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POSSESSION OF NUCLEAR WEAPONS – BETWEEN LEGALITY AND LEGITIMIZATION

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Summary: Recently in Russian policy there was a return to the Cold War practices, which include, inter alia, nuclear deterrence, and even threatening to use nuclear weapons. That policy, however, is carried out in the changed international space compared with the times of the Cold War. The period of detente in relations between world powers was dominated inter alia by discussion on the humanitarian intervention. Human rights, tied to the value of justice, become the most important component of international order. Thus, justice has become the value of the international legal order equivalent to peace. In such a reality, the legitimacy of nuclear weapons should be based not only on the deterrence, but also on the need to protect human rights, tied with justice. Possession of nuclear weapons per se is contrary to this value. This fact should be taken into account in the world powers' policies. Banning nuclear weapons, in accordance with the Radbruch formula, should be a result of these policies.

Keywords: nuclear weapons, legality, legitimization, cold war, deterrence, peace, justice.

*We have a legal and moral obligation to rid our
world of nuclear test and nuclear weapons.*

(Ban Ki-moon, Vienna, 17th February 2012)

1 Introduction

The terrifying vision of a destructive nuclear war did not vanish when the Cold War ended. The thaw of the 1990s, manifest in improved relations between great nuclear powers, induced a relaxation within the international community. The turn of the 21st century was marked by war on terror, humanitarian aid or rebuilding fallen states. The narrative of the international debate was focused on human rights. No one expected that the world would ever return to the cold war rhetoric, where nuclear weapons constituted the basic component of the imperial policy. Meanwhile, the events which took place in Crimea and in the Eastern

Ukraine made the history come full circle, making the international community face the problem of a possible nuclear war yet again. Russia has returned to the traditional Soviet policies. Restored were the long-distance journeys of aircrafts carrying nuclear payload. Ever more frequently, Russian politicians mention nuclear weapons in the context of “defense” of Crimea or the Russian relations with the Baltic states. The United States have also been forced to dust off and inventory their nuclear stock. The confrontation between Russia and the US, being a throwback to the Cold War era, is further worsened by the unforeseeable nuclear policy of North Korea.

Such political climate inspires a deeper reflection on the sense, or rather nonsense, of possessing nuclear weapons. This consideration may hardly be deemed to be reflected in the 1996 ICJ advisory opinion on the legality of use of nuclear weapons¹, which left a feeling of dissatisfaction resulting from the positivist approach adopted by the judges. It would appear that the international community is not yet ready to express its outright protest against possession of a nuclear arsenal by certain states. Most detrimental appears the lack of decision on the possibility of using nuclear weapons in situations where the existence of a state is at risk. The Court’s indecision allows to presume that the international law permits the possession of nuclear weapons but not their dissemination. ICJ’s position still constitutes a moral encouragement for politicians to demonstrate the nuclear potential of their countries. In mid-2014, the Marshall Islands filed complaints with the ICJ against all states possessing nuclear weapons, which revived the hopes that the perspective would change. Yet, only three of those states had previously subjected themselves to the jurisdiction of the ICJ under Art. 36(2) (the United Kingdom, Pakistan and India)². When considering the above-described circumstances, it appears worthwhile to resurrect the discourse about nuclear weapons. What is of essence here is the method. If the discussion is to be purely positivist, any possible deliberations on the ICJ’s advisory opinion seem to be pointless. This is why it is not only the issue of legality, but also of the legitimization of owning nuclear weapons, that is worth attention. Possession of such weapons by certain countries raises the question whether the international

1 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports (1996), p. 226.

2 *Application instituting proceedings against the United Kingdom submitted on 24 April 2014 by the Republic of the Marshall Islands to the International Court of Justice re obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament*, available at <http://www.icj-cij.org/docket/files/160/18296.pdf>; *Application instituting proceedings against Pakistan submitted on 24 April 2014 by the Republic of the Marshall Islands to the International Court of Justice re obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament*, available at <http://www.icj-cij.org/docket/files/159/18294.pdf>; *Application instituting proceedings against the Republic of India submitted on 24 April 2014 by the Republic of the Marshall Islands to the International Court of Justice re obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament*, available at <http://www.icj-cij.org/docket/files/158/18292.pdf>.

law defines the right to own nuclear weapons or prohibits it. If such right exists, is it legitimized? When making the final attempt at approaching the problem of possession of nuclear weapons, Radbruch formula may prove helpful. For one cannot help but agree that *lex iniusta non est lex*.

2 Legality

The right to possess nuclear weapons is a *fait accompli*. The research leading to the development of nuclear weapons began during World War II. Their principal objective was to gain overwhelming advantage, decisive of the outcome of the conflict. It is commonly accepted that the interest in nuclear power as a method of political combat increased as a result of Albert Einstein's letter of 2nd August 1939, addressed to President Roosevelt, where the renowned physicist expressed his concern about the possibility of the deadly weapon falling in the hands of the Nazis. The Second World War was marked by the nuclear arms race between the US, Germany and the Soviet Union. The goal was to build and detonate an atomic bomb, consequently succeeding in gaining advantage in the still crystallizing balance of power. Germany's defeat left only two superpowers on the battlefield. Both of them had managed to finish their works on the nuclear weapon in a short time. The first explosions were conducted by the US (test of 16th July 1945 and two explosions in Hiroshima and Nagasaki of 6th and 9th August 1945). The Soviet Union detonated its first nuclear payload four years later, on 29th August 1949. The group of nuclear powers was subsequently joined by the United Kingdom (3rd October 1952), France (13th February 1960), and China (16th October 1964). Consequently, on 1st July 1968, London, Washington and Moscow signed the Non-Proliferation Treaty (NPT)³.

Nearly 25 years passed from the explosion of the first nuclear bomb to the NPT effective date. It may be deemed the first international document forbidding the possession of nuclear weapons by the so-called non-nuclear-weapon states which become Parties to the Treaty. The nuclear-weapon states (possessing nuclear weapons as of the date of executing the NPT) were obliged to disarm completely (with no time limits!). Thus, the Treaty sanctioned the existing state of affairs by attesting the nuclear powers' right to possess nuclear weapons. Despite common acceptance of the NPT (until now, 191 countries have joined the Treaty), there is no doubt that the prohibition to possess nuclear weapons by the non-nuclear-weapon states is not customary, which may be inferred from the 1996 ICJ advisory opinion. The Court noted that the international community remained deeply divided by the question whether refraining from using nuclear weapons after 1945 constitutes an *opinio iuris*. Therefore, the ICJ found no grounds to confirm the customary law in the area of prohibition to use nuclear weapon. Creation of a customary norm was supposedly hampered by the deeply rooted deterrence doctrine, according to which using nuclear weapons would

3 U.N.T.S., roč. 729, p. 161; Effective date: 5th March 1970

be allowed as the exercise of the right to self-defense against an armed attack “threatening the vital security interests of the State”⁴. Ergo, if the prohibition to use or threaten to use nuclear weapons is not of a customary nature, then the prohibition to possess such weapons is not customary either.

The discourse on the legality and legitimization of possessing nuclear weapons would certainly be facilitated by adopting an approach of forcing a commonly accepted custom with regard to the prohibition of threatening or using such weapons or the obligation to disarm. Worth considering are the deliberations of R. A. Weise, who claims that the evidence supporting a uniform and common practice and *opinio iuris* is contained in numerous resolutions of the UN General Assembly and Security Council, treaties, actions of states, and the “underlying logic of the ICJ Nuclear Opinion”. According to R. A. Weise, despite the fact that the ICJ failed to find the reasons to consider nuclear weapons illegal under the customary law, the evidence that has come to light since then does lead to the conclusion that a customary norm was formed⁵. The above-raised arguments, however, are based on frail foundations, which is evidenced by the contemporary practice of the nuclear-weapon states. In the proceedings pending before the ICJ, the US expressly objected treating a possible prohibition to use nuclear weapons as customary, which was explicitly confirmed by the Court in its opinion (it proves difficult to discern the custom based on the “underlying logic” of the opinion, since the ICJ unequivocally denied the customary nature of the prohibition to threaten or use nuclear weapons). Subsequent US actions do not allow much room for certainty as to the existence of a binding norm in this scope. Besides, last months have clearly showed the sad reality of the great powers restoring their nuclear deterrence policies. The German Foreign Minister, addressing the Bundestag on 4th March 2015, said the American nuclear weapons would remain in the territory of Germany, and noted that the process of nuclear disarmament had suffered a regress.

Illegality of using – and thus, of possessing – nuclear weapons could also stem from its violation of the general principles of the international law. This is claimed by Ch. J. Moxley Jr., J. Burroughs and J. Granoff, who invoke a 1976 manual on international law for the US armed forces, which states that using certain types of arms could be illegal as a result of a violation of not only treaties or custom, but also of the “general principles of the law of war”, which include the rules of proportionality, discrimination and military necessity⁶. This approach, however, appears to omit the chief themes of the 1996 ICJ advisory opinion, where the Court allowed the use of nuclear weapons in self-defense to the extent

4 *Legality...*, *supra* note 1, p. 255.

5 WEISE, Rachel. How Nuclear Weapons Change the Doctrine of Self-Defense. *International Law and Politics*. 2012, roč. 44, pp. 1353–1361.

6 MOXLEY, Charles Jr., BURROUGHS, John, GRANOFF, Jonathan. Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty. *Fordham International Law Journal*, 2011, roč. 34 , pp. 670–671.

it was justified by the military proportionality and necessity. Above all, the Court deemed those two principles to constitute common customary law, and concluded that the principle of proportionality must not, in itself, exclude the possibility to use nuclear weapons in self-defense in any case. Using nuclear weapons ought to remain in accordance with the principles of the international humanitarian law (*i.e.*, in particular with the principles of proportionality, military necessity and discrimination). Despite the fact that, as a general rule, the use of nuclear weapons violates the principles of the humanitarian law, the Court failed to strictly prohibit it in situations where the survival of a State would be at stake⁷.

Therefore, the prohibition to possess nuclear weapons results from a mosaic of international treaties, accession to which is each state's free choice. *A contrario*, the right to possess nuclear weapons is granted to those states which refused to be bound by the Non-Proliferation Treaty (of much significance here appears to be Art. X of the NPT, allowing a signatory to withdraw from the Treaty if it considers that its superior interests are jeopardized). Apart from the NPT, such obligations result from certain treaties of regional application, such as the Treaty for the Prohibition of Nuclear Weapons in Latin America (Tlatelolco, 14th February 1967)⁸, the South Pacific Nuclear Free Zone Treaty (Rarotonga, 8th August 1986)⁹, the Southeast Asia Nuclear-Weapon-Free Zone Treaty (Bangkok, 15th December 1995)¹⁰, the African Nuclear-Weapon-Free Zone Treaty (Pelindaba, 11th April 1996)¹¹, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia (Semipalatinsk, 8th September 2006)¹². Under the aforementioned treaties, Nuclear-Weapon-Free Zones (NWFZs) were established, their source lying in Art. VII of the NPT, allowing that groups of states conclude regional treaties in order to ensure total absence of nuclear weapons in their respective territories. All listed treaties include termination clauses. Some of them permit termination in circumstances where the vital interests of a state are at risk (the Treaties of Tlatelolco, Semipalatinsk and Pelindaba), while others – in the event of violation of the terms and conditions of the relevant Treaty by another state (the Treaties of Rarotonga and Bangkok).

In the international law, the scope of authorization to possess nuclear weapons is determined by the non-proliferation obligation resulting from the Treaty. The majority of states have decided to be bound by the prohibition to possess nuclear weapons chiefly due to their limited financial or technological resources. This applies to non-nuclear-weapon states Party to the NPT and to states located in the NWFZs. Nevertheless, what should be emphasized is that such prohibition is not strict or permanent. For the right to possess nuclear weapons is rooted in

7 *Legality...*, *supra* note 1, p. 266.

8 U.N.T.S., roč. 634, p. 326; Effective date: 22nd April 1968.

9 U.N.T.S., roč. 1676, p. 223; Effective date: 11th December 1986.

10 U.N.T.S., roč. 1981, p. 129; Effective date: 27th March 1997.

11 *International Legal Materials*, roč. 35, p. 698; Effective date: 15th July 2009.

12 U.N.T.S., roč. 2212, p. 257; Effective date: 21st March 2009.

the continuously invoked deterrence doctrine, manifest in the ICJ opinion and international treaties. In order to start the process aimed at developing a nuclear weapon, a non-nuclear-weapon state (as defined in the NPT) could always use the argument of the sovereign and undisputable right to self-defense in extraordinary circumstances, jeopardizing its supreme interests. This opportunity, offered by Art. X of the NPT, was used by North Korea, when, on 10th January 2003, it declared to the parties to the NPT and to the UN Security Council that it was withdrawing from the NPT. Withdrawal was effective as of 10th April 2003. Also, it is no secret that certain states, due to their nuclear ambitions, did not accede to the NPT (India, Pakistan, Israel). To conclude, both the nuclear-weapon states, as defined in the NPT (obliged to disarm in good faith but with no time limits), and the states who are not parties to the NPT (not bound by any international treaty pertaining to the matter at hand) do possess nuclear weapons in compliance with the international law (lawfully)¹³.

One issue remains to be considered, namely, the question of legality of possessing and using nuclear weapons from the perspective of human rights, deeply rooted in the *ius in bello* in the form of the international humanitarian law (IHL). Protection of civilians during armed conflicts and the right to life, included in the 1949 Geneva Convention¹⁴, prove to be an undeniably essential part of the IHL. The right to life is imprescriptible, which means that the obligation to observe it in times of peace is not subject to revocation in the event of an armed conflict. At the same time, IHL prohibits the use of combat assets causing unnecessary suffering. In consequence, according to the common customary law, using and possessing chemical or biological weapons is illegal, as it goes against the principles of humanitarianism and discrimination between the civilians and the combatants¹⁵. Nevertheless, the International Court of Justice unanimously ruled that “a threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law”, and subsequently, by seven votes to seven, by the President’s casting vote, stated that it followed “from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of the international humanitarian law”¹⁶. Having so concluded, the ICJ did not exclude the possibility of using nuclear weapon “in an extreme circumstance of self-defence, in which the

13 Cf.: RUBIN, Alfred. Nuclear Weapons and International Law. *The Fletcher Forum*, 1984, roč. 8, p. 48–49.

14 *Convention relative to the protection of civilian persons in time of war*, U.N.T.S., roč. 75, p. 287; Effective date: 21st October 1950.

15 Cf.: JOYNER, Daniel H. *International Law and the Proliferation of Weapons of Mass Destruction*. Oxford: Oxford University Press, 2009, p. 90; GAZZINI, Tarcisio. *The Changing Rules on the Use of Force in International Law*. Manchester: Manchester University Press, 2005, pp. 222–223.

16 *Legality...*, *supra* note 1, p. 266.

very survival of a State would be at stake". According to the ICH, possessing and using nuclear weapons in extraordinary situations is therefore legal, even despite its non-compliance with the IHL, based on the principles of humanitarianism and discrimination between civilians and combatants. Such approach results from other principles of IHL, namely those of proportionality and necessity¹⁷.

Fiat iustitia, pereat mundus?

3 Legitimization

The above-quoted maxim was supposedly coined by Emperor Ferdinand I. As it is an expression of an extreme positivist approach, it gained particular importance in the 20th century. Strict observance of the applicable international law, at all costs and with no regard to the consequences, truly has the potential to make the world perish (*pereat mundus*) and leave no one who would continue pondering upon the legality and legitimization of using or possessing nuclear weapons. Ironically, the maxim itself has become so real that it now inspires a deeper consideration of the values of the international law. Is it not so that, in the times of prospective nuclear war, peace, taken as a value inscribed in the Charter of the United Nations, encompasses the imperative of survival of the human kind? Has the world, and the international law, not changed after the end of the Cold War? Has such change not been essentially influenced by the basic human rights? Perhaps, it is worthwhile to stop for a while and listen to people of authority, the most convincing of whom took part in the development and detonation of nuclear and thermonuclear bombs. These include the physicist Robert Oppenheimer and the Soviet physicist Andrei Sakharov, who, having witnessed nuclear testing, became ardent opponents of nuclear weapons. The reason for this change of heart lies, most probably, in the noticeable consequences of using said arms, which exceeded the scientists' expectations. This is why a perfect introduction to deliberations on the legitimization of possessing nuclear weapons is offered by one of the accounts describing the day of the biggest nuclear test at the Bikini Atoll, often referred to as the "day of two suns":

I thought I saw what appeared to be the sunrise, but it was in the west. It was truly beautiful with many colors—red, green and yellow—and I was surprised. A little while later the sun rose in the east. Then some time later something like smoke filled the entire sky and shortly after that a strong and warm wind—as in a typhoon—swept across Rongelap. Then all of the people heard the great sound of the explosion. Some people began to cry with fright. Several hours later the powder began to fall on Rongelap. (account of

¹⁷ Ibid., at 245; see: MAHMOUDI, Said. The International Court of Justice and Nuclear Weapons. *Nordic Journal of International Law*, 1997, roč. 66, p. 85.

John Anjain of the Rongelap Atoll, located approximately 220 km of the test site of 1st March 1954)¹⁸.

We must bear in mind that the above-quoted description comes from the Cold War period, when nuclear, including thermonuclear, weapons were the chief instrument of the deterrence policy. However, we are now witnessing a restoration of those practices. The nuclear rhetoric is present mainly in the Russian political narrative. The Cold War has been brought back to a different international reality and, what follows, to a different international law. The turn of the 21st century was not a normative or axiological vacuum. During the “Cold War pause”, the international community focused its attention, in particular, on the dilemmas of humanitarian intervention. The axis of discussion ran between the use of force and the protection of human rights. This gave rise to the issue of legality and legitimization of humanitarian intervention, enveloped in the question whether use of force is allowed for the purpose of protection of human rights if such use is not legal, therefore, initiated without the authorization of the UN Security Council. In other words, is an illegal humanitarian intervention permissible in situations where it is legitimate? In its report, the Independent International Commission on Kosovo concluded that “the NATO military intervention was illegal but legitimate”¹⁹. Antinomy appears to be the key to the phrase “illegal but legitimate”²⁰. The strictly positivist perspective of the international law lost its *raison d'être*. Ever more frequent became the positions of seeking legitimization of the international law in the sphere of values from outside of the international legal system (Grotian tradition of the international law) or considering the international law as based on the values formed within this system²¹. It seems doubtless that the importance of the values constituting the foundations of the international law increased at the turn of the 21st century. This was connected with a change of perspective – the point of reference for the international legal order became the human, who superseded the state. In essence, this change concerned the beneficiary of the international law, which began to be applied to humans in the first place. As pointed out by J. Zajadło, the traditional “statism”, placing a state at the focal point, was expelled by the approach of admitting the

18 DIBBLIN, Jane. *U.S. Nuclear Testing and the Pacific Islanders. Days of Two Suns*, New York: New Amsterdam Books, 1990, p. 25. The ball of fire caused by the explosion had a diameter of 100 km, and was visible from 450 km distance. Note that this was not the biggest nuclear explosion recorded so far. On 30th October 1960, the Soviet bomb named “Tsar” was detonated. The explosion was visible from approximately 1000 km distance. The heat radiation resulting from the explosion could cause third degree burns to people located 100 km away from the detonation site.

19 Independent International Commission on Kosovo. *The Kosovo Report. Conflict, International Response, Lessons Learned*. Oxford: Oxford University Press 2000, p. 4.

20 See: R. Kwiecień, who distinguishes the following antinomies: illegal but legitimate and legal but illegitimate (KWIECIEŃ, Roman. *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*. Warsaw: Difin, 2011, p. 131).

21 *Ibid.*, p. 195.

subjectivity of a human being²². This change of views on the role of the international law was noticed at the threshold of the new millennium, when attention was brought to the evolution of the notion of security, which was no longer perceived solely as the security of a state, but also as humanitarian security²³.

The above-described axiological trends in the international law may, or even must, affect the assessment of the issue of possessing and using nuclear weapons. Ironically, the discourse on the legality and legitimization of humanitarian interventions could have taken its toll on the discussion about nuclear weapons. Its context has changed since the humanitarian intervention in Yugoslavia. Legitimization, or the values of the international law, must be born in mind principally in situations where a military response and the protection of human rights are at stake. This applies to both humanitarian intervention and the use (possession) of nuclear weapons. In the case of humanitarian interventions, the dilemma boils down to the possibility of using force due to violation of human rights on a massive scale (catastrophic humanitarian crisis). In the case of nuclear weapons, the problem consists in the possibility of military response involving the use of nuclear weapons despite violation of human rights on a massive scale (catastrophic humanitarian crisis). In the first case scenario, a military response is the result of mass violations of human rights, in the second – it is their reason. This discourse takes place in the same axiological and international legal reality, delineated by the values of peace and justice.

Maintaining international peace and security is the supreme objective of the United Nations (Art. 1(1) of the Charter of the United Nations). Simultaneously, peace is an axiological foundation of the contemporary international order²⁴. Peace can be perceived in a negative and positive dimension. Its negative perception brings peace down to a state where there are no armed conflicts, which is achieved through preventive diplomacy, conflict resolution or peacekeeping. The positive perception of peace endows that same state with such values as peacebuilding, *i.e.*, building states²⁵. An expression of the negative approach to peace is manifest in Art. 2(4) of the UN Charter, which prohibits the threat or use of force in international relations, while the positive approach is visible in Art. 55 of the Charter, which imposes an obligation to, *inter alia*, promote universal respect for human rights. The positive perspective entails the value of justice, which, in the contemporary international legal order, is connected with respect for human rights.

22 ZAJADŁO, Jerzy. Legalność i legitymizacja interwencji humanitarnej. *Państwo i Prawo*, 2004, č. 1, p. 10.

23 See: e.g., COMMISSION ON HUMAN SECURITY. *Human Security Now*. New York, 2003, p. 2; *Report of the International Commission on Intervention and State Sovereignty. The Responsibility to Protect*. Ottawa: International Development Research Centre, 2001, p. 6.

