efficacité des activités de la désinformation, menées en effet par les pouvoirs d'état à l'aide de différents instruments médiatiques. Les informations présentées par les médias, concernant le plus souvent les mêmes événements, les mêmes faits, sont totalement différentes. En rapport avec cela l'opinion publique de la Russie et l'opinion publique des pays occidentaux sont différentes à propos des événements en Ukraine. Les soldats armés complètement jusqu'aux « dents », qui depuis les premiers jours de mars 2014 se sont trouvés en grand nombre en Crimée, nommés par les pouvoirs et les médias « les forces de l'autodéfense », formées par les citoyens de la

¹⁸ Il suffit dire – pour approuver cette thèse – que dans le livre de M. Castells, *Le pouvoir de la communication*, l'un des travaux les plus importants concernant cette thématique, la bibliographie contient 37 pages de grand format ; Castells M. , *Le pouvoir de la communication*, Varsovie, 2013, p. 465-502.

¹⁹ *Ibidem*, p. 409.

²⁰ *Ibidem*, p. 412.

péninsule crimée, par contre, les pouvoirs et les médias de l'Occident les déterminent comme l'armée russe. Malgré cela, que la version russe paraît peu vraisemblable, cependant celle est obligatoire formellement en Russie. L'opinion De S. Łavrov, le ministre des affaires étrangères de la Russie, le certifie en constatant que (le 5 mars 2014) la Russie ne peut pas ordonner le recul de ses soldats de la Crimée. Cette opinion de S. Łavrov sert au renforcement général de la conviction de la société russe de la vérité des opinions propagées par les médias et les pouvoirs de la Russie.

Tout cela mène à la motion triste, pour le moins, peu optimiste qui concerne la liberté réelle des médias. Il s'avère que même l'instrumentation tellement vaste, dont les médias contemporains disposent actuellement ne doit pas amener toujours à la diffusion des informations véritables et de la formation, à leur base, des opinions adéquates aux événements passés. Il existe toujours (et peut être, a augmenté) la capacité du pouvoir d'état à la création de la mentalité de la population souhaitable par eux-mêmes. Cela s'enchaîne, entre autres, avec la concentration, mentionnée auparavant, des médias – et par conséquent – avec la possibilité de la quasi-monopolisation de la transmission médiatique. Mais dans le contexte de la relation entre le pouvoir et les médias, il faut faire attention sur le facteur additionnel – très important – qui influence la force d'activité des médias, l'activité qui n'est pas adéquate à la réalité, aux événements et aux faits qui ont lieu. Ce facteur additionnel c'est justement le pouvoir d'état. C'est sûrement pour cela M. Castells décrivant des propriétaires et des surveillants des corporations médiatiques pensait aux entrepreneurs comme des propriétaires, en traitant les gouvernements, les pouvoirs d'état comme les surveillants. Ils disposent ensemble de suffisants moyens financiers, légaux, institutionnels et techniques, pour déterminer le contenu dominant et le format des transmissions présenté à la société.

* * *

En concluant : quoique les médias contemporains puissent potentiellement devenir, et en certaine partie sont ceux, qui préviennent les principes de la liberté et les formes différentes d'influencer sur les destinataires, pourtant l'approbation de la thèse que le progrès technologique dans la sphère

de la transmission médiatique constitue la garantie **suffisante** contre les informations n'importe lesquelles, ou contre la transmission menteuse, serait une erreur. L'influence sur l'amélioration de cette situation, à l'aide des règles légales doit avoir (actuellement a) le caractère très limité.