24 KWIECIEŃ, Roman. *Teoria...*, *supra* note 20, p. 195.

25 Cf.: SANDOLE, Dennis J. D. *Peace and Security in the Postmodern World. The OSCE and Conflict Resolution*. London – New York: Routledge, 2007, p. 43.

The above-described notion of peace introduces chaos to the axiological sphere of the international law. Do we mean one single value, which is peace in its positive meaning? Or do we mean two, sometimes opposed, values of peace and justice? Peace in its positive meaning, in fact perceived as “just peace”, is an unattainable idea (“orientation standard for the interpretation of the international law”) for which we may only strive continuously²⁶. The state of “just peace” is impossible to achieve, which may have a somewhat demoralizing effect on the members of the international community. For, if it is unattainable, why bother trying? The analogy to the mythical toil of Sisyphus jumps to mind. More value is presented by the negative meaning of peace. Riddance of armed conflicts appears within reach of the international community. Therefore, we need to assume the coexistence of two values – peace and justice – around which revolved the discourse on the dilemmas of humanitarian interventions²⁷.

During the Cold War, peace was an unquestionable value of the international order. Part of that order – the nuclear weapon – being the instrument of the deterring policy, played a stabilizing role. Legitimization of nuclear weapons was based on the deterrence doctrine. The fear of the cruelty and the possible consequences of military confrontation between nuclear powers ensured relative security for the international community divided into two blocs. Ironically, the arms race contributed to international balance. The end of the Cold War forced the international community to face new challenges in the area of international peace and security. Due to an erosion of the deterrence policy, the question of possessing nuclear weapons appeared in a different context, related to the definition of the international order (multipolarity or unipolarity?) or the threat of nuclear weapons being intercepted by terrorist organizations. At the same time, another problem appeared, concerning the new function of nuclear weapon, since it was devaluated as a deterrence tool. It was already in the new international reality that the ICJ allowed the possibility of using nuclear weapons in extraordinary circumstances, endangering the very survival of a state. Thus, the ICJ made a reference to the Cold War deterrence policy. One may think, the Court issued its opinion while still in the shackles of the Cold War²⁸. In this context, pos-

26 Cf.: SKORDAS, Achilles. “Just Peace” Revisited: International Law in the Era of Asymmetry. In STETTER, Stephen (ed.). *Territorial Conflict in World Society. Modern Systems Theory, International Relations and Conflict Studies*. London-New York: Routledge, 2007, pp. 151–152.

27 Cf.: KWIECIEN, Roman. *Teoria...*, supra note 20, p. 193; ZAJADŁO, Jerzy. *Dylematy humanitarnej interwencji. Historia-etyka-polityka-prawo*. Gdańsk: Arche, 2005, p. 27.

28 “Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as “policy of deterrence” to which an appreciable section of the international community adhered for many years (...). Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be

sessing nuclear weapons remains in compliance with the value of peace, taken as a worldwide-conflict-free state, serving as a “stabilizer” of international relations. Nevertheless, we must not forget that the turn of the 21st century brought about new threats to the international order, resulting from a breakdown of the bipolar order, in the form of the so-called failed, failing and rogue states. These include North Korea who, as mentioned previously, is in lawful possession of nuclear weapons. Revival of the Cold War requires that the deterrence doctrine be applied in a different international reality, whose bipolarity is not so obvious anymore. Nuclear threat is no longer posed solely by the participants in the Cold War, but also by unpredictable states, whose policies cannot be accommodated within said confrontation. Nuclear weapons were somehow incorporated into the relations of the bipolar world. The political complexity of the modern world (its multipolarity, terrorism, symptoms of the Cold War revival, failed and rogue states, success of the *jihadi* movement) inspires reflection on the meaning of nuclear weapons. The deterrence doctrine was to a certain extent predictable in the 20th century. In the 21st century, this is no longer the case. This is why it cannot constitute the basis for legitimization of using nuclear weapons. At the same time, we must not think “what if” the ICJ’s opinion was issued under the current circumstances or without referring to the deterrence doctrine. However, this raises a question of whether the ICJ would still hesitate as to the legality of using nuclear weapons in extraordinary situations threatening the survival of a state.

Similar uncertainties should not be caused by the reference to the value of protecting human rights (justice). The discourse on humanitarian intervention referred to the *iusta causa* (just cause), arguing that using force should be allowed for the purpose of preventing mass violations of human rights. In this context, an intervention may prove just. Hence, we could ask: Is it just to possess nuclear weapons (in order to use them)? Neither this question nor the issue of legitimacy of humanitarian interventions were the object of any interest during the Cold War, when the unquestionable value was peace, which should be achieved even at the price of injustice, understood also in terms of violation of human rights by totalitarian regimes. After 1989, these two values have been considered to be of equal rank and placed in opposition to each other on numerous occasions, where humanitarian interventions proved controversial²⁹.

Justice, considered as one of the basic values of the international law, is an emanation of the norms which obligate states to protect human rights. Their postwar development, marked by the Universal Declaration of Human Rights, has had an undeniable effect on the shape and application of the national laws in the 21st century. Referring to the terminology of A. Buchanan and D. Golove, J. Zajadło points out that, both in the case of transnational justice and international justice, the final point of reference are the human rights. The power of

at stake” (*Legality...*, *supra* note 1, p. 263).

29 See: ZAJADŁO, Jerzy. *Dylematy...*, *supra* note 27, p. 27 and the references quoted therein.

the human rights has had a major influence on the level of transnational justice. However, one trait of the concept of the human rights is their escalation, which proves difficult to be contained. This is why the problem is shifted from the level of transnational justice to the level of international justice, that is to say, from the level of basic principles of universal application to all states and their internal affairs to the level of distributive justice, applicable not to one single state but to the relations between states, groups or residents of different countries. Ever more frequent is the postulate to the fulfill the idea of justice not only within borders, but also beyond borders, or even without borders. International justice based on political realism and formal rules, shaped throughout centuries as “justice among nations”, is now more frequently perceived in terms of material global justice or “cosmopolitan justice”³⁰. As stated in the Preamble to the Universal Declaration of Human Rights, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”³¹. Therefore, what lies at the foundation of the human community is not only equality, but also human dignity. This is certainly an achievement of the postwar human rights regulations. As emphasized by M. Piechowiak, acknowledgement of dignity as the foundation of justice by the international law is the acknowledgement of what humans are as the foundation of the law. The author points out that the pre-WW II totalitarian regimes considered that the ultimate reason for the existence of the law and the basis of the legal provisions was not so much the wellbeing of individual humans (relationships between specific people in terms of the goodness which contributes to personal development of a human being) as the normative act (relation of humans and norms), racial or class interests (relation to objectives whose achievement may require that people be treated instrumentally)³². Currently, equality should not be perceived as arithmetic or geometric distribution of wealth. Wealth distribution always takes place in specific circumstances ensuing from human dignity. Hence, the interpretation of Aristotle’s idea of justice is based on the fact that “the formal rules referring to equality determined <in terms of the object> are secondary to the equality <of us> which assigns the wealth due, bearing in mind a specific individual and his specific circumstances” [own translation]³³. Presently, the distribution of wealth based on the international law must refer to the human dignity and the right ensuing therefrom. The focal point of the distribution of wealth is the human and his dignity.

30 ZAJADŁO, Jerzy. Teoria sprawiedliwości międzynarodowej: prawa człowieka contra suwerenność. *Polski Przegląd Dyplomatyczny*, 2005, č. 5, pp. 107–108.

31 Universal Declaration of Human Rights. [online]. Available at <http://www.un.org/en/universal-declaration-human-rights/>

32 PIECHOWIAK, Marek. Godność i równość jako podstawy sprawiedliwości. Z perspektywy międzynarodowej ochrony praw człowieka. *Toruński Rocznik Praw Człowieka i Pokoju*, 1992 (1993), roč. 1, p. 38.

33 *Ibid.*, p. 46.

The value of peace has now, as it had during the Cold War, an interstate dimension – it boils down to maintaining an armed-conflict-free state of affairs. At the same time, peace entails not only international security, but also humanitarian security, by its reference to the value of justice³⁴. In consequence, the idea of peace and security, as manifest in the international law, was permeated by the human rights ideology in the 1990s, primarily due to the discussion on the premises of humanitarian intervention. In these circumstances, the Cold War doctrine of deterrence with the use of nuclear arsenal is no longer valid. Nuclear weapons, *per se*, are a negation of the above-discussed idea of justice. Their potential use would lead to a violation of human rights on a massive scale. Nuclear weapons are weapons of mass destruction (similar to biological and chemical weapons), with the potential of destroying living organisms on a catastrophic scale and causing long-term effects on the natural environment. The specificity of nuclear weapons, differentiating them from conventional arms, lies in the consequences of detonation, in the form of lethal radioactive contamination, comparable to the effects of chemical weapons. Considerable number of victims would die slow agonizing death.

The foregoing arguments prove that the use of nuclear weapons essentially goes against the IHL, which, however, does not necessarily exclude the legality of possessing or using them in extraordinary circumstances (as opposed to chemical and biological weapons, which is strictly prohibited by the common customary law)³⁵. Nevertheless, we must not forget that the modern-day international legal order does not exist in an axiological vacuum. Its values stem, *inter alia*, from the regulations of the IHL and the UN Covenants on Human Rights, drawing from the idea of human dignity. In the 21st century, acknowledging the legality of possessing (or using) nuclear weapons is not a synonym of its legitimization (or compliance with the value of the international law). To sum up, we may say that a lawful possession of nuclear weapons is not legitimate (compliant with the valued of the modern-day international law). What is visible here is the antinomy of “legal but not legitimate”. As stated before, in the event of humanitarian intervention without the approval of the UN Security Council, the antinomy of “illegal but legitimate” was present. The common denominator of the foregoing dilemmas of the modern international law is justice, negated by massive violations of the fundamental human rights (on a catastrophic scale).

So, is this the case of *fiat iustitia, pereat mundus*? Can we still, in the 21st century, accept the fact that some states lawfully possess nuclear weapons in compliance with the international law? Surely, we cannot argue that the posses-

34 *Report...*, *supra* note 23, p. 15.

35 Cf.: L. Tien, who is of the opinion that nuclear weapon is *per se* illegal due to its non-compliance with the IHL (TIEN, Lipin. On the Legality of Development of Nuclear Weapons. *National Taiwan University Law Review*, 2011, č. 6, pp. 521 et seq.). This approach, however, has not been applied in practice by the nuclear-weapon states or by the ICJ in its 1996 opinion.

sion of such weapons by democratic states (such as the US) is legitimate, while their possession by non-democratic states (e.g., North Korea) is not. The issue of legitimization involves the relation between possession of nuclear weapons and the human rights and not between the possession of nuclear weapons and the political system. In accordance with the Radbruch Formula, illegitimate possession of nuclear weapons, and, what follows, their illegitimate use, in any circumstances makes such possession or use illegal (*lex iniustissima non est lex*). We ought to remember, however, that this conclusion is valid if we adopt the naturalist approach. Yet, if we assume that the value of justice, inherent to the modern international law, is somehow a part of the international legal order³⁶, we must accept that the possession or use of nuclear weapons is legal. But it was justice that made the nuclear-weapon states agree to complete disarmament in good faith. This obligation stems solely from the binding international treaties. Even if it was customary, failure to specify time limits for such disarmament would inevitably lead to the potential legal norm being ineffective. The assumption of legality of possession of nuclear weapons, despite it going against the value of justice, should be, in the 21st century, considered detrimental to the international community and the international legal system. It is rather a relic of the Cold War period, wherein states were the chief beneficiaries of international legal norms. Such order inspired the ICJ to accept the legality of using nuclear weapons in extraordinary circumstances. As a matter of fact, a contribution to such decision was offered by the international law, whose norms justified – in the opinion of the ICJ – the unfair conclusion manifest in the lack of a strict prohibition. Presently, the acceptance of legality of possession of nuclear weapons within the homocentric international legal order is unconceivable. We should be rather inclined towards the application of the Radbruch formula. In the times of common acknowledgment of human rights, extremely unjust legal norms must not be accepted. A revival of the naturalist approach is an important value, particularly in the unstable international reality in which we now live. Positivism works in times of peace, ensuring legal security. We have recently experienced a return of the Cold War, only this time the doctrine of deterrence seems unable to ensure such security due to the complexity of international relations, consisting, *inter alia*, in the problem of identifying two antagonistic political blocs. Bearing in mind this condition of the international community, the naturalist approach seems preferable. Otherwise, it may be too late for metamorphosis of opinions and following G. Radbruch, once the potential armed conflict breaks out. Illegality of possessing nuclear weapons must be strongly affirmed, as it goes against the idea of justice.

This is why we should be enthusiastic about the initiative of the Marshall Islands, who filed complaints against all states possessing nuclear weapons, accusing them, amongst other things, of “a flagrant denial of human rights” by

36 See: KWIECIEN, Roman, *Teoria...*, *supra* note 20, p. 195.

delaying their complete disarmament. Unfortunately, only three of those states acknowledged the ICJ's jurisdiction under Art. 36(2) of the ICJ Statute (the United Kingdom, India and Pakistan). It is possible that the International Court of Justice will rule that the Marshall Islands are not a legitimate applicant in these three cases, as they could only have a case against the United States for their nuclear tests at the Bikini and Enewetak Atolls. Regardless of the outcome, we should demand that the non-nuclear-weapon states adopt a more active approach towards asserting the illegitimacy, and thus – illegality, of possessing nuclear weapons. Some assistance is offered by the naturalist approach whose early signs are visible in the position of the Marshall Islands. An important role in the potential change of attitude towards nuclear weapons will be played by those states who already have them, in particular, by the US. By continuing their Cold War policy of deterrence, they are allowing states, such as North Korea, a possibility to justify their works on a nuclear arsenal. Delegitimation and, consequently, delegalization, of nuclear weapons in the American or Russian policy (following the chemical and biological weapons) would certainly support negotiations with Iran or North Korea.

CIVIL LITIGATION PROCEDURE – A NEW CODE OF PROCEDURE OF THE SLOVAK REPUBLIC

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Summary: On 1 July 2016 the new codes of civil procedure will come into effect with the aim to provide for more effective, simplified and more economically efficient civil procedure, including more efficient enforcement of law in Slovakia. This article explains some of the new legal concepts that may facilitate attainment of this goal.

Keywords: Re-codification in the Slovak Republik, Civil Litigation Code, intervenient/intervener, *litis denuntiatio* (notice of suit), service of process, claim/court action, judicial concentration, preliminary hearing, default judgment, illegal evidence, court costs, protection of contractually weaker party, appeal, appellate review sought by the General Prosecutor.

1 Introduction

Effective of 1 July 2016, the three new codes of civil procedure will replace the current Code of Civil Procedure, Act 99/1963 Zb¹, namely *Civilný sporový poriadok/Civil Litigation Code*, *Civilný mimosporový poriadok/Civil Non-Litigation Code* and *Správny súdny poriadok/Code of Administrative (Court) Procedure*.

The legislator has thus decided to enact separate codes for contentious matters, non-contentious matters and the matters falling under administrative justice.

At the time of interdepartmental consultations various views² appeared not approving this decision of the re-codification commission. But these views and comments were not accepted by the re-codification commission. For taking a stand whether the enactment divided into the three codes was proper or practi-

1 Amended on 88 occasions, up to this date.

2 For more detail see ŠTEVČEK, Marek. *Princípy a východiská nových kódexov civilného procesu. O dogmách, paradigmatách a trochu o právnej filozofii /Principles and starting points of the new codes of civil procedure. On dogmas paradigms and a little bit of legal philosophy/*. *Bulletin slovenskej advokácie*, 2014, vol. 20, no. 12, p. 15–17.

cal, in particular, it may be necessary to consider above all to what the extent the three codes differ one from the other, to what extent they contain concurrent rules, and to what extent they refer one to the other. This, however, is beyond the intent of this article. Without making any complimentary or criticizing statements in this discussion, the situation of the three separate codes is accepted as it exists. In my opinion, there would not be much difference between the enactment contained in one single code and the one divided into separate codes by their subject-matter. Its legal taxonomy and the rules concerning the relevant concepts are much more important.

With regard to the breadth of the enactment my article deals solely with the Civil Litigation Procedure Code. But this does not indicate at all that this Code is more important than the two other codes. However, this Code may be prioritized, to some degree, because both the Civil Non-Litigation Procedure Code and the Code of Administrative Court Procedure refer secondarily to the Civil Litigation Procedure Code (§ 2 (1) of the Civil Non-Litigation Procedure Code and § 5 (1) and § 25 (1) of the Code of Administrative Court Procedure).

2 Taxonomy/System of Classification of the Civil Litigation Procedure Code

When compared to the system of classification contained in the current Code of Civil Procedure, no big changes may be expected in the taxonomy/classification of the Civil Litigation Procedure Code, as it is logically based on the progress of the judicial process. The only exceptions apply to some parts of the current Code of Civil Procedure that are now statutorily laid down in a new code. This applies to the following:

- Part Three, Chapter Five covering *special provisions (in non-contentious matter)*, now transferred to the new Civil Non-Litigation Procedure Code,
- Part Five concerning *administrative justice* the rules of which are transferred to the Code of Administrative Court Procedure, and
- Part Six relating to enforcement/execution of judgments, the provisions governing the *enforcement of judgment in cases of custody of minor children*, transferred to the Civil Non-Litigation Procedure Code. The remaining parts applying to *enforcement of judgment of debt payments claimed by the court and recovered by the Judicial Treasury, as provided by Act 65/2001 Z. z. on the administration and recovery of debt payments claimed by the courts*, are newly provided for in this Act.

From among the changes in the system of classification, also Part Two of the Code of Civil Procedure concerning *pre-trial court activities* was left out in full. In future, no provisions will be made for conciliation proceedings originally included in Part Two of the Code of Civil Procedure. The rules of another pre-

liminary activity – paternity determination by joint consensual declaration of parents – has been transferred to the Civil Non-Litigation Procedure Code (§ 104). And the last two concepts originally included in Part Two of the Code of Civil Procedure – interim measures (newly defined as immediate measures) and securing evidence – are newly regulated by the Civil Litigation Procedure Code, included, however, in Part Three, among special procedural rules.

Also Part Seven of the Code of Civil Procedure – *other court activities* – has been left out in full, as justified by the fact that such concepts do not necessarily have to be included in a procedure code³.

Newly incorporated in the taxonomy of the Civil Litigation Procedure Code are the articles (altogether 18) preceding the text arranged into sections, laying down *the fundamental principles* of this legislative enactment, and *setting the framework of interpretation* not only for the rules of the Civil Litigation Procedure Code, but, also the rules of the Civil Non-Litigation Procedure Code and the Code of Administrative Court Procedure.⁴

The Civil Litigation Procedure Code is divided into five Parts.

Part One, as previously, contains the **general provisions**, covering the subject-matter of the law (Chapter One), powers of the courts and their jurisdiction (Chapter Two and Chapter Three), composition of the courts and exclusion of judges (Chapter Four), parties to the proceedings, representation, and other/specific legal parties to the proceedings (Chapter Five and Chapter Six), trial procedures, and time limits (Chapter Seven and Chapter Eight).

Part Two covers **first-instance proceedings**, since the provisions formerly regulating pre-trial procedures have been either left out in full or transferred to another part of the code or to another law (see the information above). In the framework of the first-instance proceedings, the original concepts and terms are preserved, such as procedures after commencement of the proceedings (Chapter One), the trial (Chapter Three), the evidence (Chapter Four), judicial decisions (Chapter Five) – with only judgment and resolution, and costs of the proceedings (Chapter Six), being partially modified. Newly included is the preliminary hearing (§ 168–172) and complaint (§ 239–250).

Part Three, as indicated also by its heading **Special Procedures in Civil Process**, is completely new. Although, not as far as its content as a whole. Some concepts/terms contained there come from the former enactment, some are completely new.

Taken from the previous code are e.g. the decisions resulting from the summary proceedings, namely, an order for payment and a European order for pay-

³ Explanatory Report, A. General Part.

⁴ Explanatory Report to the Civil Litigation Procedure Code, B. Special Part, text concerning Article 1.

ment. The legislator has not incorporated any provisions concerning specific performance orders, or orders for payment of checks and bills of exchange for future use. Judgments based upon the party's conduct, i. e. judgments made upon admitted claims or judgments made upon waiver of the claim, as well as default judgments, have all been taken from the previous code. Among the new provisions, default judgment against defaulting claimant is now included.

Regulation of the concept of interim/provisional measures/orders, now called peremptory measures/orders in urgent cases have also been preserved. But additionally a new concept of safeguarding measures (§ 343–344) is defined. From among the original concepts, also that of securing the evidence has been preserved.

New concepts include proceedings for the protection of contractually weaker party. The legislator has created three basic forms – consumer disputes, (unfair) discrimination disputes and employment discrimination disputes.

Part Four remains reserved for appellate remedies. With reference to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court the European Court of Human Rights case law⁵, the category of extraordinary appellate remedy has been left out. A new remedy – appellate review brought by the General Prosecutor (§ 458–465) has been introduced.

The last, **Part Five**, contains the conventional common, transitional and final provisions.

In this paper I am not concerned with Articles 1–18.⁶

3 On some concepts included in the Civil Litigation Procedure Code

The incorporation of the concept of the so called **causal jurisdiction** of the court in the Civil Litigation Procedure Code (§ 22–§ 30) is a positive point. At present this concept is laid down in a special law, Act 371/2004 Z. z. on the addresses and districts of courts in the Slovak Republic, which is not an expedient solution.

Regrettably, the provisions on causal jurisdiction are not included right after the provisions governing the subject-matter jurisdiction of the courts; it would be a more systematic placement than placing them subsequent to the provisions on local jurisdiction of the courts. Therefore, it may seem at first sight that the interpretation problems about whether causal jurisdiction is a special/specific

5 Explanatory Report concerning the Civil Litigation Procedure Code, A. General Part.

6 I discussed Articles 1–18 of the Civil Litigation Procedure Code in my paper presented at the conference in May 2015, organized under the topic Principles of Civil Procedure by the Faculty of Law of Palacky University in Olomouc, published in *Acta Iuridica Olomucensia*, 2015, vol. 10, no. 1, p. 37–56.

type of subject-matter or of local jurisdiction⁷ will continue, to which another problem was related, namely what a court ought to do when thinking no causal jurisdiction arises. However, it will be irrelevant in future as to how the concept of causal jurisdiction should be perceived. It is important that under § 40 of the Civil Litigation Procedure Code the court is required to inquire *ex officio* whether its causal jurisdiction exists, that is also in absence of any objections, and throughout the entire process.

The legislator abandoned the present concept of enjoined party/subsidiary party/co-party, replacing it by the concept of **intervenient/intervener**, as newly defined in § 81 – § 88 of the Civil Litigation Procedure Code.

What has remained unchanged is the condition that such party must a *legal interest in the litigation results* (§ 81 of the Civil Litigation Procedure Code). The intervenient may join the proceedings also on his/her own accord or upon a notice by either party to the dispute at any stage of litigation (§ 82 (1) and (2) of the Civil Litigation Procedure Code). Such intervenient may join either with the claimant or the defendant (§ 81 of the Civil Litigation Procedure Code). The court has no discretion to decide on such intervention in the litigation process, except where either party may request it (§ 83 of the Civil Litigation Procedure Code).

What is different in the new Code?

Two types of intervenient/intervener are introduced, together with a *litis denuntiatio* (notice of suit).

The first intervenient type is defined in § 84 of the Civil Litigation Procedure Code. Within its meaning the intervenient may form a necessary/indispensable union with the party, and where it is so set in a special law, the judgment is binding also for the intervenient.

A marginal note may be made at this point concerning inexpedient terminological wording of the provision according to which „... the intervenient creates, together with the party on whose side the intervenient acts ...“ The party is a new term, replacing the term of a participant currently in use. This is not just a denomination referring to claimant or defendant. Translated into the present terminology this clause would read: „... the intervenient creates, together with the participant/party to the proceedings in which the intervenient acts ...“. Therefore *de lege ferenda* it would be more appropriate to reformulate this text for example as follows: „...the intervenient creates, together with the party beside which he acts ...“

7 See different views presented in ŠTEVČEK, Marek. K problematike tzv. kauzálnej príslušnosti niektorých slovenských súdov /On the issues of the so called causal jurisdiction of some Slovak courts/. *Justičná revue*, 2009, vol. 61, no. 6–7, p. 852–860; FICOVÁ, Svetlana. Otázniky nad kauzálnou príslušnosťou /Question marks over causal jurisdiction/. *Justičná revue*, 2009, vol. 61, no. 6–7, p. 861–867.

These provisions present still another terminological inaccuracy. These two different concepts/terms” are combined in one legal party, the intervenient with the necessary/indispensable union. It is not possible for a *dominus litis* to act as a necessary/indispensable party, and also as an intervenient (subsidiary party/co-party). In one and the same litigation such party may either be a *dominus litis/main party* or an intervenient.

The legislator’s intent is quite obvious. However, more appropriate terminology might have been used, such as e.g. „in such cases, as for the position of an intervenient, the rules governing the necessary/indispensable union are applicable“.

And now, the very nature of this type of intervenient may be discussed.

For the rules governing the necessary/indispensable union to be applicable for the intervenient, the following two conditions must be met concurrently:

- *Judgment is binding for the intervenient, and*
- *this binding obligation arises from a special law.*

In the Explanatory Report this is illustrated by reference to provisions of § 54 (2) of the Commercial Code⁸ or § 131 (5) of the Commercial Code. On the same basis, also provisions of § 369d (6) of the Commercial Code are construed.

Where the intervenient fails to satisfy the two conditions of law, the provisions governing necessary/indispensable union of parties, should not be applicable for the intervenient. These cases correspond with the other type of intervenient.

Distinguishing between the two types of intervenient has important impact on independent conduct of such parties. Where the rules governing the necessary/indispensable union do apply, the intervenient may, on his/her own accord, use the procedural means of attack or defense without any approval of the main party (§ 84 in conjunction with § 77 of the Civil Litigation Procedure Code). The procedural means of attack or defense defined in the Civil Litigation Procedure Code include, in particular, allegations of fact, denial of the facts alleged by the opposing party, proposed evidence, objections to the evidence proposed by the opposing party, and objections based on substantive law (§ 149 of the Civil Litigation Procedure Code). Under the same conditions, i.e. without consent of the main party, the intervenient may seek an appellate remedy [appeal (§ 360 (1) of

8 The entitled persons whose rights have been impaired or endangered by unfair competition may, through a court action commenced to restrain a wrongful conduct, demand that the wrongdoer abstain from such conduct and remedy the detrimental/objectionable conditions. No court actions brought by any other entitled persons seeking the same claims in the same proceedings are admissible, but the entitled persons may join the proceedings as subsidiary parties. Final judgments in these claims of one entitled person are effectively applicable also to other entitled persons.

the Civil Litigation Procedure Code), re-trial (§ 401 of the Civil Litigation Procedure Code), or appellate review (§ 425 of the Civil Litigation Procedure Code)].

Where the rules governing necessary/indispensable union do not apply, the intervener's rights to use the procedural rules of attack or defense will be limited, as these rights may be exercised *only with the consent of the party beside which the intervenient acts in the proceedings* (§ 85 of the Civil Litigation Procedure Code). Such intervenient also needs such consent when filling an appeal (§ 360 (2) of the Civil Litigation Procedure Code). And such intervenient has no right to seek a re-trial/renewal of the proceedings or appellate review at all, that is, regardless of whether the party to the proceedings was willing to grant such consent.

The conditions necessary to be met as for the provisions governing necessary/indispensable party to be applicable for the intervenient will be, unquestionably, subject to a detailed interpretation analysis; especially the definition element "... where the binding nature of judgment arises from a special law." Should a narrow interpretation prevail, being limited only to cases expressly anticipated by a legal rule (as illustrated in the Explanatory Report in relation to § 80 of the Civil Litigation Procedure Code), and not to cases in which it follows from the *merits of the dispute* that the judgment *dictum* will affect the relationship between the intervenient and the party joined by intervenient, then it would not be possible to consider this a step forward. Since sufficient leeway for abuse of law still remains here, for example in cases of the insurance company's obligation to pay⁹.

The introduction of the concept/term of *notice of suit (litis denuntiatio)* may be assessed as constructive, together with the related effects depending on whether the intervenient will join the proceedings or not (§ 86–§ 88 of the Civil Litigation Procedure Code). In both cases, where the dispute has been finally decided, it is not possible to object the decision is wrong. Also the option to object wrong procedural conduct is limited as it relates to expressly enumerated cases, only. The law has, however, failed to consider a situation, in which the party acting as *dominus litis* has not notified the intervenient about the suit/litigation or has notified the intervenient, but not in the manner implied by § 86 of the Civil Litigation Procedure Code (stating what claims and their reasons may be sought against the intervenient by the main party when not successful in litigation).

9 A flagrant case publicized in Trend magazine 6/2004, in which The Slovak Insurance Association, was threatened with making payment from the mandatory contractual insurance of SKK 30 million as damages for pain and social hardship to the wife, without any right to seek appeal in absence of consent granted by the aggrieved person's husband as the principal party to the proceedings, may be found analyzed by GEŠKOVÁ, Katarína; ŠORL, Róbert: Postavenie a zmysel inštitútu vedľajšieho účastníka v civilnom procese a jeho vývojové premeny /The position and meaning of a subsidiary party in civil trials and its developing changes/. *Justičná revue*, 2005, vol. 57, no. 8–9, p. 1024.

Under the present law, also a legal person/entity, the business activities of which include protection of rights under a special law, may act as a subsidiary party/co-party, even in absence of the legal interest in the results of litigation; under the Civil Litigation Procedure Code such co-party will act in the position of a *specific party* (§ 95 of the Civil Litigation Procedure Code). Surprisingly, the position of such person will be stronger than that of an intervenient to whom the rules governing the necessary/indispensable union do not apply. The position will be stronger since a legal entity, acting as a specific party to the proceedings, is entitled to exercise all acts in law applicable to a party (except for the acts in law exercisable by a party who is subject to substantive-law relations) without an express consent of a co-party. In case their acting is conflicting, the court will consider it so that it will correspond with a reasonable settlement of the relations involved (§ 95 (3) of the Civil Litigation Procedure Code). Unlike in case of a specific party to the proceedings, the intervenient, as already mentioned, may exercise the acts only with the consent of the co-party. If such consent has not been granted, the court may not take into regard the intervener's procedural conduct and may not consider the issue as to what would correspond with a reasonable settlement of the relations involved.

Significant changes have affected the concept of **service of process** (§ 105 – § 116 of the Civil Litigation Procedure Code) due to substantial simplification. The simplification results from preference of service at an electronic mailbox or, otherwise, service at a registered address.

In case of individuals/natural persons, service is at their *address registered in the Register of Inhabitants of the Slovak Republic*, or in case of an alien, at the address of residence in the Slovak Republic. The address registered in the Register of Inhabitants may be that of permanent or temporary residence and the citizen's address of residence abroad (as laid down by Act 253/1998 Z. z. on residence reporting residence by the citizens of the Slovak Republic and on the Register of Inhabitants of the Slovak Republic).

As for legal entities, service is at the *address of their registered office* as registered in the Companies Register, or another register.

Where the process documents cannot be served in this manner, legal *fiction of service as of the date of documents returned* to the court will apply. If the addressee does not dwell at the particular address for excusable reasons while not violating any legal obligation, the concept of legal excuse for missing the time limit will apply where, in the meantime, the time limit set for the service of process has expired.

The natural persons and legal entities are still free to give another address for the purpose of service of process or they may appoint a proxy for receiving the service of process documents.

The law anticipates also a situation in which a natural person has *no* address registered in the Register of Inhabitants of the Slovak Republic. By legal fiction a document is deemed to have been served after 15 days following its publication at the official notice board and at the website of the relevant court.

The procedure for serving the *initial legal action/claim on a natural person*, compared to other types of legal documents, is slightly stricter. If such notice to the defendant who is a natural person cannot be served at the address registered in the Register of Inhabitants of the Slovak Republic or at the alien's address of residence in the Slovak Republic, the court cannot serve the notice of legal action immediately by publication at its official notice board or the website. First the court takes all steps necessary to ascertain the actual location of the defendant (§ 116 of the Civil Litigation Procedure Code).

The law has introduced a new concept/term of **manifestly unfounded claim/initial legal action** (§ 138 of the Civil Litigation Procedure Code). In such case the court should demand the claimant to withdraw the claim/initial legal action. How the court should proceed in case that the claimant fails to do so is not included in the provision quoted above. Should the court continue in the proceedings and take evidence in order to make a decision on the merits, or should the court apply the provisions of Article 5 of the Civil Litigation Procedure Code containing the fundamental rule of interpretation? Under this Article the court could dismiss the claim/initial legal action as a procedural act in law and use sanctions. Some uncertainty concerning such interpretation has been caused by changes brought in the wording of the Civil Litigation Procedure Code when compared to its draft presented for interdepartmental consultations. Article 4 of the draft included not only denial of procedural acts in law, but also dismissal of such legal action. The Explanatory Report does not explain this modification, either. So it is not clear whether leaving out the word "initial legal action/claim" from the original Article 4, now Article 5, by reasons of redundancy, as the initial legal action is one of procedural acts in law, or on the grounds that dismissal and sanctioning do not apply to initial legal actions even though they may be manifestly unfounded.

In § 149 of the Civil Litigation Procedure Code a new term/concept **procedural means of attack and defense** has been introduced, containing, however, just demonstrative enumeration. Included are, in particular, allegations of fact, denial of facts alleged by the opposing party, proposed evidence, objections to the evidence proposed by the opposing party, and objections based on substantive law. In the interest of speed and economic efficiency, the law requires their timely application/exercise under threat of a sanction that otherwise the court may disregard them. Thus, also the concept of *judicial concentration of/setting strict time limits for the process* (§ 153 of the Civil Litigation Procedure Code) is laid down. This is most clearly applied in the procedures following the service of the initial court action/claim upon the defendant (§ 167). The defendant must

answer within the time limit set by the court and indicate his/her defense evidence. The defendant's answer is sent by the court to the claimant who, again, must reply to the statements concerning the defendant's answer and evidence. Where the claimant makes a replication, the court must (unless the court makes another relevant order) serve it on the defendant so that the defendant may respond (make a rejoinder). When will this process end should the parties make new statements of fact indicating also new evidence in response to the opposing party's response? The law is silent on a further procedure in § 167 of the Civil Litigation Procedure Code. Does it mean that the second response by the defendant/rejoinder will not be sent by the court to the claimant for his/her response/surrejoinder? No unambiguous answer to this question can be found in the fundamental interpretation rule laid down in Article 9 of the Civil Litigation Procedure Code, either. Within its meaning the parties to the dispute have the right to be informed of the opponent's responses, proposals and evidence, and to present their own views. According to Article 9, the court could be sending the information for the opposing party until one of the parties can provide no new allegations of fact or indicate proposed evidence. However, Article 9 contains an additional idea, according to which the parties have the right to be informed and to respond within the scope set by law. Does it mean that the rules contained in § 167 of the Civil Litigation Procedure Code are limited to service of initial legal action/claim upon the defendant, service of defendant's answer upon the claimant, and the last service of claimant's reply/replication upon the defendant should be considered the scope set by law within which the responses of one party to the other end?

In addition to the judicial concentration/setting strict time limits, the existing *legal concentration of the process is preserved*, according to which the procedural means of attack and procedural means of defense may be used before a resolution on completion of taking of the evidence.

The next novelty is **preliminary hearing** (§ 168 – § 172 of the Civil Litigation Procedure Code). It may be considered a replacement of the present preparation for trial/hearing. This is not an obligatory part of the proceedings. Preliminary hearing takes place before the first trial hearing, unless the court has determined otherwise. Within preliminary hearing the court should try to reach settlement by conciliation of the parties. If not successful, the court should determine which allegations of fact are at issue, which have been admitted, which evidence will be taken and which evidence will not be taken, announcing also its preliminary legal observations and the anticipated date of trial. The law gives the court the right to make a decision on the merits of the case already at this stage of the process, generally depending on whether it is feasible and/or reasonable. Both claimant and defendant must be present at the preliminary hearing of the case. Actually, the court has a discretion (not an obligation) to make a default judgment against the party absent without a good cause, provided the party has been

duly and timely summoned and instructed on such judicial discretion, and provided also the repeated procedure of service of process documents upon both parties, as described above in reference to § 167 the Civil Litigation Procedure Code. Thus, a leeway has been newly provided for making a default judgment also against the claimant, not only against the defendant, as it is at present.

A judgment in case of default by claimant is possible also under § 273, et seq. of the Civil Litigation Procedure Code. The rules for such judgment are the same as in the case of the defendant's default (failure to appear to a hearing despite his/her timely and duly summoning, failure to excuse his/her absence in due time, good cause announced upon serious circumstances, and the instruction on possible default judgment). By a default judgment against the defendant, the legal action is dismissed.

Within the framework of taking of the evidence, the provision contained in § 187 (1) of the Civil Litigation Procedure Code is worth mentioning. According to this provision, everything obtained in a lawful manner through the means of evidence may serve as a proof. Based on such wording it may appear that also **illegal** (means of) **evidence** may be used in civil litigation. It is only illegal proof that may not be used, i.e. the information¹⁰, resulting from the evidence adduced. In other words, when the evidence, although illegally obtained, is adduced in accordance with the law, the resulting proof (the information) is lawful and may be used in weighing the evidence. However, if the evidence, although lawfully obtained, is adduced in violation of law, such proof (information) is illegal, and must be excluded from weighing the evidence. However, the interpretation is not as simple as it may appear. Actually, we may say it is disallowed under Article 16 (2) of the Civil Litigation Procedure Code. Within its meaning, in considering and deciding the matters of the case, the court does not take into regard the evidence obtained unlawfully/contrary to law, unless the *presentation of the evidence* obtained unlawfully may be justified under Article 3 (1) of the Civil Litigation Procedure Code. Although in the Explanatory Report the bill presenter maintained, in reference to § 183 that the terms “proof” and “(means of) evidence” are thoroughly distinguished, in fact the opposite is true. A proof is mentioned in relation to its presentation. But a proof is just the information obtained by presenting (the means) of evidence. Thus, it is the evidence which is presented, not the proofs. By such terminological modification, this Article would read (in abridged wording as for its substance) „...does not take into regard the proofs obtained contrary to law, unless presentation of the (means of) evidence obtained unlawfully may be justified under Article 3 (1) of the Civil Litigation Procedure Code“. Thus we come to the meaning other than that implied by § 187 (1). Under Article 16 (2) of the Civil Litigation Procedure Code, in principle unlawfully obtained evidence may not be used. The only exception is the

¹⁰ As for the definition of the concept of proof, see e.g. WINTEROVÁ, Alena et al: *Civilní právo procesní /Civil Procedural Law/*. Praha: Linde, 1999, p. 216..

situation, where the presentation of the evidence is justified (e.g. because the right to have personal rights protected where the statements of a person have been recorded without his/her consent, is, in this particular case, proportionally weaker when compared to a constitutional right the violation of which is to be proven by the evidence so obtained; proportionally stronger is the right to racial, gender or other nondiscrimination)¹¹.

The next novelty is **complaint/statement of discontent** (§ 239 – § 250 of the Civil Litigation Procedure Code). It may be made only against a first-instance resolution, never against the judgment. Concurrently a condition requiring the resolution to be issued by a judicial officer must be satisfied. Such complaint is not included among appellate remedies. According to the Explanatory Report referring to § 233, this is a remedial procedure of the defense. However, it comprises all the elements of an appellate remedy – subjective and objective conditions of admissibility, suspending effect and determination of whether it may be granted or denied.

Simplification of **court costs** (§ 251 – § 264) is certainly to be welcomed, because they were made more and more complicated by each of the amendments to the current Code of Civil Procedure until reaching the present unhappy situation. This enactment contains no classification of various types of court costs/costs of proceedings by means of illustrative enumeration. The court costs/costs of the proceedings are specified merely by general signs of provability, reasonableness, purposefulness, and limitation to the commencement of the proceeding. The principles of payment of court costs, reimbursement of court costs, and of exemption of court fees have remained almost unchanged. A considerable change concerns determination on the court costs. Once again we have returned to the court's obligation *ex officio* to determine on the court costs, i.e. not only at the party's request. However, the court will only decide on the right to reimbursement of the court costs, not on their amount. The court will only decide which of the parties has the right to reimbursement of the court costs and in what proportion (in the form of a fraction or percentage). The court determines on the right to reimbursement of the court costs in the decision by which the proceedings are closed. Only after the decision becomes final, the *amount of court costs* will be set. This will always be determined by the first instance court, i. e. also where the proceedings are closed by a decision of the court remedying an error. The decision (resolution) of the amount of court costs is now to be issued by a judicial official in order to unburden the judges. Such resolution may be challenged by a complaint under § 239, et seq. upon decision of a first-instance court.

A new kind of proceedings is being introduced with the aim to provide for judicial **protection of contractually weaker party**. This applies to **consumer disputes, antidiscrimination disputes and labor disputes of individuals**. What is the basis of higher protection provided by the court? In the first place this

¹¹ Special part of the Explanatory Report concerning Article 16

applies to *widening the general duty to instruct the weaker party*, i. e. a consumer, a person in relation to whom the principles of equal treatment were violated, and an employee. Under this special duty to instruct beyond the scope of the general duty, the court must inform these persons, already during the first act in law, on the options of legal representation, on the evidence that must be presented, on the options to request immediate, and security measures, or other alternatives that may be reasonably used in exercising and defending the rights of such persons. In proving the facts the court is not limited to the evidence proposed by the parties. The court may obtain and present the evidence not proposed by the weaker party. Thus, the *principle of inquiry*, unilaterally applied in relation to finding and proving the facts concerning the weaker party is anticipated. Similarly, the provisions governing judicial and legal concentration of the process do not apply, once again only unilaterally. By the same unilateral application, the possibility to make a default judgment against the weaker party is excluded.

Quite a minor change concerns the system of **appellate remedies**. Instead of extraordinary appellate review, the appellate review lodged by the General Prosecutor is laid down. The other appellate remedies have been sustained.

As for **appeals** (§ 355 – § 396 of the Civil Litigation Procedure Code) the rules of admissibility of appeal against a resolution have been changed, so an appeal is possible only against resolutions concerning exhaustively enumerated cases. Where a complaint is admissible against such resolution, an appeal is excluded. As for the grounds for appeal, changes may be found merely in the reformulated wording, the essence of grounds remain unaffected. The change relates to summary judgments (based on admission or waiver of claim, and default judgment). Such judgments may be appealed on the grounds that the conditions for issuing the judgment have not been met. That means not also by reason of incorrect legal consideration of the case. The effort to prevent “blank” appeals, the appeals giving no reasons of appeal, may be positively accepted. Some normative attempts in this area were made also in the past, but without any desirable effects. As a result, the Supreme Court ruled¹² that where the appellant failed to state *any* grounds of his/her appeal, the Court must try to remedy such deficiency. If the appeal was amended, also beyond the time limit set for appeal but before the decision made by the appellate court, the Court must consider and review such appeal as faultless. The legislator, having taken lesson from this interpretation by the Supreme Court, has expressly stipulated that the court will not ask the appellant to submit the missing reasons for appeal (§ 373 (1) of the Civil Litigation Procedure Code). In conjunction with § 365 (3) of the Civil Litigation Procedure Code this means that reasons for appeal may be modified and amended only within the time limit set for appeal, not later. Surprisingly the same limitation is

12 Published in the Collections of Opinions of the Supreme Court of the Slovak Republic and Judgments of the Courts of the Slovak Republic under R 20/2014, case no. 1 Cdo 195/2005, of November 22, 2005.

stipulated also in relation to the means of evidence and also in the new concepts. The appellant's respondent is limited, as for the means of defense or attack, by the time limit set by the court for responding to the appeal which may not be less than ten days (§ 373 (3) and (4) of the Civil Litigation Procedure Code).

In place of extraordinary appellate review, a new appellate remedy, **appellate review sought by the General Prosecutor** (§ 458 – § 465 of the Civil Litigation Procedure Code) has been laid down. But it may be seen as a correction of the present extraordinary appellate review. The correction concerns the extension of admissible subject-matters. Appellate review by the General Prosecutor is admissible against any final judgment (subject to further conditions that must be satisfied), irrespective of the subject-matter of dispute, the amount in dispute, the form or method of the decision, except for a decision made upon appellate review or a decision made upon appellate review brought by the General Prosecutor which may not be challenged by an appellate review sought by the General Prosecutor (§ 459). The time limit for appellate review sought by the General Prosecutor has been reduced to three months. The reasons, representing, concurrently, the conditions of admissibility, have been reduced to two – the decision has been made in violation of the right to a fair and just trial, and the conclusions in matters of law which are arbitrary or unsustainable. Simultaneously, the need to set aside/quash a decision/judgment must prevail over the interest to sustain it as irrevocable, and/or over the principle of legal certainty. The option to suspend enforcement of judgment *ex lege* by seeking an appellate review together with a request to suspend enforcement of judgment has been abandoned.

4 Instead of a conclusion

According to the Explanatory Report (its General Part) these legal measures represent fundamental and unavoidable steps taken to improve enforceability of law in the Slovak Republic, and to reach more effective and speedy judicial decisions. The fundamental aim of the re-codification is to make civil procedure more effective and economically more efficient, to accelerate and streamline the civil process, and thus to provide for a more efficient protection of rights and legitimate interests of individuals and legal entities, and of the interests of the whole society.

Whether this aim will be reached and fulfilled, will be the matter of everyday practice and application.

It would be too naive to believe the law will be interpreted without any problems. Similarly naive it would be to expect that the parties or their legal representatives will not take advantage of legislative holes, or at least to make obstructions in an effort to prolong the proceedings and thus to delay the anticipated unfavorable decision. Such has always been the true reality, and it will be so in future, too. Still we must hope that a legal doctrine that needs to amplify its activ-

ity, will contribute, at least to some extent, to bring, in particular, more uniformity in the interpretation of some of the legal norms.

The task of the science and theory of law is not just to criticize the existing legislation and decisions made by the courts. Its task is to provide explanations, trying, on the basis of logical arguments, to help the judicial practice also by reference to some legal deficiencies, ideally by presenting some *de lege ferenda* proposals.

RESTORATIVE JUSTICE IN THE CONDITIONS OF THE SLOVAK REPUBLIC¹

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Summary: Nowadays, traditional criminal policy is facing its limits and is unable to cope with the rising criminality. Current criminal justice based on repressive approaches is unable to face serious obstacles and problems, namely in efficiency of punishment, poor protection of victims, and slow and overburdened criminal courts. New models of criminal judiciary based on principles of restorative justice have been unveiled while traditional systems of criminal justice are facing a serious crisis. The conception of restorative justice is one of the most modern and progressive of current approaches to criminal law that deserves to be implemented into the Slovakia criminal judiciary system. Author focused on punishments as home arrest, compulsory labour and financial penalty.

Keywords: Principles, Features, Retributive Justice, Theoretical Background, Reform History, Home Arrest, Compulsory Labour, Financial Penalty.

1 Principles of Restorative Justice

a) Support Victim and Healing is a Priority

When Liebmann is talking about restorative justice, he often ask whether anyone has been a victim of crime – often half or all the audience put their hands up – then ask what they would have wanted after the crime. Almost all of them mention things they needed (mainly their property back etc.) rather than punishment for the offender.

b) Offenders take Responsibility for what they have done

Offenders are used to take punishment but this is different like to taking responsibility for what they have done. Offenders suppose „I’ve done my time, I’ve paid my debt to society“, while in reality they had cost the state a lot of mon-

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ey and had not given a thought to those they had harmed. To take responsibility means to say „Yes, I did it and I take responsibility for the harm I caused“. From this statement starting point restorative justice.

c) Achieve Dialogue Leading to Understanding

A lot of victims have questions: Why me? Why my house? Is it likely to happen again? Etc. Only one person knows and can answer these questions. Some of offenders do not understand how they have harmed their victims, “What is the problem? They can get it back on insurance, can ’t they?”. The offenders realize when they hear from victim what they did.

d) There is an Attempt to put Right the Harm Done

Further step should be logically to take responsibility for doing harm is to try to put things right, as far as possible. Sometimes an apology is enough but mostly not. Sometimes the community has been harmed and these needs putting right, an example might be removing graffiti on an elderly persons’ home.

e) Preventing Recidivism of the Offender

Once, when offenders have realized the harm they have done, they usually don’t like the idea of repeating their behavior. Many offenders have problems that lead to offending, such as homelessness, drugs or alcohol – they may need considerable help to avoid future offending and build a different kind of life. Restorative justice need to go hand in hand with the resources to achieve this. This is long run, most victims are interested in offenders avoiding future offending, thereby preventing the creation of more victims.

f) Reintegration of Victim and Offender

The offenders need to be reintegrated into the community, especially after a prison sentence. They need accommodation, jobs and relationship to become positive members of the community. On the other hand, victims need reintegrating into the community too. They often feel alienated and cut off as a result of crime.²

2 Features of Restorative Justice

There are three basic pillars of restorative justice: *harm and need, obligation, engagement*.

a) The Restorative Justice Focuses on Harm.

The term “restorative justice” means in the first place the harm done by crime, specifically to people and the society. Our legal system focuses on the law

2 LIEBMAN, Matt. *Restorative justice/how it works*. London: Jessica Kingsley Publishers, 2012, pp. 8.

(rules), which sees the state as the main victim. The goal of restorative justice is to provide experience with rehabilitation to all involved parties.

b) Wrongs and Harms Resulting in Obligations.

The restorative justice emphasizes that the offender should be accountable for his acts. The offender assuming responsibility is the basic step for the restorative justice to operate. If the way of punishing the offender is to put him into an institution to serve a term of imprisonment and thus restricting his personal freedom, then the restorative justice cannot be applied. The offender has to realise that he caused harm and, especially, he has to assume responsibility for his acts. The offender has to understand the consequences of his acts. He also has the obligation to restore the damage caused to the highest extent possible.

The first obligation is on the offender's side but let's not forget also the obligation of the society as such that lies in the reintegration of the offender and postpenitentiary care.

c) Restorative Justice Supports Participation or Engagement.

The principle of engaging the offender lies in influencing the parties directly affected by the act – the victim, the offender and members of society – they have an important role in the criminal procedure. These involved parties must be provided with information about each other and at the same time they need to know what the prosecuting authorities need from them.

In some cases it might concern dialogues between parties that commonly take place between the offender and the victim at victim offender conferences. Opinions are shared and consensus is sought during such conferences. In other cases, indirect parties, such as surrogates, might be involved.

The engagement principle means involving an enlarged circle of parties as compared to the traditional justice process.

The Restorative Justices Requires, at Minimum:

- compensating the victims and addressing their needs,
- preparation of offenders and holding them accountable to restore the damage and
- subsequently the involvement of victims and offenders and the society into this process.³

Features of Restorative Justice:

1. To focus on consequences of the crime more than on the fact that the law was breached.

³ ZEHR, Howard. *The little book of Restorative Justice*. Intercourse, PA: Good Books, 2002, pp. 22–25.

2. To show the same concern and resolution towards the victim and the offender that involves the participation of both in the justice process.
3. To work on the compensation of victims, to strengthen them in addressing needs as they perceive them.
4. To support and encourage offenders in the understanding and acceptance of obligations, to make them fulfil their obligations.
5. To recognise obligations that might be more difficult for offender and should not be seen as something harmful and that should be, at the same time, attainable.
6. To provide opportunity for dialogue, direct or indirect, between the victim and the offender.
7. To find meaningful ways how to involve the society in the process.
8. To support cooperation and reintegration of victims and offender rather than to apply coercion and isolation.
9. To pay attention to thoughtless consequences of one's own acts.
10. To respect all parties – the victim, the offender and the society.⁴

3 Restorative Justice versus Retributive Justice

In the opinion of Conrad Brun, the theoretical and philosophical scopes of the terms restorative justice and retributive justice are not opposites, as some people might assume.⁵ The restorative justice introduces new elements into the traditional criminal justice, such as mediation between the offender and the victim, group extrajudicial hearings of minor offences of juvenile delinquents (the so-called a family group conferences) and also pointing out to the compensation of harm caused to the victim.⁶ At the same time, restorative justice represents a traditional form of criminal justice that focuses mainly on punishing the offender but also on the restoration of previous conditions.

The characteristic feature of both theories is the compensation of damage to the victim. The difference between both theories arises in application of specific settlement of affairs.⁷

The retributive theory means that the punishment is deserved, which in practice is often counter-productive for the victims and the offenders. On the other hand, the restorative justice theory shows that the addressing the needs and harms done to the victim is needed in combination with the active effort to

4 BECK, Elizabeth; KROPF Nancy P.; BLUME LEONARD, Pamela. *Social work and restorative justice*. Oxford: Oxford University press, 2011, pp. 43.

5 BRUNK, Conrad. Restorative Justice and The Philosophical Theories of Criminal Punishment. In *The Spiritual Roots of Restorative Justice*. 2001.

6 SCHEINOST, Miroslav. Restoratívni justice. In *Sborník příspěvku a dokumentu*. Institut pro kriminologii a sociální prevenci, Praha, 2003.

7 KURILOVSKÁ, Lucia, LENHARTOVÁ, Katarína. EÚ ako otvorená cesta restoratívnej justície = EU as an open way of restorative justice. In *Právny obzor*, roč. 96, č. 3, 2013.

support the offender to accept responsibility for committed crimes and focus on the causes of his behavior.⁸

According to Howard Zehr, the differences between restorative and retributive justice are:

Restorative Justice:

- The crime presents a disruption of personal and interpersonal relations.
- The disruption leads to obligations.
- In the restoration process, justice involves: victims, offenders and the society.
- Focus: needs of the victim and offenders and responsibility for restoration of damage.

Retributive Justice:

- The crime presents a disruption of law and the interests of state.
- The disruption leads to guilt.
- The justice requires the state to decide on the guilt and impose punishment.
- Focus: the offender should get what he deserves.⁹

Howard Zehr created on the basis of these differences three different questions how to see the committed crime from the point of view of restorative or retributive concept:

Restorative justice:

Who has been hurt?

What are their needs?

Whose obligations are these?

Retributive justice:

What law has been breached?

Who did it?

What do they deserve?¹⁰

The retribution theory believes that the harm caused to the victim will be remedied, but it is often counter-productive in practice for the victim and the offender. On the other hand, the restorative theory justice argues, or more precisely, really advocates for becoming aware of the damage the offender caused to the victim together with the effort to encourage him to assume responsibility for the offence. At the same time, the restorative justice has the potential to transform the lives of the offender and the victim in a positive way.¹¹

8 ZEHR, HOWARD. *The little book of Restorative Justice*. Intercourse, PA: Good Books, 2002, pp. 58-59.

9 ZEHR, Howard. *The little book of Restorative Justice*. Intercourse, PA: Good Books, 2002, pp. 21.

10 ZEHR, Howard. *The little book of Restorative Justice*. Intercourse, PA: Good Books, 2002, pp. 22-25.

11 ZEHR, HOWARD. *The little book of Restorative Justice*. Intercourse, PA: Good Books,

The proponents of restorative justice have a different opinion from the traditional reformers of criminal law. Before they see victims, they also see offenders and how to get them back into society, i.e. how to reintegrate them. Naturally, the victims are people that were “hurt” by the offence but at the same time, they should be able to empathize with the offender as a person who could be punished in another way than by a verdict of imprisonment. The restorative justice focuses, inter alia, on the return of the victim into the society.¹²

4 Origins, Aims and Theoretical Background of Restorative Justice in the Slovak Republic

Nowadays, traditional criminal policy is facing its limits and is unable to cope with the rising criminality. Current criminal justice based on repressive approaches is unable to face serious obstacles and problems, namely in efficiency of punishment, poor protection of victims, and slow and overburdened criminal courts. New models of criminal judiciary based on principles of restorative justice have been unveiled while traditional systems of criminal justice are facing a serious crisis.

The conception of restorative justice is one of the most modern and progressive of current approaches to criminal law that deserves to be implemented into the Slovakia criminal judiciary system. The foundations of restorative justice is a conviction that crime (criminal offence) itself does not mean only a breach of Criminal Code clauses (provisions), but it also means social conflict between individuals and an invisible breach of social and interpersonal relationships. Because of this we think the conflict should be resolved on an elementary level of interpersonal relationships with aim to restore damaged social relations and to compensate damages or other harms. Nevertheless, 100% restoration of damaged social relationships is hardly ever possible, so instead of repression we should focus on preventing criminality and protection of victims. The main goals of restorative justice are to decrease number of those incarcerated, crime prevention, to motivate offenders to compensate damages, give up criminal activities and live in a socially responsible way. We should protect society against criminality with special attention to victim’s rights.

4.1 Overview on Forms of Restorative Justice in the Criminal Justice System

Criminal judiciary in the Slovak Republic is based on traditional continental criminal procedure. Substantive Criminal Law as well as Procedural Criminal Law are more or less rigid and there is not enough space for the independent actions of judges, attorneys-general, prosecutors and policemen to determine

2002, pp. 59.

12 CLEAR; Todd R.. Community justice versus restorative justice: contrasts in family of value. In SULLIVAN, Dennis; TIFFT, Larry (Eds). *Handbook of Restorative Justice*. Routledge International Handbooks, 2008, pp. 464.

the best practices to cope with criminality and at the same time protect the interests of victims, offenders and the public as well. Modern features of restorative justice in Slovak criminal judiciary are appearing and it could be the way out of the crisis of criminal judiciary in Slovakia.

It is clear that main reforms of Slovak criminal procedure had been implemented in 2005 during the process of Re-Codification of Slovak Criminal Law. Some restorative measures and concepts came into effect on 01 January, 2006, when Criminal Code No. 300/2005 Coll. and Code of Criminal Procedure No. 301/2005 Coll. came into effect, Act No. 215/2006 Coll. On Compensation to Injured Persons by violent criminal offences, as well as Probation and Mediation Officers Act No. 550/2003 Coll. which came into force few years before.¹³

First of all, criminal procedure had been amended via strengthening the position of victims and other injured persons (better chance to claim damages). There is another progressive move, an effort to make victims and other injured persons take part in the criminal proceedings in order to ensure quick and satisfactory claim of damages (using so-called diversions). Finally, some modern informal processes had been implemented, e.g. Conditional Discharge, Reconciliation and Agreement of Guilt and Sentence (Arbitration and Mitigation in criminal proceedings).

Last but not least, substantive criminal law had been amended through implementation and application of alternative sentences. The most important of them is Community Service Orders and the opportunity to impose Protective Supervision over juvenile offenders exercised by the Probation and Mediation Officer in case of Conditional Suspension of Execution of Sentence of Imprisonment with Probation Supervision and Waiver of Sentence with Probation Supervision.

There is also a new institute of Mediation, a form of formal arbitration or mitigation proceedings outside the criminal procedure. It is an alternative to the criminal procedure, which creates an opportunity for imposing alternative sentences, using diversions in criminal procedure or substituting protective custody with less harmful protective measures. However, several concepts of restorative justice have never been implemented in the Slovak Republic, namely restorative group conferencing, police cautioning, community reparation boards and sentencing circles.

4.2 Reform History

The 1990s brought a broad discussion about possible implementation of restorative justice instruments such as Conditional Discharge and Conditional Discharge with enforcement by the Probation Supervision in Slovakia. Though it sounds strange, the first efforts to implement Conditional Discharge were in the 1980s during the totalitarian regime in Czechoslovakian Socialist Republic

13 DIANIŠKA, Gustáv a kol. *Kriminológia*. 2. vyd. Plzeň, Aleš Čeněk, 2011.

(solving issues of criminal liability for minor criminal offences, misdemeanors, anti-social and moral derelict behaviour). There was also an issue of Criminal Conciliation outside the Criminal Trial Proceedings. The proposed conception of Criminal Conciliation Proceedings was mentioned as a diversion from traditional course of criminal proceedings. The reforming effort was successful and some instruments of restorative justice have been finally implemented in the Slovak Republic.

First of all, the diversion in criminal proceedings, Conditional Discharge, was enacted by Amendment No. 247/1994 Coll. to the Criminal Procedure Code No. 141/1961 Coll. and came into force on 01 October 1994. Moreover, in Amendment No. 422/2002 Coll. to the Criminal Procedure Code No. 141/1961 Coll., which came into effect on 01 October 2002, the instrument of Criminal Conciliation Proceedings was implemented. Criminal conciliation ensures faster criminal proceedings as well as a strengthened position for victims and other damaged parties (to help them claim damages). In order to impose alternative sentences and non-custodial protective measures the Probation and Mediation Service was created. The Probation and Mediation Officers Act No. 550/2003 Coll. was enacted and came into force on 01 January 2004. Last but not least, a new alternative sentence was implemented in Slovakia– Community Service Orders (Sentence of Community Work). Moreover, for juvenile offenders, there was an opportunity to create the Conditional Waiver of Sentence (or Conditional Restraint of Sentence).

4.3 Contextual Factors and Aims of the Reforms

According to the Submission Report submitted to the Criminal Conciliation Implementation Act the criminal conciliation proceedings should enable agreement between prosecution (the Slovak Republic, victim, other damaged parties) and defence outside of the regular formal criminal proceedings. Of course, regular statutory criminal proceedings cannot be diverted at all, but it could focus exclusively on matters of guilt and sentence. On the other hand, when a criminal conciliation agreement comes into effect, it influences regular criminal proceedings in various ways: First of all, to make conciliation proceedings successful, there should be an agreement of awarding damages to the victim (this will make criminal proceedings quicker, less expensive and far more efficient). Furthermore, if there is valid and effective conciliation decision and an agreement of damages to be awarded, there is still space for Agreement of Guilt and Sentence at the criminal court.

Re-Codification of Criminal Law in 2005 created ideal circumstances for implementation and application of concepts and approaches of restorative justice into the Slovak system of criminal judiciary.¹⁴ The reform process had sev-

14 DIANIŠKA, Gustáv, STRÉMY, Tomáš. *Introduction to Criminology*. Plzeň, Aleš Čeněk, 2009.

eral main goals compatible with the concept of restorative justice, namely effort to decriminalize, depenalize, and to help overburdened courts. Moreover, Trial Proceedings had become less complicated and less time consuming as well as more efficient. Finally, the institute of Probation and Mediation Officers was created and they tried to solve as many criminal cases as they could outside the criminal proceedings and criminal judiciary.

4.4 Influence of International Standards

Criminal justice in Slovakia is being influenced by current European trends, such as extending use of alternative sentences in substantive criminal law and diversions in procedural criminal law. Also International standards played important role in the process of Re-Codification of Slovak criminal law by introducing restorative measures.

5 Home Arrest in the Slovak Republic

Home arrest was introduced in the Slovak legal system by Act No. 300/2005 Coll., Criminal Code, as amended (hereinafter as “Criminal Code”). It holds a crucial position within the system of alternative sentences, also due to that the lawmaker has inserted it right behind the sentence of imprisonment within the enumeration of the types of sentences under S 32 of Criminal Code. The conditions for imposing home arrest, its modifications, including other specifics of its content are governed by the provision of S 53 of the Criminal Code. The execution of home arrest is governed by the provision of S 435 of Act No. 301/2005 Coll., Criminal Procedure Code, as amended, and of S 79a of Decree No. 543/2005 Coll., on Administration and office regulations for district courts, regional courts, the Special court and military courts, as amended.¹⁵

Section 53 Home Arrest

(1) The court may impose home arrest for a period of up to one year on the offender of a minor offence.

(2) During the execution of home arrest, the convict shall be obliged, for the period of time determined by the court, to stay in his dwelling and premises adjacent thereto, lead a regular life and, if ordered by the court, submit himself to supervision by means of electronic monitoring devices.

(3) During the execution of home arrest, the convict may leave his dwelling only upon the previous consent given by a probation and mediation officer or an authority responsible for overseeing the convict via technical devices, and only on the grounds of urgency and for the period no longer than necessary. This period of time shall be included in the calculation of the overall sentence.

¹⁵ VRÁBLOVÁ, Miroslava. *Slovak substantive criminal law*. Trnava: University in Trnava, 2013.

(4) If the convict does not comply with the conditions referred to under paragraph 2, the court shall convert home arrest into an unconditional imprisonment sentence in such a way that two days of unserved portion of home arrest shall be equivalent to one day of an unconditional imprisonment sentence, it shall also decide about how the sentence is to be executed.

In the context of the Slovak Republic, the courts are missing the statutory option to impose the home arrest on a minor, because home arrest is not included in the enumeration of sentences under S 109 of Criminal Code which may be imposed on a minor.

Home arrest is a separate sentence and despite the fact that it presents a detriment to the personal freedom of the convict, the fact that during the execution of home arrest the convict remains in his natural environment with his social, family and economic bonds remaining intact, but with concurrent monitoring of his behaviour, can be seen as a positive attribute. Home arrest should be imposed mainly in cases when the significantly lesser intensity of interference with personal freedom of the offender is required given the nature and severity of the crime, given the personality of the offender, his chance of re-socialisation, taking into account his family background.¹⁶ Introduction of home arrest was motivated by the requirement of the society to punish the offender and at the same time to eliminate the negative effects of unconditional imprisonment, which include the effect of so-called prison subculture that often leads up to the negative change in value orientation, whereas family and social bonds are severed or work habits are lost and the connection of the convicted with the everyday reality is severed. This undoubtedly leads to bad financial situation and the indirect increase of the risk of relapse. The financial intensity of imprisonment compared to home arrest is also an important attribute.

6 Punishment of Compulsory Labour in the Slovak Republic

Punishment of compulsory labour was introduced into our legal system by Act No. 300/2005 Coll. Criminal Code, which is effective from 1 January 2006. Imposition and execution of this sentence are set forth in several legal regulations. Conditions for its imposition are set forth in Act No. 300/2005 Coll. Criminal Code. Specifically, the provisions related to the conditions of its imposition are contained in S 54, S 55 and S 111. Execution of punishment of compulsory labour, its alternation as well as possibilities and conditions of waiving of the executions is regulated by a separate Act No. 528/2005 Coll. On Executions of punishment of compulsory labour. Provision of S 422 of Act No. 301/2005 Coll. Criminal Procedure Code which deals with executions of punishment of compulsory labour refers to the application of Act No. 528/2005 Coll. On Executions of punishment of compulsory labour.

¹⁶ ŠČERBA, Filip. *Alternativní tresty a opatření v nové právní úpravě*. Praha, Leges, 2011.

Community Service Work
Section 54

The court may impose on the offender, upon his consent, a community service work sentence for a period not less than 40 hours and not exceeding 300 hours, if it issues a ruling for a minor offence punishable by the term of imprisonment of not more than five years under this Act.

Section 55

(1) The convict shall be obliged to perform community service work within one year after the date on which the related court ruling becomes final. The court may, as appropriate, impose the restrictions and obligations referred to under Section 51 par. 3 and 4 on the offender, with the aim of encouraging him to lead regular life; as a rule, the court shall also order him to compensate, to the best of his abilities, for the damage inflicted by the criminal offence. When calculating the period of participation in a community service work, it shall not be taken into account any period of time, during which the convict

a) could not perform community service work due to a temporary illness, or because he was not assigned any work during this period,

b) attended compulsory military service or other service instead of compulsory military service,

c) stayed abroad,

d) was remanded in custody, or was serving a term of imprisonment in connection with other offence.

(2) The court shall not impose community service work if the offender is on long term sick leave or has been disabled.

(3) The offender shall have an obligation to perform community service in person and during his free time without receiving remuneration.

(4) If the convict fails to lead regular life or perform, of his own causation, the service in the required scope, or if he does not respect the restrictions and does not fulfil the obligations imposed on him under the sentence, the court shall convert the community service work sentence or the remainder thereof into an unconditional imprisonment sentence execution in such a way that every two-hour segment of unserved portion of community service work shall be equivalent to one day of an unconditional imprisonment sentence, it shall also decide about how the sentence is to be executed.

(5) The court may waive the execution of community service work, if the convict, during the serving of this punishment, has gone on long term sick leave or permanent disability without any fault on the part of him.

Materials of the Council of Europe emphasize that punishment of compulsory labour pro bono for the society has been one of the most progressive measures of the European criminal law over the last few years. The punishment of compulsory labour offers several possibilities for its use and the professionals

put a lot of trust into it. The originality of this punishment is that the punishment actively contributes to the perpetrator's re-socializing, not only during the execution of the punishment. Furthermore, the relationships of perpetrator with his surround are not disturbed. The perpetrator is not exempted from social obligations and also his responsibilities. Thereby the perpetrator's re-integration to the society increases after the punishment. The detriment caused by this punishment is shown in the notable impact into the perpetrator's leisure time, as well as by not receiving any income for the work performed. In accordance with the principle of Decriminalisation it allows to execute this punishment mostly to those perpetrators to whom imposition of another punishment would mean an inappropriate impact into the rights compared to the severity of the crime.¹⁷

One of its characteristics is universality. The punishment of compulsory labour is not mentioned in any facts of the crime contained in a special part of the Criminal Code. Therefore it may be imposed to all perpetrators, either as a separate punishment or along with another punishment (S 34 (6) and S 34 (7) of Criminal Code) for which unconditional sentence of imprisonment may be imposed. It is obvious that all statutory requirements must be respect.

In all countries where this punishment is enacted, its main feature is that it lies in performing work as a benefit for the society.

7 Financial Penalty in the Slovak Republic

Financial Penalty, unlike sentence of compulsory labor and punishment of house arrest, was introduced to Slovak law as a punishment which was already in the provisions of Act No. 140/1961 Coll. Criminal Code, as amended. The inclusion of financial penalty to the fixed list of punishments did not affect the codification of criminal law, which resulted into the regulation of conditions of new types of alternative punishments. Currently, the conditions of financial penalty, conversion to a term of imprisonment as well as other aspects of content governed by S 56 to S 57 of Act No. 300/2005 Coll. Criminal Code, as amended (hereinafter the „Criminal Code“). Procedure for enforcement of financial penalties is governed by the provisions of S 429 to S 432 of Act No. 301/2005 Coll. Criminal Procedure Code, as amended and S 79b of Regulation 543/2005 Coll. On Administration and Office Rules for district courts, regional courts, the Special Court and military courts, as amended.

The Financial Penalty *Section 56*

(1) The court may impose a financial penalty of not less than 160 EUR and not more than 331 930 EUR the offender of an intentional criminal offence whereby he gained or tried to gain property benefit.

17 ČENTĚŠ, Jozef. Trest povinnej práce. In Strémy, T. (ed.) *Restoratívna justícia a alternatívne tresty v teoretických súvislostiach*. Praha, Leges, 2014, pp. 340–351.

(2) *In the absence of the conditions referred to in paragraph 1, the court may impose a pecuniary penalty for a minor offence if, in view of the character of the offence and the potential for rehabilitating the offender, it decides not to impose a custodial penalty.*

(3) *The court may, taking account of the amount of the financial penalty and the personal and property situation of the offender, allow the payment of the financial penalty in monthly instalments. At the same time, the court shall determine the amount of instalments, and the time limit for the payment of the financial penalty, which may not be longer than one year from the date on which the convicting judgment became final.*

(4) *The financial penalty that the sentenced person has already paid shall be credited towards the new financial penalty imposed in respect of the same offence, or the penalty imposed as a cumulative or concurrent sentence.*

(5) *The court shall not impose a pecuniary penalty if this would obstruct the payment of the compensation for damage caused by the criminal offence.*

Section 57

(1) *When imposing the financial penalty the court should consider the personal and financial circumstances of perpetrator. The court doesn't impose a financial penalty if it is clear that the perpetrator will not be able to pay.*

Effective until 31/8/2011:

[(1) In determining the amount of the financial penalty, the court shall also consider the personal and property situation of the offender. It shall not impose a pecuniary penalty if it is obvious that it cannot be collected.]

(2) The paid financial penalty shall constitute the revenue of the State.

Effective until 31/8/2011:

[(2) The confiscation amounts of financial penalty shall constitute the revenue of the State.]

(3) *In addition to imposing a pecuniary penalty, the court shall deliver an alternative custodial penalty of up to five years to be executed, should the execution of the pecuniary penalty be deliberately prevented. The combination of such alternative penalty and the imposed custodial penalty may not exceed the statutory sentencing range.*

(4) *If the alternative penalty would exceed the range referred to in paragraph 3, or if a pecuniary penalty is imposed in combination with life imprisonment, the court shall impose no alternative penalty.*

Section 114

(1) *The court may impose a pecuniary penalty of not less than 30 eur and not more than 16 590 eur under conditions set out in this Act, if a young offender is gainfully employed, or the property owned by him enables such a penalty to be imposed.*

(2) *When imposing a pecuniary penalty on a young offender, the court shall deliver an alternative custodial penalty of up to one year to be executed, should the execution of the pecuniary penalty be deliberately prevented within the prescribed time-limit. The combination of such alternative penalty and the imposed custodial penalty may not exceed the statutory sentencing range reduced pursuant to S 117 par. 1.*

(3) *When a decision whereby a young offender has been imposed a pecuniary penalty becomes final and conclusive, the court, upon the statement of a young offender, may issue a ruling that its payment or unpaid remainder thereof be replaced in such a way that a young offender shall perform community service work within the probationary programme.*¹⁸

Financial Penalty is a specific type of punishment that does not have the nature of alternative sanctions in relation to imprisonment. Especially given that the court may impose statutory conditions as an independent punishment but also to another sentence, for example, to imprisonment. Financial Penalty is an injury to the prisoner's property but his primary purpose is to affect the perpetrator's efforts to gain unfair advantage by means of withdrawal of funds raised directly by crime or those funds that could be used to commit other crimes. Provisions of S56 of the Criminal Code apply to those cases and the court will impose a financial Penalty rule, in addition to imprisonment.

Financial Penalty as the sentence imposed separately applicable for offenses of a less serious nature (misdemeanors), while his alternative nature is in relation to imprisonment, in the literal sense, governed by S 56 of the Criminal Code. Provision of Criminal Code creates a relatively wide space for its court application and after assessing the nature and seriousness of the offense, as well as the person and the circumstances of the perpetrator. Imposition of financial penalties is also associated with a major drawback because it does not only affect the perpetrator but also other people against whom the perpetrator may have commitments, such as the actual victim.

Financial Penalty pursuant to the provisions of the Criminal Code could be imposed on a juvenile and the conditions for its application are governed by S 114–116 of Criminal Code.

8 Conclusion

We pointed out in the article on the definitions of restorative justice, principles and their basic features. Furthermore, we tried to show up the main differences between restorative justice and retributive justice. Also, we focus on the application of restorative justice in the Slovak Republic. The conception of restorative justice is at the beginning of implementation into Slovak criminal judiciary system. We could make an example as application of Probation and

18 According to Act No. 300/2005 Coll. Penal Code, as amended.

Mediation Officer or other institutes which works more theoretically than practically. At the end of the article, we mentioned the alternative punishments as home arrest, compulsory labour or financial penalty which are used in Slovak criminal judiciary system.

AGENT PROVOCATEUR IN THE LEGISLATION OF THE CZECH REPUBLIC, THE SLOVAK REPUBLIC AND THE USA¹

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Summary: In relation to the activities of organized crime groups and their dynamic development in the areas of corruptive behavior which seems to be aimed at not only the leading representatives of the national political scene, but also at the area of national economy, economy and culture, discussions keep arising especially in the lay public about the enactment of the institute of the so called agent provocateur into the Czech legal environment. This institute has many supporters and also many opponents. Also some foreign legislations could be an inspiring element for the Czech legislation.

Keywords: criminal liability, entrapment, encouragement, organized crime, corruption, police provocation, reactive agent, agent provocateur.

1 Introduction

In relation to the activities of organized crime groups and their dynamic development in the areas of corruptive behavior which seems to be aimed at not only the leading representatives of the national political scene, but also at the area of national economy, economy and culture, discussions keep arising especially in the lay public about the enactment of the institute of the so called agent provocateur into the Czech legal environment. The voices pleading for the enactment of this institute support the need for such a step by the fact that corruption is one of the most common and at the same time the most effective tools not only for the advancement of interests of criminal structures, but also for the establishing and successful growing through the strategic areas of our state. This is why it is essential to search for other, more effective tools in order to eliminate this undesirable phenomenon. It is good to say that the corruptive behavior mentioned above is not the one and only reason² for the enactment of this institute, however, it is the primary reason.

1 This article was elaborated under the project IGA_PF_2015_026: Current threats of organized crime and the means of combating them.

2 The institute of the agent provocateur could be applied e.g. in cases of drug dealership or

Before we can deal with the issues concerning the constitutionality of the institute of the agent provocateur as well as the subsequent impact upon the criminal liability of the person who has committed a crime as a result of the police provocation it is essential that we should define the terms “provocation” or “police provocation” respectively. There are several definitions available that can be found in the professional literature when talking about police provocation. Chmelík offers the following definition: “Police provocation is an intentional and active incentive or inducement into or an initiation of a commission of a crime by another person who would not have acted otherwise”³ According to Vrtěl the agent provocateur is the person who actively provokes or induces someone else into the commission of a crime with the aim to denounce somebody or obtain their confession”.⁴ Kratochvíl states that “Police provocation is usually a secret police operation the result of which is an act committed by another person which later became the subject of the person’s criminal prosecution or which originally should have become the subject of such a criminal prosecution.”⁵ Based on the above mentioned definitions of the police provocation the following characteristic features can be derived:

- inciting, soliciting into or other initiating of commission of a crime by another person
- the activity described above is carried out by a person different from the one who committed or is supposed to commit the crime
- the aim of the activity described above is to prosecute the person who under the influence of the provocation behaved in a way which was showing signs of a criminal activity

2 Consistency of the Institute of the Agent Provocateur with the Constitutional Order of the Czech Republic

When assessing the issues related to the establishment of the institute of agent provocateur within the Czech legal order it is important that we should realize that an option has to be made choosing either the protection of human rights and freedoms on the one hand or breaking into the constitutional guarantees of these rights and freedoms for the sake of securing a more effective protection of the society against aggravated criminal activity on the other hand. Thus, allowing the enactment of the institute of agent provocateur would be meant as an active protection of the society at the expense of the untouchability of the rights and freedoms of individuals. The opposite option would mean a certain satisfaction with the current state of protection of the rights and freedoms of individuals

money counterfeiting.

3 CHMELÍK, Jan. Úvahy k agentu provokatérovi a korunnímu svědkovi. *Kriminalistika*, 2005, č. 1, pp. 69.

4 VRTĚL, Petr. Nepřípustnost policejní provokace. *Trestní právo*, 2001, č. 5, pp. 6.

5 KRATOCHVÍL, Vladimír. Policejní provokace „trestného činu“ z pohledu právního a ústavněprávního. *Trestní právo*, 2001, č. 10, pp. 3.

even at the expense of the inefficiency of the state in the fight against this type of aggravated criminal activity. This is why it is very important to assess the consistency of the institute of the agent provocateur with the sources of law of the highest legal power, i.e. the Charter of Fundamental Rights and Freedoms⁶ (hereinafter just “Charter“) and also the Convention on the Protection of the Human Rights and Fundamental Freedoms⁷ (hereinafter just “Convention“). Criminal proceeding in the form as it is regulated by the criminal procedure code⁸ is based upon certain legal ideas which have a foundation which can be traced back to the two legal documents mentioned above. One of the fundamental principles behind the criminal proceeding is the right to a fair trial which is expressed in the article 6 clause 1 of the Convention, according to which every individual has a right for his case to be justly, publicly and within a certain limit of time dealt with by an independent court of law which was created under the law of the country which will at the same time decide upon his/her civil law claims, duties and obligations or upon the fairness of any criminal accusation against him/her. One of these specific manifestations of this right is also the principle of prosecution based solely on lawful reasons which is regulated on the constitutional level in the article 8 clause 2 of the Charter⁹, which states that no individual shall be prosecuted or deprived of his/her own freedom in a way that is not lawful. As far as the issues relating to the consistency of the police provocation with the principles mentioned above the Constitutional Court of the Czech Republic has expressed its views on the subject matter discussed in this paper. As the most important ruling of the Constitutional Court on this issue the ruling under the file number III. CC 597/99 as of June 22, 2000 can be considered as a landmark ruling. In order to have all the important and essential details of the case for the purpose of full understanding of the ruling we offer some facts of the case below. The defendant was found guilty of the crime of abuse of power of a public official under the § 158 clause 1 letter a), clause 2 of the criminal code and the crime of accepting bribes under the § 160 clause 2, clause 3 of the criminal code. The verdict was given by the Circuit Court in Prague 7 and the Municipal Court in Prague. The defendant as a police officer was allegedly supposed to create an imprisonment in another person that he was able to secure that the other person who was being investigated would not be taken into custody and finally that he would not be prosecuted at all (it is good to say that the person was facing prosecution). The police officer allegedly suggested

6 Constitutional Act N. 2/1993 Coll., as amended by later legal regulations.

7 The Convention on the protection of human rights and freedoms as of November 4, 1950. Ratified on the March 18, 1992.

8 The Act N. 141/1961 Coll., upon the criminal justice procedure (criminal order), as amended by later legal regulations.

9 The express legal regulation of the principles of the prosecution based solely on lawful reasons can be found also in § 2 clause 1 of the Act N. 141/1961 Coll., as amended by later legal regulations.

that he was expecting a certain amount of money that was not specified (in order to “cover the expenses”). Thus he allegedly set up the situation in such a way that he could be offered the amount of money. This is what really happened. The defendant took over the amount of money in the value of 250 000 Kč in cash from the other person and subsequently he was arrested by the Police. This person was prosecuted for this crime and he was also convicted. During the time when the defendant was to suggest the necessity of the bribe to the witness, it was the witness who turned to the Police of the Czech Republic and denounced the conduct of the defendant. The inspection of the Ministry of the Interior began to deal with the whole case which provided the witness with an electronic device in order to make it possible for the witness to record the conversation and at the same time they arranged that the witness will give the amount of money, specifically 250 000 Kč over to the defendant. It was the Inspection of the Ministry of the Interior which provided the witness with the money and it also monitored the takeover of the amount and at the same time they arrested the perpetrator. The Constitutional Court took into account the fact that at the time of the commission of the crime the perpetrator had never been prosecuted or accused of any crime, not even in relation to the bribery he was later charged with and convicted of. If in fact previously there was a suspicion that the defendant more or less is acting in such a way that he is suggesting that he requires the bribe and if this suspicion was relevant then the procedure and the steps taken by the police were justifiable as they were consistent with the criminal procedure code.

The Constitutional Court in its ruling clearly stated that it is an unacceptable violation of the article 39 of the Charter and the article 7 of the Convention when the conduct of the state (of the police in this case) becomes part of the facts of the case, the whole subsequence of the steps constituting the crime (e.g. provocation or initiation of the crime, the completion of the crime, etc.). In other words it is unacceptable for the state to intervene into the facts of the case itself in such a way as described above or in other words the state’s participation in the person’s activity which is qualified and considered as a crime.

The Constitutional Court has ruled in a few previous cases before that one of the most significant elements of a state respecting the rule of law is, apart from other things, the fact that the definition of a crime, the prosecution of the perpetrator and the subsequent punishment of the perpetrator is something that falls within the relations between the state and (or the state power representing the state itself) the perpetrator, i.e. something which happens under the circumstances when the state decides in accordance with the rules of criminal procedure whether a crime has been committed or not. Thus if the state becomes the initiator of the commission of a crime through its bodies of authority, then it also becomes a deciding factor in matters where it should be decided whether a particular person has committed a crime or not. In this way the state intervenes into the free will of such a person and thus it unacceptably deprives the person

of their own free will. The Constitutional Court has taken into consideration the fact that the defendant in this case complained about the state's intervention especially in those cases where the state officials do not appear clearly against the commission of a crime but on the other hand they pretend to be participating in the criminal activity knowingly and willingly then such an activity is subject to scrutiny by other independent bodies of authority.¹⁰

The Czech criminal procedure code is in fact not familiar with the type of police intervention that is supposed to initiate the decision to commit crime and thus such an intervention on the part of the police officers is necessarily *extra leges* and as thus it is inadmissible. In this way all the evidence gained through such a procedure is illegal and subsequently unacceptable for the purposes of criminal proceedings.

Based on what has been said above it is essential that the following questions should be asked:

- Did the perpetrator intend to commit a crime or did he decide to commit the crime as a result of the police provocation?
- Is the perpetrator acting out of his own free will or is he acting as a result of the police provocation?
- Would the perpetrator have committed the crime even if there had been no police intervention?

It is even the European Court of Human Rights (herein after just ECHR) which has dealt with the issues relating to the agent provocateur in its rulings. The ruling in the case of *Teixeira de Castro v Portugal*¹¹ became a key decision in this matter as it is this case which sets the boundaries and limits of usability of the evidence gained through the activity of these agents. In accordance with this ruling it is not possible to commit a crime if this crime was to be initiated through the police intervention. Such an intervention would deprive the accused of the right to a fair trial as guaranteed by the article 6 clause 1 of the Convention. The ECHR admits that the widespread expansion of the organised crime requires an adoption of further adequate measures, however, it prefers the rights to proper justice. The ECHR does not accept the view that public interest can justify the use of evidence gained through the police provocation.

What is, then, the conclusion that can be drawn from the above mentioned? Based on the rulings of the ECHR which further interpret the provisions of the

10 See e. g. the provision § 363 of the criminal code upon the legality of the agent working within organized crime group.

11 The ruling has been published in the collection of rulings and decisions of the ECHR under the file number 55/1997/828/1034, next e.g. *Van Mechelen and others v Netherlands* published in the collection of rulings and decisions under the file number 55/1996/674/861-864, *Kostovski v Netherlands* published in the collection of rulings and decisions of the ECHR Series A, Vol. 166, p. 6–28, Vol. 170, p. 27–30. All decisions are available at: www.hudoc.echr.coe.int.

Convention and based on the decisions of the Constitutional Court of the Czech Republic we can reach the conclusion that the introduction of the institute of the agent provocateur in the Czech legal environment would definitely mean a contradiction with the Convention which is binding for the legal order of the Czech Republic and any further provisions of the law (no matter whether it would be a norm regulating the criminal procedure or legal rules regulating the activity of the police of the Czech Republic) would not be consistent with the Constitution of the Czech Republic. As, however, it has been said above, there is a large number of those who support the police provocation even though it has to be said that it is mainly the lay public who usually do not have professional knowledge necessary for assessing the results of the introduction of the institute from the legal perspective or especially from the perspective of the Czech Constitutional Law.

One of the arguments which is frequently used to justify the police provocation is the fact that this provocation is aimed against persons who have certain tendencies towards the commission of a crime. However, as Chmelík states, our legal order does not provide room for distinguishing between persons who have a tendency to commit a crime and those who do not have such tendencies.¹² If we were supposed to admit such a distinction, not only would we have to consider a certain group of persons a priori as the perpetrators without these persons committing any crime at all, but it would have great negative impact on the application of the principle of presumption of innocence.¹³ Not only would we have to view the person against whom the criminal proceeding has been initiated as someone who is guilty of a crime, but this view would de facto include the person who has not committed any crime so far and no criminal proceeding can be initiated against him or her.

Logical reasoning only brings us to persuasion that it could have been this person who has committed the crime or that he/she will commit the crime if they have the opportunity to do so. According to the supporters of the institute of the agent provocateur those who are law-abiding people have no reason to be afraid as in their case the police provocation could not result in a commission of a crime at all and thus no subsequent sanctions would follow. The second argument which has, in our view, better logic and justification is the fact that recently there has been a widespread expansion of organized crime groups committing crimes. Their activities are becoming more and more sophisticated and the position of the bodies of investigation during the investigating and revealing the criminal activities is therefore becoming more difficult. Thus this situation

12 CHMELÍK, Jan. Úvahy k agentu provokatérovi a korunnímu svědkovi. *Kriminalistika*, 2005, č. 1, pp. 70.

13 The principle of the presumption of innocence is a principle of the Constitutional level. It is expressed in the article 40 of the Charter and further in the provision under the § 2 clause 2 of the criminal procedure code.

brings us to consideration whether the current tools of criminal law are sufficient for the fight against this phenomenon or whether it is necessary to introduce other tools that could make the struggle of the bodies active in investigation with the organized crime groups easier. Thus the Czech criminal law does not have the institute as a part of the legal regulation of the country now and taking into account the circumstances and facts briefly outlined above the Czech Republic will probably not have this institute enacted in the near future either. Those provisions of the criminal code and of the criminal procedure code are provisions regulating the institute of the agent controller and not the agent provocateur.

Thus the police officer cannot induce the person to commit a crime nor can he cause the person to start thinking about committing a crime. On the contrary, the task of the police officer is motivated by other purposes. The activity of the police officer is to monitor conspiratorially the criminal activities of organized criminal groups which is carried out in a secret manner and to actively operate in a manner that cannot be beyond the limits set by the law. It is this active operation where it is important to make sure that the police operation is not beyond the limits of law and that the police operation does not go so far as to become a police provocation. The agent, as a part of his efforts, can easily cross the limits and thwart the whole process of investigation in this way.

This is also the reason why the position of an agent should be occupied by a person who is experienced and prepared well enough as to not go beyond the limits set by the law and thus thwart not only their own efforts but also the efforts of all the others who have been participating in the whole operation.

3 Criminal law consequences of the police provocation

When looking for the answer to the question what are the criminal law consequences for the person who has committed a crime as a result of a provocation which was generated by the state or its law enforcement section we have to base our conclusion on the results that the police provocation is according to the Czech legal order an unconstitutional activity, activity that is illegal and thus not allowed and supported by the law of the land. Then, it is also very important to answer the question what are the criminal law consequences of the police provocation on the person of agent provocateur himself. First we should be dealing with the criminal liability of the person provoked. This person is acting in the sense of the criminal law, however, there is a discrepancy between what the person knows, perceives or imagines and what is reality.

With respect to the fact that this discrepancy between falsely perceived and real reality is concerns factual circumstances, we come to the conclusion that the person provoked is acting in a positive factual misrepresentation which is, from the perspective of subjective aspect of the criminal activity, assessed as an attempted crime. That is why it is very important to realize that the criminal code is built

upon the principle of materialized and formal concept of a crime.¹⁴ According to this legal regulation the substantive criminal corrective of the criminal injustice is the principle of subsidiarity of criminal repression as expressed in § 12 clause 2 of the criminal code, according to which the criminal liability of the perpetrator as well as the criminal law consequences connected with the liability can only be applied in cases where the conduct of the perpetrator is harmful to the society and where the application of the liability is not sufficient in accordance with other legal regulation. Thus, it is possible that the person who has been provoked in this way would not be criminally liable for their actions based on the principle mentioned above. In the same way any situation of this kind could be assessed on the basis of former legal regulation¹⁵ which was based upon formal material concept of a crime, i.e. in order for a crime to be committed it was necessary for the person to fulfill not only a formal sign, i.e. those signs stated in the law, but at the same time the material sign would have to be fulfilled sufficiently, i.e. the level of social harmfulness.

And it is just the material sign or its insufficient level that could be the reason which made the activity of the person provoked in its results legal. As it has been mentioned above it is inadmissible for the state to behave in such a way which can induce another person to commit a crime with intent. Based on the ruling of the Constitutional Court¹⁶ it is clear that the police authority cannot through the use of its provocation activity participate in the completion of the facts of the case which can serve as a base for a crime which is later prosecuted nor can it create such a factual base itself. If we then came to the conclusion that the person provoked is not criminally responsible for his/her conduct as a result of failing to fulfill the principles of subsidiarity of the criminal repression, then we still have to answer the question of criminal liability of the person of provocateur.

Under the provision of the § 127 of the Criminal Code the agent provocateur is the person who is at the same time the member of the Police of the Czech Republic or a member of the General Inspection of the Security Corps. The conduct of this person acting as an agent provocateur is motivated by the intention to induce the other person into the intention to commit a crime which could subsequently be prosecuted, i.e. de facto to cause the person provoked a certain type of damage in the form of the criminal prosecution of this person. As a damage, in this case, is not considered merely a material damage, i.e. a damage that can be calculable in a monetary value, but also an immaterial damage, especially the violation of the rights of a physical person.¹⁷ And as it has been said a few times before, provocative conduct is a conduct which crosses the

14 See more in JELÍNEK, Jiří (eds). *Trestní právo hmotné. Fourth edition.* Praha: Leges, 2014, pp. 118.

15 Act N. 140/1961 Coll., criminal law, as amended by later legal regulations.

16 See report of the Constitutional Court file number III. ÚS 597/99 as of 22. 6. 2000. Available at: www.nalus.usoud.cz.

17 The ruling of the Supreme Court of the Czech Republic N. 25/75. Available at: ASPI.

constitutional rules and as such it is a type of conduct that is prohibited. Thus the result of police provocation is the fact that the provocative subject carries out the duty in a way that contradicts with the law of the land i.e. with the intent to cause somebody else a damage by which the agent provocateur fulfills the signs of a crime of the abuse of power of the public official as regulated by the § 329 clause 1 letter a) of the criminal code. However, the conduct of a public official can also be directed in a way the aim of which is not to cause someone else damage.

The activity of the agent provocateur can be aimed at getting an unlawful benefit which can consist in e.g. showing the results of his/her success rates as far as the detecting of criminal activity is concerned.¹⁸ However, even in such a case it is necessary to take into account the fact whether the principle of subsidiarity of criminal repression was fulfilled or not. We personally believe that compared to the person who has been provoked into the commission of a crime, the acting of an agent provocateur fulfills this principle sufficiently. Based on what has just been said above it is clear that it is not the person who has been provoked that should become criminally liable but it is on the contrary the person who is acting as an agent provocateur who is then facing the consequences in the form of criminal prosecution as a result of his/her provocation.

4 Entrapment and Encouragement in the legal environment of the USA

In the Anglo-Saxon legal system or in the criminal justice environment of the United States of America it is important to distinguish between two specific operational methods which are frequently used for the detection of corruption but also for other types of criminal activities such as for example the drug dealership, money laundering, etc. Specifically these institutes are the institutes of so called defense of entrapment and government encouragement.¹⁹ In order to distinguish between the institutes mentioned above in the text it is important to ask a question whether in the situation before the crime was committed there was a certain contact between the accused and the law enforcement bodies the accused was influenced by the activity of the bodies to such extent that he would not have committed the crime if he had not been provoked to such an act. If the answer to this question is positive then the accused would be allowed to use the defense of entrapment.

From a historical perspective it is possible to say that the use of so called government encouragement has had a long tradition not in the USA only. These activities are frequently connected with a whole number of historically well known characters from all over the world who are interconnected by a common aim – i.e. the effort to remove undesirable persons from the political scene

18 CHMELÍK, Jiří. Úvahy k agentu provokatérovi a korunnímu svědkovi. *Kriminalistika*, 2005, č. 1, pp. 71.

19 These institutes can be translated into Czech as “obrana proti vyprovokování trestného činu“ and “povzbuzování ze strany úřední moci“.

through making them commit a crime or engage in a type of criminal activity even though these persons are in fact innocent, but through the commission of the crime they discredit themselves. On the contrary the use of the so called defense of entrapment which results in the acquittal of the accused by the court has not had such a long tradition in the American history as the government encouragement mentioned above. Most of the time of the existence of the American justice system, the American courts did not recognize the “entrapment” as a defense of the accused. In 1864 the Court in New York expressed its view upon this issue when it stated that “the statement of the accused who said that he was forced to commit the crime by the law enforcement authorities is so old as the world itself and this type of defense was first used in the Biblical Paradise.”²⁰ In a similar way another American court expressed its view upon the subject in 1904 when it stated that the requirement to apply the defense of entrapment is a result of the requirement for the protection of the accused not because he is innocent but because a strenuous clerk went beyond the limits of his power and entrapped this person. However, the courts, in its opinion, are not looking for the one, who entrapped the person, but they are looking for the one who has been entrapped.²¹ Thus, based on the above mentioned we can say that once the crime was committed then it should not be the matter of interest whether there were any specific inducements and what they were, but rather who was the one who offered them to the accused. However, it is good to say that the practice has changed a lot since then, the changes having been made in favor of the accused. The current legal regulation dealing with the encouragement towards the commission of a crime is trying to find a type of balance between the criminal presuppositions of an accused person and the practice of the authorities active in the proceedings. The aim of such a conduct is not to “catch in a trap of the law the law-abiding citizens” but rather to affect the incorrigible recidivists. However, the current state is not the answer to the violent crime but rather it is the result of the difficulties connected with the detection of such crimes where the victims do not want to announce the commission of the crime to the police. Among such crimes we can usually count pornography, prostitution, hazard, etc. The inducement towards the crime usually shows these signs:

- the members of the authorities active in criminal proceedings usually pretend to be the victims of a crime themselves
- there is an intention to induce the suspicious person into the commission of a crime
- there is an influence upon the decision to commit a crime

In cases where the inducement into the commission of a crime went beyond the limits generally accepted the accused can apply the so called defense of entrapment. However, there is a question where the dividing line between the

20 SAMAHA, Joel. *Criminal procedure*. Belmont: Thomson Wadsworth, 2005, pp. 381.

21 The same as in 19.

acceptable conduct of the authorities active in the criminal proceedings and the unacceptable conduct should be drawn? A number of states as well as the federal government base their presumption on the so called “subjective test” which is supposed to prove whether or not the specific conduct was an act of entrapment. This test is focused primarily upon the finding out of the predispositions of the criminal tendencies with the accused. Based on the results of this test the accused is then allowed to apply the defense of entrapment in case he/she is able to submit the evidence of these two features:

1. before the inducement conducted by the authorities active in the criminal proceedings the accused did not have any intention to commit the crime
2. the inducement was the real cause why the accused committed the crime

The essential question to be asked in order to assess the results of the subjective test is where the origin of the intent to commit a crime is. If this origin can be found with the accused person, then it was not the state official who committed the offense of prohibited entrapment. In other words if there was a predisposition with the accused person to commit the crime and the state authority merely helped the accused to commit the crime then it cannot be said that entrapment occurred. As an example the case *Sherman v U. S.* can be used where the Supreme Court of the United States ruled as follows. In this case two characters met in a Drug Addicts Detox Center, namely the Government informer and an agent in disguise Kalchinian and a drug addict Joe Sherman. Kalchinian made friends with Sherman and asked to get some heroin for him. However, Sherman refused to do so, but after a few weeks’ time after urgent pleas from the part of Kalchinian he gave in and got the drug for him. Right after this Sherman was arrested. The conclusion of the court was that the intention to commit the crime in this case did not come from the accused but from the state authority.

In cases where the accused submits evidence that he/she has been made to commit the crime by the state authority it is up to the state authority to prove that the accused really is predisposed to commit the crime. Those circumstances that can be used to prove this can differ based on the different legal orders of the specific states of the federation, however, the factors that are, in such cases analyzed are usually the character of the accused or his/her type of behavior. As an example that can be used in this context we can use the legal regulation of the state of Minnesota which takes into consideration the following facts and circumstances:

- any previous convictions
- any previous criminal activities which however did not end up in convictions
- criminal reputation of the accused
- other circumstances²²

22 SAMAHA, Joel. *Criminal procedure*. Belmont: Thomson Wadsworth, 2005, pp. 383.

Apart from the subjective test described above there is also another one, so called objective test which is applied less frequently than the subjective one, however, it is good to say that it is being used more and more in the justice practice. This test that is also called hypothetical person test is not based on the predisposition of the accused to commit a crime as it is in the case of the subjective test, however, it is based on the assessment of the state authorities and the fact whether or not the operation was “clear“ or not from the perspective of the law. Both of the above mentioned tests represent a type of last resort solution and as such they contain different types of obstacles and drawbacks. If we reach the conclusion that the accused is or is not allowed to apply the defense of entrapment merely on the basis of the subjective test then we put the accused in danger of being convicted of crime merely on the basis of his past or poor criminal reputation. The previous behavior of the accused though it could be undesirable or even dangerous from the viewpoint of the society, cannot be in itself the sufficient evidence of the accused’s guilt. On the other hand, however, the application of the objective test merely, in order to assess the guilt of the accused would, on the other hand, mean not to make differences between those who have committed a crime for the first time and those for whom the criminal environment and activities relating to the environment is very close and familiar. However, how can the optimal solution be found? In our view the solution is in the combination of both elements of the two above mentioned tests. The state authority can use certain procedures which lead towards the initiation of the commission of the crime based on the presumption that the accused has such predispositions towards the commission of the crime that he/she would have committed the crime even if there had not been for the intervention from the state authority.

5 The agent provocateur in the Slovak legal regulation

As far as the legal regulation of the agent provocateur in Slovakia it is good to say that this regulation is very progressive, disputable and even daring. At the beginning it is also good to say that there have been some objections towards the expression agent “provocateur” and some of the authors incline towards the expression “active” agent²³ instead. The provision which can give rise to many questions and doubts is contained in the § 117 clause 2 of the criminal code. According to the second sentence of this provision the agent cannot initiatively induce into the commission of a crime, i.e. cannot be the one who intentionally initiates in another person the decision to commit a crime. However, this prohibition cannot be applied generally and the law admits certain exceptions. The above mentioned cannot be applied in cases when the crime falls within the category of the bribery of a public official or a foreign public official and the facts and circumstances found show that the perpetrator would have committed the crime even when the order to use the agent had not been given. These are

23 LIPŠIČ, Daniel. Jako je to naozaj s tzv. agentom provokatérom? *Bulletin slovenskej advokacie*, 2007, č. 4, pp. 29.

then the cases, where the evidence material, obtained by the authorities active in criminal proceedings, clearly indicates that the public official is already decided to commit the crime and this decision of his was formed based on his own free will. Šanta mentions two possible cases of provocation allowed by the law:

- the public official has required from certain person or from several different persons a bribe several times and such a bribe is required by the perpetrator even in the future
- it was found out that the public official has already required or accepted the bribe in the past, however, he/she would not have committed such a crime in the future had it not been for the initiative of the agent provocateur, who offered the bribe to him/her.²⁴

In the above mentioned cases it is clear that the conduct of the agent provocateur is not unlawful and this agent can induce the perpetrator, who is already decided to commit the crime, into further activity, e.g. as far as the form and the manner in which the bribe will be provided, the place and the time, the way it will be given over to the other person, etc. As far as the specific conditions are concerned we have certain objections towards the examples given by Šanta. The first situation, in our view, fulfils the requirements of the law in the sense of the provision of § 117 of the clause 2 of the criminal code. However, the same cannot be said about the second example. It cannot be said, based on the fact that the public official has already committed a crime of bribery in the past that he/she will do the same in the future and in this way automatically force the official to accept and carry out such a decision in the future. In such a situation we would have to come to the conclusion that those persons who have committed a crime in the past are logically predetermined to commit a crime again in the future and in this way we would be allowed to induce them into committing another crime and automatically arouse their intention to commit such a crime. Such a situation is a fatal violation of one of the fundamental principles of criminal procedure and the principle of the presumption of innocence and as such it is unacceptable and unjustifiable in terms of the protection of the human rights of individuals in a state respecting the rule of law.

In the same way we have strong doubts that are justifiable in our opinion concerning the fact that the agent provocateur can induce into the commission of a crime and at the same time suggest the monetary value of the bribe required. One of the obligatory signs of a crime is also the consequence of the crime which in such cases as described above has the characteristic feature of harm calculable in monetary value. Thus the consequence or the amount of the harm is a sign which can be a circumstance conditioning the application of a higher criminal sentence, i.e. the condition for a stricter legal qualification of the criminal conduct. Thus if we admit that the agent provocateur sets the specific

²⁴ ŠANTA, Ján. Právní úprava postavení agenta v České a Slovenské republice. *Trestní právo*, 2007, č. 3, pp. 9.

monetary value of the bribe then he/she at the same time sets a stricter legal qualification and subsequently de facto the maximum penalty for such a crime committed. Our last reproach is aimed at the definition of the subject against which the possible provocation could be used. As it has been said above one of the conditions for the application of the institute of the agent provocateur is that it is used against a perpetrator who enjoys the position of a public official or a foreign public official. The efforts of the legislator to deal with this type of criminal activity where it could have a long term negative impact seems to be obvious and justifiable from the viewpoint of the lay public, however we believe that as such it goes beyond the limits of Constitutional Law and thus it is unacceptable. If we take into account the provisions of the Constitution and the Charter of the Fundamental Rights and Freedoms clearly proclaiming the equality of all the citizens before the law, then we cannot automatically consider a certain category of the society as potential perpetrators of crime and in this way approach this category of citizens. It is true that the crime of bribery usually occurs in these circles, on the other hand, this cannot always be absolutely true. If then, the main aim of the institute of the agent provocateur in Slovakia is to contribute towards the lowering of the number of the cases of bribery then it is logical to apply the police provocation in all cases of such conduct without any limitations as far as the person of the perpetrator is concerned.

6 Conclusion

The development of the criminal activity and especially the area of the activities of organized crime groups which has been developing dynamically in the recent period necessarily leads towards the questions relating to the efficiency of the current legal tools and the possibilities of the adoption of new and sometimes self-contradictory means which could play an important role in the fight against these forms of serious criminal activity. The institute of the so called agent provocateur could be one of these means. The current Czech legal regulation does not allow the application of this tool as it merely regulates and is familiar with the operatively investigating institute of the agent controller. However, it is always important to assess in specific cases whether or not it is the provocation from the state authorities as the final solution of the issues is not always an easy one. The tests mentioned above in this paper as well as a diligent activity on the part of the authorities active in the criminal proceedings could be used to assess this fact when clarifying all the facts and circumstances of specific cases.

INDIRECT EFFECT OF EU LAW UNDER CONSTITUTIONAL SCRUTINY – THE OVERVIEW OF APPROACH OF CZECH CONSTITUTIONAL COURT¹

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Summary: The paper deals with the non-normative impacts of the EU law in the national legal systems (Czech Republic in particular) and focuses on the approach of the Czech Constitutional Court (CCC) towards the so-called principle of indirect effect of EU law. The authors examine the case law of CCC and offer the conclusions about the place, constitutional relevance and (national) limits of the EU-consistent interpretation of national law. CCC up to date case law clearly indicates that a EU-consistent interpretation is the most ideal tool for meeting the Czech Republic's membership obligations. But it is simultaneously a tool for preserving the autonomy of the national authorities applying law and reduces possible tensions between supranational and nation law. CCC accepts the indirect effect broadly and used this concept even in controversial cases (European arrest warrant, State responsibility for damages etc.). But still it does not approach this effect without reservations. CCC points on the necessity to protect the fundamental constitutional values ('Solange' concept) even in connection with the duty of EU-consistent interpretation.

Keywords: EU law, indirect effect, EU-consistent interpretation, limits, Czech Republic, Constitutional Court, EU Charter.

1 Introduction

EU law reaches its goals either through the effect of its own norms or through national law based on European rules. Thus, also the question of the relationship between European and national law (as a whole) must reflect these two options. To summarize, the application of EU law within the legal system of a Member State can be of two different types:

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- Direct, normative influence on the national legal system, i.e. its enrichment with new 'European' norms.
- Indirect, value-based influence, when the goals of European integration, the ideological basis of the EU and its law, the intentions and purposes of the EU's legislator, etc., must be considered by national authorities when interpreting national law, i.e. it is enriched with new 'European' meanings.

The first type of influence is connected with the direct application of EU legal norms in national law or with the application of EU norms contained in national legislation, which transposes EU law. These types of EU legal effects open space for clashes between European and national law. There is a danger of a 'genuine conflict' between the national and EU norms. It is because two different norms stemming from independent legal systems can potentially apply to the identical situation. Because these norms originate in different (independent) legal systems, none of the traditional imperative relationships of supremacy (*lex superior derogat legi inferiori*), temporality (*lex posterior derogat legi priori*), or speciality (*lex specialis derogat legi generali*) apply. The resolution of the relationship between these norms under such circumstances depends on the extent and will of national authorities to apply or rather accept the principle of primacy of EU law over national law (as the Court of Justice perceives it).²

The second type covers the indirect effects when the implementing authority does not face the dilemma of choosing between the national and EU norm, yet it also struggles with challenges relevant to EU law. Specifically, the challenges are related to the existence of its obligation to interpret national law in line with the EU norm (EU-consistent interpretation). Here the same possibility of tensions between supranational and national law exists. The clashes may arise especially when objectives of the EU norm which national authority should follow when interpreting national law could be considered as conflicting with the requirements of the national law and its building principles.

2 EU-consistent interpretation of national law – the foundations

The foundations of the principle of the indirect effect of the European Union law, i.e. the obligation to interpret the national law in conformity with the EU law requirements were settled in *Von Colson*³ case. It represents another pillar of effective impact of EU law in proceedings before national authorities. Basically it means that the national judge (or another authority responsible for application of law) is obligated to interpret the national law in the light of objectives and content of rules of EU law. It was originally associated with the directives. According to the Court of Justice: obligation arising from a directive to achieve the result envisaged by the

2 This is the consequence of heterarchy and pluralistic reality within the European constitutionalism. See further DE BÚRCA, Gráinne, WEILER, Joseph. *The Worlds of European Constitutionalism*. Cambridge: Cambridge University Press, 2012, 348 p., especially contributions from Neil Walker, Daniel Halberstam and Nico Krisch.

3 *Von Colson and Kamann vs. Land Nordrhein-Westfalen*, 14/83, ECLI:EU:C:1984:153.

directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement directive [...], national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of article 189. [...] It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, in so far as it is given discretion to do so under national law.⁴ The Court of Justice resolved here a question whether the directive may have some legal effects even though its provisions do not meet requirements laid down by *Van Gend en Loos*⁵ formula (aren't sufficiently clear, precise and unconditional) and thus they cannot be directly applicable. It replied this question in the affirmative because it stated an obligation of national courts to interpret their law in line with the meaning of the directive. The arguments for the imposition of such a new duty on national authorities were based on the binding nature of directives and the principle of loyalty (article 4, paragraph 2, third subparagraph 3 TEU) which impose to Member States the duty to take any measures to fulfil the obligations conferred upon them by Treaties.

The subsequent case-law of the Court of Justice brought the substantial development of the principle of the indirect effect. The duty to interpret national law in the light of EU norms evolved both qualitatively and quantitatively. At the very beginning it covered only the duty to interpret national law adopted in order to implement directives in the light of this particular directive. It was introduced as some kind of alternative to the lacking direct effect⁶ but developed to the influential impact of EU regulative power. The crucial expansions were brought by the decision in *Marleasing*⁷ case where Court of Justice brought a clarification of some problematic aspects of this principle. It extended the scope of national law that has to be interpreted in the light of rules of EU law. One of the most problematic issues of the doctrine of indirect effect was whether the duty of consistent interpretation covers only that part of the national law that implemented a certain directive into the national legal system of the Member State or whether it covers also other national laws whose adoption was not related with the implementation. The Court of Justice stated that duty of consistent interpretation has to be understood widely and acknowledged that indirect effect covers all the national law even that which was not adopted in the connection with the implementation of the directive and no matter whether it was adopted before or after the adoption of the directive. Basically the principle of indirect effect affects the national legal order as a whole

4 Ibid., points 27–28.

5 *Van Gend en Loos*, 26/62, ECLI:EU:C:1963:1.

6 See further BETLEM, Gerrit. The Doctrine of Consistent Interpretation – Managing Legal Uncertainty. *Oxford Journal of Legal Studies*, 2002, vol. 22, no. 3, pp. 397–418.

7 *Marleasing vs. Comercial Internacional de Alimentación*, C-106/89, ECLI:EU:C:1990:395.

(including the national constitutions). Another important issue is that Court of Justice acknowledged the impact of indirect effect also in so-called horizontal relationships. National courts are according to this wide view obliged to interpret the national law in a harmony with EU requirements even in disputes between individuals, where indirect effect served mainly as an alternative to the prohibition of horizontal direct effect of directives.

3 EU-consistent interpretation of national law – a path to indirect dominance of supranational rules

The Court of Justice claims that independent character, binding force and efficiency of EU norms require full and unitary application of EU law from the moment of its adoption and throughout its legal ‘existence’ in all Member States. The Court of Justice does not distinguish between EU and national laws in their application by national courts and public authorities. On the contrary, it establishes that the EU legal provisions are indispensable parts of the Member States’ legal systems (see *Van Gen den Loos*; *Simmenthal*⁸ or *Melki and Abdeli*⁹ cases). Direct (immediate) applicability includes a command for the national courts to accept supranational law as their own and apply it as originally adopted, i.e. without transposition into national law – this command is an expression of general obligation to apply¹⁰ which binds the national institutions.

National authorities must accept EU law as an integral part of their national legal system. But moreover they have to consider the content and objectives of the EU when interpreting national norms (principle of indirect effect). This broad capability of EU law to affect the legal practice within the Member States also indirectly stands as a consequences of Member State’s commitment to solidarity or loyalty (see article 4 paragraph 3 TEU). The principle of indirect effect implies the obligation of national authorities to reflect the aims of EU law and to follow the goals of EU norms when interpreting national law. EU law stands here as a dominant matrix and forces the national authorities to choose the pro-European options of given possible mods of national law interpretation.

The indirect effect moreover stands as a ‘robust’ EU law principle¹¹ and its wide consequences seem to be more crucial for the national sovereignty and national law autonomy discussions than the direct applicability and primacy. It is because indirect effect is connected with all provisions of EU law and touches all fields of

8 *Simmenthal*, 106/77, ECLI:EU:C:1978:49.

9 *Melki and Abdeli*, C-188/10, ECLI:EU:C:2010:363.

10 Described by PRECHAL, Sacha. Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union. In BARNARD, Catherine (ed). *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate*. Oxford: Oxford University Press, 2007, pp. 35–69.

11 BOBEK, Michal. The Effects of EU Law in the National Legal Systems. In BARNARD, Catherine; PEERS, Steve. *European Union Law*. Oxford: Oxford University Press, 2014, p. 155.

national law and is capable to turn the established way of interpretation of domestic norms (and therefore the adjudication processes).

Additionally indirect effect of EU law stands also as a “flexible” principle. It produces several consequences in national practice which are dependent on the wording and strength of EU law norm (used as the model) and wording and scope of national rule as well. EU law may be used as argument in different forms:

- as confirmative argument to underline the relevance of the chosen decision, which clearly flows from national law,
- as mediatory argument where EU norm determines which of plausible paths of interpretation of national law must be chosen.
- as evolutive argument where EU law bent the traditional interpretation of national norm and open it for new non-established meanings.¹²

4 Omnipresent but not omnipotent

The wide influence of EU law via indirect effect is balanced by the fact that it is still national law, which is applied here. In comparison with direct effect and primacy we do not face here the penetration of norms produced by different public power and replacement of national norms. It is also worth to say here, that direct effect is not limitless. Court of Justice expressed several boundaries of EU-consistent interpretation of national law, which more or less should act to protect the autonomy of national rules. It has formulated following rules in the connection with the limits of obligation of national judges to interpret the national law in the light of the European Union norms¹³:

- The interpretation of the national law in the light of European Union law provisions is limited by the scope of discretionary competences of the national authority applying law and interpretation methods governed by the national law (*Von Colson*).
- The EU-consistent interpretation of the national law may not lead into conclusions denying the essence of the national legislation, i.e. to decisions *contra legem* (*Marleasing*).
- The position of an individual may not be aggravated in the meaning of the establishment or the extension of the criminal responsibility (*Kolpinghuis*¹⁴).
- In case of indirect effect of a directive the obligation of the harmonious interpretation may be established only after the expiration of the period prescribed for the implementation of a directive (*Adeneler*¹⁵).

12 Michal Bobek recalls these three options as weak, medium and strong indirect effect. Ibid, p. 154.

13 See detailed analysis in PRECHAL, Sacha. Directives in EC Law, 2nd edition. Oxford: Oxford University Press, 2005, pp. 193–210.

14 *Kolpinghuis Nijmegen*, 80/86, ECLI:EU:C:1987:431.

15 *Adeneler and others*, C-212/04, ECLI:EU:C:2006:443.

Next to the above-mentioned limits that have been introduced by the Court of Justice (EU-universally), one must also take into account the pluralistic set-out of the Union and potentiality of introduction of special national approaches towards the effects of EU law, including the burden of EU-consistent interpretation. In next sections we will shift to these special limitations as have been settled by the Czech Constitutional Court.

5 CCC approach towards indirect effect

5.1 Openness towards EU-consistent interpretation of national (constitutional) law

The up to date case law of the CCC displayed openness and good will to accept all categories of effects and consequences of EU law in the national legal system.¹⁶ We can say the same about the acceptance of the so called indirect effect of EU law. The approach of the CCC towards the acceptance of the duty of EU-consistent interpretation shall be described as very open and has its origin even in the pre-accession period. CCC accepted the EU law as source of inspiration and expressed good will to seek for EU-consistent interpretation in several decisions prior to accession to EU in the 1st May 2004.¹⁷ It is worth to mention here, that CCC accepted EU law as important guideline for its decisions voluntarily, because before accession Czech Republic was not committed to follow the loyalty principle. We see this as another example of unprecedented dominance of EU law in the European legal space.

The crucial developments of CCC approach towards principle of EU-consistent interpretation of national law were drawn up in its seminal ‘European’ decisions of 2006 – *Sugar Quotas* and *European Arrest Warrant* cases.¹⁸ In the course of a few months CCC presented answers to the questions how it would approach this principle, which part of EU law it would consider as a model for interpretation of national law and vice versa, which part of Czech law it would open to a pro-European bending. It focus further also on the question what are (not only constitutional) limits of application of indirect effect of EU law in national practice.

In the first of the abovementioned rulings, the CCC agreed that ‘[it cannot] entirely overlook the impact of Community law on the formation, application, and

16 See further BOBEK, Michal., KÜHN, Zdeněk. What about that “Incoming Tide”? The Application of the EU Law in the Czech Republic. In LAZOWSKI, Adam (ed). *The Application of EU Law in the New Member States – Brave New World*. Hague: TMC Asser Press, 2010, 325–356.

17 *Sanctioning of the competitors for abusing the dominant position on market*, III. ÚS 31/97, ECLI:CZ:US:1997:3.US.31.97; *Milk Quotas*, Pl. ÚS 5/01, ECLI:CZ:US:2001:Pl.US.5.01.

18 *Sugar Quotas III*, Pl.ÚS 50/04, ECLI:CZ:US:2006:Pl.US.50.04; *European Arrest Warrant*, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04. For details see HAMULÁK, Ondrej. *New Fighter in the Ring: The Relationship between European Union Law and Constitutional Law of Member States from the Perspective of the Czech Constitutional Court*. *Journal of Eurasian Law*, 2011, vol. 3, no. 2, pp. 279–303.

interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law.¹⁹ The most important outcome of quoted opinion is the fact, that CCC accepted the impacts of indirect effect even in connection with national constitutional law. This approach brought significant consequences in the second seminal decision in *European Arrest Warrant* case. CCC described the duty of EU-consistent interpretation of national law as a constitutional principle that must be followed even by the Constitutional Court itself.²⁰ According to CCC this constitutional principle ‘can be derived from Art. 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it.’²¹

Abovementioned decisions describe the main contours of the approach of CCC towards the principle of indirect effect of EU law, but they cannot be understood as rare examples. CCC uses indirect effect quite frequently. This method of work with EU law influence was used in other cases, including the ones with big constitutional relevance. Here are some examples:

- *Burden of proof in discrimination disputes.*²² Here CCC rejected the proposal to revoke provision of the Civil Procedure Code (§ 133a/2) which deals with the so-called reverse burden of proof for alleged contradiction with the right to a due process established in the Czech constitutional order. CCC claimed that national constitutional rules must be understood and interpreted with respect to the goals of the EU, its value framework and supranational system of human rights protection. Based on this, it accepted the institution of reverse burden of proof as a legitimate goal of the EU, which does not contradict national constitutional order.²³

19 *Sugar Quotas III*, Pl. ÚS 50/04, ECLI:CZ:US:2006:Pl.US.50.04.

20 KOMÁREK, Jan. European Constitutionalism and the European Arrest Warrant: In Search of the Limits of „Contrapunctual Principles“. *Common Market Law Review*, 2007, vol. 44, no. 1, pp. 9–40.

21 *European Arrest Warrant*, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 61.

22 *Burden of proof in discrimination disputes*, Pl. ÚS 37/04, ECLI:CZ:US:2006:Pl.US.37.04.

23 See further MATOCHOVÁ, Soňa. Právo Evropské unie a Evropských společenství v judikatuře Ústavního soudu ČR [EC and EU Law in the Case Law of the Czech Constitutional Court]. In MALÍŘ, Jan et al. (eds) *Česká republika v Evropské unii (2004–2009). Institucionální a právní otázky členství* [Czech Republic in the EU (2004–2009). Institutional and Legal Aspects of Membership], Praha: Ústav státu a práva AV ČR, 2009, pp.

- *Protection of the principle of trust in the contract relations*²⁴ where CCC accentuated the duty of general courts to consider the value impact of EU law also in cases of legal relationships which emerged prior to accession to the EU and even before the adoption of the EU legislation, which introduced the legal rules in question. Opinion of the CCC gets ahead of the Court of Justice case law, which does not require such retroactive application of EU law principles.²⁵
- *State liability for damages caused by violation of EU law*²⁶, where CCC considered the principle of a state's liability as a special autonomous liability regime valid in the Czech Republic, despite the absence of an explicit national legislation defining the process of prosecuting liability caused by the violation of EU law by a state. The acknowledgement of 'state liability principle' as legal institution which must be accepted by national courts was based on the pro-European bending of Czech national rules.²⁷
- *The obligation of courts to interpret and apply national law in EU-consistent way*. In several decisions from last years²⁸ CCC dealt with the problematic issue of the scope of compensation to clients of travel agencies in the case of non-realization of the trip due to bankruptcy of the agency. Directive 90/314/EEC envisages the establishment of a system of guarantees which will enable clients to a refund their money back in those cases. Czech Republic has implemented this requirement by introducing a compulsory insurance scheme for travel agencies in case of bankruptcy. Act 159/1999 Coll. established the obligation to arrange the insurance for the amount of at least 30 % of predicted or last year's sales. Insurance companies have interpreted this rule in way that also insurance indemnity (and payment to clients) could be surpassed by abovementioned limit. The affected clients considered this practice as contrary to the directive requirements. In subsequent disputes some general courts used the indirect effect to reach extensive interpretation of Czech law and to grant full refund to clients. But other courts have refused the EU-consistent interpretation as being *contra legem*. The cases came to the Constitutional Court, which inclines to the broad (EU-consistent) interpretation. According the CCC the opposite approach (non-application of indirect effect) would violate the Czech constitutional rules (fair trial, legal justice, protection of property)

29–30.

24 *Protection of the principle of trust in the contract relations*, II. ÚS 3/06, ECLI:CZ:US:2007:2.US.3.06.1.

25 *Ynos*, C-302/04, ECLI:EU:C:2006:9.

26 *State liability for damages caused by violation of EU law*, IV. ÚS 1521/10, ECLI:CZ:US:2011:4.US.1521.10.1.

27 For detailed analysis of the decision see KOMÁREK, Jan. Ústavní soud České republiky: Odpovědnost státu za škodu způsobenou porušením práva EU. [Czech Constitutional Court: State liability for Damages Caused by Breach of EU Law]. *Právní rozhledy*, 2011, vol. 19, no. 9, pp. 331–335.

28 III.ÚS 1996-1913, ECLI:CZ:US:2015:3.US.1996.13.1; IV.ÚS 2370/15, ECLI:CZ:US:2016:4.US.2370.15.1

and especially would lead to the breach of duty of EU-consistent interpretation which CCC considers as an important constitutional principle. According to some (critical) comments, CCC elevated the indirect effect to the level of some constitutional duty binding the general courts, violation of which may be the reason for the constitutional review.²⁹

5.2 *The special influence of the Charter of Fundamental Rights of the European Union*

Granting the legally binding force to the Charter of Fundamental Rights of the European Union (EU Charter) in 2009 brought significant changes within the EU legal system as whole.³⁰ Thanks to the EU Charter the project of European integration entered a new stage and got a new image. Breakthrough importance of adopting a legally binding catalogue of fundamental rights has several aspects. It's a tool of making fundamental rights (which were present only in the form of unclear principles in the past decades) visible and therefore strengthening the legal certainty of addressees. EU Charter itself legitimises the EU public power in "black letter" understanding. Its active use as the source of legality review by the Court of Justice³¹ deepens this impact in real world.³² It's a tool of universalisation of fundamental rights notion since it formally associate all traditional generations of fundamental rights into the one legal source. And last but not least, the EU Charter reaches also the spheres of the Member States as they are included in to the list of "negative" addressees – the entities obliged to respect this catalogue. Given the predominantly decentralized effects of EU law, the national dimension of understanding, reflection and application of the EU Charter forms the crucial issue for the functioning of EU fundamental rights protection. EU Charter itself has a big potential to shift and change the content, nature and mechanisms of the fundamental rights protection within all Member States. It forms a part of EU law and therefore is connected with the obligation of national courts to take into account

29 See KRÁL, Richard. Je ujednijná povinnost k eurkonformnímu výkladu i ústavní povinností [Is EU law obligation to EU law consistent interpretation also Constitutional obligation?]. *Jurisprudence*, 2016, vol. 25, no. 4, pp. 15–20.

30 See in detail KERIKMAE, Tanel. EU Charter: Its Nature, Innovative Character, and Horizontal Effect. In KERIKMAE, Tanel (ed). *Protecting Human Rights in the EU*. Heidelberg: Springer, 2014, pp. 5–20.

31 As very visible example of the real impact of the Charter one may recall to the crucial decision of the Court of Justice *Digital Rights Ireland*, C-293/12, ECLI:EU:C:2014:238, where Court used the Charter as the main argument for the (surprising) invalidation of the so called Data Retention Directive (2002/58/EC) as whole. Another strong example is *Opinion on the Agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 2/13, ECLI:EU:C:2014:2454, where Court of Justice found the incompatibility between the proposed agreement and EU law including the Charter (stating the doubts about sufficient protection of autonomy of Charter, see points 186–190).

32 DE BÚRCA, Gráinne (2013). After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 2013, vol. 20, no. 2, pp. 168–184.

its contents when interpreting domestic law. It is obvious that CCC must and starts to use the EU Charter as a source of inspiration or a supporting argument in its decisions. CCC's approach to the EU Charter confirms its "positive" relationship with the indirect effect of EU law in general.

The indirect use of the EU Charter should be twofold. Firstly, it can be used as another supporting argument for the conclusions about unconstitutionality (the breaches of the Czech Charter of Fundamental Rights and Freedoms – CRF) of national legal sources or acts of public authorities. This should be understood as some false indirect effect, when the EU Charter (its quotation by the CCC) does not affect the decision of the CCC in normative way – it's just a supportive argument. Secondly there may be cases where the EU Charter is used as interpretative guidance in interpreting Czech constitutional norms, so as a source, which affects the final decision. This should be titled as real indirect effect of the EU Charter. Here the norms of the EU Charter determine the outcome of the proceedings.

As an example of the first category of indirect effect one may point to the decision of the CCC in case II. US 164/15³³. CCC rejected a constitutional complaint in which the petitioner claimed the interference with the constitutionally protected right to assemble and freedom of expression. The complainant protested against the decision of the Czech authorities that had banned a demonstration against artificial abortion, part of which should be a radically natural photographic documentation of abortions. One of the reasons for the ban was the interest in protecting children from the negative effects of disclosure of such visual documentation. CCC in its arguments acknowledged that interest in child protection (protected by article 32 para. 1 second sentence of CFR) can be a legitimate purpose, which should lead to the limitations of other constitutional rights. When using this argument CCC referred also to the article 24 of EU Charter, under which the higher interest of the child should always be protected. In other decision III. US 1956/13³⁴, the CCC dealt with the question of the right to access to the file in criminal proceedings by the so-called other persons (suspicious persons, suspects, the owners of seized goods etc.). Under Czech criminal Codes these persons did not have the right to access to the file. CCC found the limited regulation unconstitutional. In its argumentation it opted for broad understanding of the right to access to the file also by using the supporting argument of EU Charter, which guarantees this right in article 41 in very broad manner even in the context of administrative proceedings.

The second variant of the indirect effect appears in CCC decision Pl. US 12/14³⁵ (although explicit mention of the EU consistent interpretation absents there). CCC

33 Nález Ústavního soudu II. ÚS 164/15, Zákaz konání shromáždění z důvodu zvláštní ochrany zájmu dětí, ECLI:CZ:US:2015:2.US.164.15.1.

34 Nález Ústavního soudu III. ÚS 1956/13 Právo podezřelého na nahlížení do policejního spisu a přiměřenost nařízení a provedení domovní prohlídky. ECLI:CZ:US:2014:3.US.1956.13.1.

35 Nález Ústavního soudu Pl. ÚS 12/14 K protiústavnosti výluky soudního přezkumu u pozastavení výplaty části dotace, ECLI:CZ:US:2015:Pl.US.12.14.2.

considered the question of the constitutionality of the exclusion of judicial review of the decisions of subsidy provider to suspend the payment of subsidies.³⁶ CCC assessed the exclusion of judicial review as unconstitutional (contrary to article 36 para. 2 of CFR) and in its arguments is referred, inter alia, to article 47 of the EU Charter (ensuring the right to effective remedies). Its decision on the unconstitutionality of the contested part of the law on budgetary rules is significantly based on the Czech Republic's obligations towards the European Union (CCC directly refers to the principle of sincere cooperation within the European Union). The absence of judicial review within the subsidy proceedings could (according to the CCC) led also to the violation of the requirements of EU Charter. At first glance, it seems that this decision is rather an example of the first category of indirect effect. But the intensity and thoroughness of "European" arguments used by the CCC, leads us to the conclusion that without that European "pressure" the decision of the Constitutional Court might be different. The second variant of indirect effect of the EU Charter is not merely a manifestation of voluntary willingness to reflect EU catalogue as another source of fundamental rights. It's a consequence of the duty of loyalty prescribed by the EU law as well as obligation to comply with the international obligations which flows from article 1 para 2 of the Constitution of the Czech Republic. This form of use of the Charter certainly will not be so frequent, as the first option. Firstly, it will come into consideration especially in cases covered by article 51 para. 1 of the EU Charter (the cases of "implementation" of EU law by the Member States). Secondly, it will apply only under twofold condition (1) provided that EU Charter offers more extensive protection of concrete right than narrowly interpreted norm of constitutional order; and (2) provided that protection offer by the EU Charter in individual case does not contradict with the core requirements of the Czech constitutional law – that it is not *contra legem*, as we shall describe in the incoming part of this paper.

5.3 Limitations of the EU-consistent interpretation

Even though the principle of indirect effect obviously plays an important role in the case law of CCC and is brought up relatively often, it does not mean that CCC uses it by hook or by crook. On the contrary CCC has defined some limitations of the EU-consistent interpretation of national law, partly inspired by Court of Justice case law, partly introduced by its own.

According to the CCC the norms of Czech constitutional law cannot be bent by interpretation in a biased or voluntarist way. Thus, in cases when the methodology of law interpretation does not offer any suitable method, it will not be possible to reach the expected aims of EU law. Therefore the indirect effect of EU law is limited by potential non-existence of a national interpretation method (and on a constitutional level by the existence of the method of interpreting constitutional law) suitable for reaching the goals anticipated by EU law. Here the view of the CCC is fully compatible with the position of the Court of Justice, which takes into account the

36 Prescribed the Act no. 218/2000 Coll., on budgetary rules.

principle of national procedural autonomy and does not request national courts to meet EU goals by an absurd or fictitious reading of national law. The principle of indirect effect should be applied only within the limits of national court's discretion as established by national law. The obligation to apply EU-consistent interpretation does not mean that the reading of constitutional norms must always be in a line with the EU law requirements. It is limited by the content and systemic logic of the constitutional text. In this context CCC stated that: 'The constitutional principle that national law shall be interpreted in conformity with the Czech Republic's obligations resulting from its membership in the European Union is limited by the possible significance of the constitutional text. Article 1 para. 2 of the Constitution is thus not a provision capable of arbitrarily modifying the significance of any other express constitutional provision whatsoever.'³⁷ It's clear that CCC admits a pro-European reading only to the extent which is allowed by the logical content of the national constitutional norm. The more general (and therefore more flexible) the rule of the constitutional law is, the possibility of its EU-consistent interpretation is bigger. That happened to be the case in relation to the article 14 paragraph 4 second sentence of the Czech Charter of Fundamental Rights and Freedoms³⁸ interpreted in *European arrest warrant* case. It is so general and abstract that it gave CCC a space for a pro-European interpretation. Nevertheless, in case of strict rules which do not offer the space for interpretative manoeuvres, the principle of indirect effect of EU law cannot be applicable. In this situation the current form of the constitutional text must be respected and preferred. Under these conditions there is only one way how to meet the obligations stemming from the EU membership. It is a change of that part of Constitution which prevents the fulfilment of the Czech Republic's commitment to loyalty to the EU. According to the CCC: 'If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly's prerogative to amend the Constitution.'³⁹

CCC realizes the importance of meeting the integration goals and prefers 'to adopt a European normative approach'⁴⁰ in cases where the national constitutional text impedes the employment of these goals. Here we are facing another specific impact of dominance of EU law. Apart from the role of EU law as an interpretation guideline, it can also serve as a legislative incentive to adopt changes or modifications to the national Constitution.⁴¹

37 European Arrest Warrant, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 82.

38 Article 14 paragraph 4 second sentence of the Convention says that 'No citizen may be forced to leave its homeland'.

39 European Arrest Warrant, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 82.

40 See GRUSZCZAK, Artur. European Arrest Warrant – success story or constitutional troublemaker. In GRUSZCZAK, Artur et al. *European Arrest Warrant – Achievements and Dilemmas*. Warsaw: European Centre Natolin, 2006, p. 9.

41 This is the example of the so called 'l'aiguilleur' (the pointsman) role of the Constitutional Courts. See SADURSKI, Wojciech. *Constitutionalism and the Enlargement of Europe*. Oxford: Oxford University Press. 2012, p. 135.

However this incentive is not unlimited. Under the rule of law, the absolute autonomy of European law cannot be presumed, even if the EU legal system is often declared to be *sui generis*.⁴² Barents warns, “that in such an approach Community law is in danger of being conceived in a visionary way, strongly influenced by ideology and idealism.”⁴³ CCC realizes this and repeats that the fulfilment of the Czech Republic’s obligations stemming from its EU membership cannot lead to derogation of the inviolable core of the Czech Constitution. CCC states that constituent authority can decide to modify the Constitution ‘[...] only under the condition that it preserves the essential attributes of a democratic law-based state (Art. 9 par. 2 of the Constitution), which are not within its power to change, and not even a treaty pursuant to Art. 10a of the Constitution can assign the authority to modify these attributes [...]’⁴⁴ The so called ‘Solange’ concept of the CCC (introduced in *Sugar Quotas*⁴⁵ case), by which CCC accepts the effects of EU with reservation of non-violation of core constitutional values, applies also in this respect.

6 Final remarks

The up to date case law makes it clear, that CCC adopted broad approach to the indirect effect. We may conclude that CCC considers all national norms (including constitutional level) as ‘EU-consistently bendable’ and reflects also itself as an addressee of the obligation to follow the EU-consistent reading of national law. EU-consistent reading of constitutional law represents an easy and effective tool for the elimination of potential contradictions between the demands of EU law and the demands of the Czech constitutional order. The relevance of this approach is significant mainly because indirect effect works as a preventive tool eliminating the ‘hard’ strains between EU law and national norms. Even though there might be some tensions between demands of EU law and national law in case of using the EU-consistent interpretation the conflict is only putative. Legal contradictions which can be settled by interpretation are only a seeming one. Only contradictions which are not removable by interpretation bring us before a true normative conflict.⁴⁶

Case law of the CCC clearly indicates that a EU-consistent interpretation is the most ideal tool in meeting the Czech Republic’s membership obligations. But it is simultaneously a tool for preserving the autonomy of the national authorities

42 KERIKMÄE, Tanel. *Estonia in the European Legal System: Protection of the Rule of Law Through Constitutional Dialogue*. Tallinn: Tallinn University, 2009.

43 BARENTS, René. *The Autonomy of Community Law*. The Hague: Kluwer Law International, 2004, p. 16.

44 European Arrest Warrant, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 82.

45 Sugar Quotas III, Pl. ÚS 50/04, ECLI:CZ:US:2006:Pl.US.50.04.

46 KYSELA, Jan. Mezinárodní smlouvy podle čl. 10a po ‘lisabonském nálezu’ Ústavního soudu [International Treaties under article 10a after Lisbon decision of the Constitutional Court]. In GERLOCH, Aleš; WINTR, Jan (Eds). *Lisabonská smlouva a ústavní pořádek ČR* [Treaty of Lisbon and the Constitutional Order of the Czech Republic]. Plzeň: Aleš Čeněk, 2009, pp. 49–61.

applying law and reduces possible tensions between supranational and national law. Furthermore, a quantitative view tells us that the phenomenon of indirect effect of EU law is in comparison with a direct applicability of the EU norms a more distinctive feature of supranational legal system. The approach of CCC shows that it understands this principle as a necessary component of 'everyday' practice of general courts, and not as some ultimate solution for a situation when the courts reach a dead end in their interpretations. Also, we need to mention that the application of a EU-consistent reading is defined broadly in both subject (relates to all components of the Czech Republic's legal system including constitutional law) and time matter (its use excludes neither relationships nor fact situations which emerged, or rather set in, before EU accession).

Finally, we have to remember, that even so broadly accepted impact of EU law has its limits. Besides the limits prescribed by the case law of the Court of Justice, there are also some national boundaries. The problems in positioning the EU law into the domestic legal system are even more evident in the cases where the EU rule or precedent is not commonly understood or is differently interpreted. By Williams: "Identifying a central principle is an essential step in the process of judgment. But it is not enough. A mere rhetorical observation.... is patently insufficient. We need to look further for guidance. What concerns us is how the principle is or not fulfilled. In other words, the principle is not the last word in values. We must also consider the means by which it is brought into effect. Only then can effective evaluation be made as to the extent to which the principle has been and is realized."⁴⁷ The 'Solange' concept of relative acceptance of EU law, which serves to protect the core values of Czech constitutional order, must be accepted and should be applied also in connection with the principle of indirect effect. Primacy of EU law over Member States constitutions claimed by the Court of Justice has always been controversial as the national constitutions are the source of allowing the EU law to enter to the national legal system. Constitutional homogeneity can be seen as a precondition for loyalty to European Union. This kind of homogeneity cannot be (legally) framed, but must be seen as a process where the values emerge and develop through the communications between the two levels.⁴⁸

47 WILLIAMS, Andrew. Respecting Fundamental Rights. In BARNARD, Catherine. *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*. Oxford: Oxford University Press, 2007, p. 82.

48 KERIKMÄE, Tanel. *Estonia in the European Legal System: Protection of the Rule of Law Through Constitutional Dialogue*. Tallinn: Tallinn University, 2009.

THE NEW EUROPEAN NETWORK ON VICTIMS' RIGHTS

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Summary: The Netherlands, Slovakia, France and Ireland are the States that came up with the initiative to establish a European Network on Victims' Rights. This project is financed by Action grant of the European Commission and partially by Netherlands. The aim of this paper is to give general information about the main goals of the network and current work of Member States in the area of victims' rights. The information is simply structured and composes of one main chapter and two subchapters. The first subchapter is divided into four paragraphs reflecting the framework of the network while the second one descriptively informs about the Council conclusions adopted during Netherlands' presidency that confirmed the existence of the network.

Keywords: compensations, cross-border cases, European Network on Victims' Rights, ENVR, individual assessment, SK PRES, victim, victims' rights.

1 Introduction

Several years ago, victims had only few rights that were also encompassed within the domestic legal order of respective States.¹ Among those were mainly rights to be heard, informed and present within the criminal justice systems. Notwithstanding these important guarantees, we may only label them as exception confirming the rule defining that more extensive rights pertaining to victims of crime were not even codified but largely absent. Among most important rights that were omitted from various legal systems was right to be informed about the arrest or release of potential perpetrator of the crime. Usually, the victims were also not notified about the court proceedings which meant that the presence of the perpetrator was unknown to them.

1 From historical point of view two types of procedures coexist within criminal judicial framework. Whereas the adversarial system does not grant no formal standing to the victim, i.e. the victim serves only as a prosecutorial witness; inquisitorial model preferred within continental Europe has recognized victim as a party with his or her own rights. FISHER, Bonnie, Sue, LAB, Steven P. *Encyclopedia of Victimology and Crime Prevention. Volume I*. SAGE Publications, Thousand Oaks, 2010, p. 1015.

Nevertheless, in recent years the topic of victims of crime has been given considerable attention at the EU level. It is evident that cultural, social and political developments over last decades enabled victims' rights to be part of EU legislation which arose in numerous different initiatives. This paper reacts on the recent activity of the European Union ensuring the efficiency of EU law concerning victims. Nowadays, the result is that victims' rights are more established in our jurisdictions. It flows from existing EU legislative acts in the area of victims' rights that the EU is eager to protect victims of crimes.² For this purpose it has created legal framework for establishing minimal standards on the rights, support and protection of victims of crime.

The Lisbon Treaty established precise EU competence to adopt legislative measures on the rights of victims of crime³ and the Stockholm programme came with the intention to establish an integrated and coordinated approach towards victims within the EU. More specifically, after the adoption of Lisbon Treaty that stipulates minimal standards applicable in the Member States with the purpose to facilitate mutual recognition of judgments and other judicial decisions and police and judicial cooperation in criminal matters with cross-border character, the endeavours of the EU have acquired a new dimension. This concerns in a more substantive way also victims of crimes and their rights. Same pronouncements about concrete steps were also made by the Council of the European Union. Furthermore, on the basis of Stockholm Programme – An open and secure Europe, the Commission and Member States were asked to examine how to improve legislation and practical support measures for protection of victims with regard to special attention, support and recognition of the priority given to all victims of crime.⁴

The actual work of Member States was additionally translated into the creation of the European Network on Victims' Rights (hereinafter "ENVR"). It concentrates on further reinforcement of the position of victims not only in criminal but also in civil matters within the entire EU area.⁵ It is to be noted that

2 See EU Council, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, 17024/09 [online]. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:j10034&from=EN>> Accessed: 21.07.2016

3 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, Art. 69A para. 2, letter c) [online]. Available at: <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2007%3A306%3ATOC>> Accessed: 21.07.2016.

4 POLÁK, Peter. Legal regulation of status of aggrieved parties (victims) in criminal proceedings in context of current European Union legislation requirements. In *Obete kriminality a ich práva: Zborník príspevkov zo seminára z medzinárodnou účasťou konaného dňa 6. novembra 2014 na Fakulte práva Paneurópskej vysokej školy v Bratislave*. Žilina: Spoločnosť pre trestné právo a kriminológiu, 2015, p. 36.

5 At the beginning of 2015 Netherlands, Slovakia, France and Ireland applied for an Action Grant of the Commission for the project of European network for victims' rights that was

reinforcement of the position of victims is an important step that has to be done by laying down their rights in EU legislation. However, victims will only have a full-fledged position when they can exercise their rights in practice and actually get the support and protection they need from Member States.

2. The role of a Victim as defined by Victims' Directive

2.1 Comparison to other instruments

As we have mentioned above, victims' rights were neither increasingly enshrined in national legislations nor could they be found in any global or regional legally binding instruments. After several reminders of unquestionable relevance of the topic,⁶ a slight shift towards more explicit rules encompassing protection of victims was observed. With regard to first international law documents concerning victims' rights, Rover as quoted by Viktorová and Blatnický has mentioned UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted within the UN General Assembly in 1985.⁷ Novokmet further points out to the United Nations Convention Against Transnational Organized Crime adopted in 2000 and the United Nations Convention Against Corruption of 2003 respectively which both contain explicit provisions concerning procedural rights of victims.⁸

In the following lines we will put our focus on Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime

later confirmed by Council conclusions on establishing an Informal European network for victims' rights. With reference on the identified legislation it is evident that it involves both criminal and civil law approach.

- 6 The topic started evolving in the 1960s when women's groups and feminists groups brought attention to the "plight of rape victims." FINKELMAN, Paul. *Encyclopedia of American Civil Liberties. Volume I*. New York: Routledge, 2006, p. 1710.
- 7 VIKTORYOVÁ, Jana, BLATNICKÝ, Jaroslav. Rights, support and protection of victims from the perspective of criminal investigation. In *Obete kriminality a ich práva: Zborník príspevkov zo seminára z medzinárodnou účasťou konaného dňa 6. Novembra 2014 na Fakulte práva Paneurópskej vysokej školy v Bratislave*. Žilina: Spoločnosť pre trestné právo a kriminológiu, 2015, s. 133. [VIKTORYOVÁ, BLATNICKÝ, 2015]. Although aforementioned declaration has been clearly a non-binding, i. e. so-called soft-law instruments adopted by the UN General Assembly, importance of such proclamations was fostered by referring to them in practice by some important legal authorities. During the infamous Milosević trial before the International Criminal Tribunal for Yugoslavia, the Prosecutor Carla del Ponte as well as the leading Prosecution counsel, Geoffrey Nice referred repeatedly to the victims in their speeches. More importantly, Carla del Ponte emphasised the priority of victims' rights when she unequivocally called for the joinder of the three indictments against Milosević. LAUGHLAND, Jon. *Travesty: The Trial of Slobodan Milosević and the Corruption of International Justice. First Edition*. London: Pluto Press, 2007, p. 84.
- 8 NOVOKMET, Ante. The Right of a Victim to a Review of a Decision not to Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of its Transposition in Germany, Italy, France and Croatia. *Utrecht Law Review*, 2016, roč.12, č. 2, p. 87.

(hereinafter “Victims’ Directive”) provides in general a wider scope of procedural rights of the victim. The aim of Victims’ Directive is the revision and supplementation of principles stated in Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings in order to improve the protection of victims’ rights within the EU (hereinafter “Framework Decision”),⁹ mainly in criminal proceedings. Framework Decision as stated by Groenhuijsen and Pemberton was the first hard-law instrument concerning victims of the crime at the international level.¹⁰ Although big hopes were put into it, its implementation was not successful. In 2009 the Commission stated that the national legislation of many Member States contains numerous omissions and reflect existing practice before the adoption of the Framework Decision.¹¹ On the other hand, the Framework Decision referenced above, remains applicable to Denmark even after the transposition deadline for the Victims’ Directive has passed for the other 27 Member States (Recital 71 of the Preamble of the Victims’ Directive) since Denmark has not adopted it.¹² Therefore, in judicial cooperation with Denmark the respective regime according to Council Framework Decision is to be maintained.

In this context, it is interesting to note that the Slovak Republic, like some other Member States, has not yet fully transposed the Victims’ Directive. What is noteworthy, the Slovak Republic puts its endeavors towards the protection of victims’ rights flowing from Victims’ Directive. In particular, as one of the co-founders of the ENVR, it organizes the Second meeting of the European Network on Victims’ Rights which will be held in Bratislava on 21 November 2016 during the Slovak presidency in the Council of the EU.¹³ Significance of the topic of victims’ rights is enhanced also by the fact that the European Judicial Network in criminal matters will organize several workshops in margins of its plenary meeting on 22–23 November 2016.¹⁴

9 See European Union: Council of the European Union, Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA, 15 March 2001 [online]. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001F0220&from=EN>> Accessed: 28.07.2016.

10 GROENHUIJSEN, Marc, PEMBERTON, Antony. The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference? *European Journal of Crime, Criminal Law and Criminal Justice*, 2009, roč. 17, č. 1, p. 43.

11 GROENHUIJSEN, Marc. The development of international policy in relation to victims of crime, *International Review of Victimology*, 2014, roč. 20, č. 1, p. 36.

12 MAIZENER, Linda, et al. *EVVI (Evaluation of Victims)*, The Ministry of Justice of the French Republic, 2013, p. 7. [online]. Available at: <http://www.justice.gouv.fr/publication/evvi_guide_en.pdf> Accessed: 01.08.2013

13 For further information regarding this event kindly consult <<http://www.eu2016.sk/en/political-and-expert-meetings/second-meeting-of-the-european-network-on-victim-rights>>.

14 For further information kindly consult <<https://www.ejn-crimjust.europa.eu/ejn/Events-detail.aspx?event=428>>.

One of new approaches of the Directive is more profiled cooperation and coordination of services. This has resulted in fact to the establishment of an Informal European Network on Victim's Rights. Due to this achievement and to the binding force of the Victims' Directive, it may be characterized as a bigger step towards better protection of victims' rights and harmonization of procedural rules in EU Member States.

2.2 Elaboration of Victims' Directive provisions

The aim of the Victims' Directive is to ensure that "victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings,"¹⁵ In contrast to abovementioned Framework Decision The Victims' Directive contains more exhaustive definition of a victim in its Art. 1 a), it describes victim as:

*(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death;*¹⁶

Furthermore, the important aspect enshrined in the Victims' Directive is the right to receive information from the first contact with a competent authority as stipulated by Article 4.¹⁷ Rover, as quoted by Viktorová and Blatnický points out that focus on due consideration will partially remove negative consequences of the offense committed and helps to create trust towards law enforcement authorities.¹⁸

This issue is closely connected to the educational level of the society. The awareness of the society is very low and victim learns about his/her rights and responsibilities at the first contact with the competent authorities which can be too late with respect to his/her psychological or physical damage suffered by the crime.

Victims' Directive in its Art. 4 para 1 regulates the list of rights that need to be given to the victim from the first contact with a competent authority.¹⁹ Medel-ský provides for following suggestions for improvements relating to the better

15 European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 14 November 2012, L 315/57, Art. 1 para 1 [online]. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>> Accessed 28.07.2016 [Directive, 2012].

16 *Ibid.*, Art. 2 para. 1 letter a).

17 *Ibid.*, Art. 4.

18 VIKTOROVÁ, BLATNICKÝ, 2015, supra note 7, p. 133.

19 Article 4 Para 1, letters a-k of the Directive 2012/29/EU list the categories of rights that need to be addressed.

education offered to public society and organization of trainings for persons of the first contact with victims:

- to provide better education offered at secondary school and/or Police Academy,
- trainings for people of first contact, such as police officers, prosecutors, judges, probation and mediation officers and other entities that come into contact with victims of crime.

Moreover, police needs to know how to interpret necessary information to the victim reflecting the particularities of specific cases. The list elaborated in Art. 4 para 1 provides some new provisions establishing more rights of victims and it may be agreed with the opinion of Medelský that it is not enough if the policeman learns how to interpret these rights by practice.²⁰ This Article reads as follows:

“Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.”

In connection to this, Medelský is of the opinion the police is able to fulfill such requirement. It is also to be noted that such trainings could be organized also with assistance of the Commission or even ENVR.

Comparing the 2012 Directive with the prior Framework Decision, it provides for a wider definition of victim by including also family members. Furthermore, the rules on cooperation between Member States' authorities have been expanded and it contains new provisions requiring Member States to make victims more aware of their rights which can be seen by the wording of Art. 26.²¹ Art. 26 para 1 of the Victims' Directive enshrines that Member States shall take appropriate action to facilitate cooperation between them to improve victims' access to the rights set out in the directive and under national law. This respective article is also the legal basis for creation of Informal European Network on Victim's rights.²²

DG Justice Guidance Document further specifies the importance of communication between Member States and the establishment of national contact

20 MEDELSKÝ Jozef. Actual and future regulation of victims' rights in the Slovak republic. In *Obete kriminality a ich práva: Zborník príspevkov zo seminára z medzinárodnou účasťou konaného dňa 6. novembra 2014 na Fakulte práva Paneurópskej vysokej školy v Bratislave*. Žilina: Spoločnosť pre trestné právo a kriminológiu, 2015, p. 222. [MEDELSKÝ, 2015].

21 For the comparison with the 2001 Framework Decision see PEERS, Steve. *Guidelines for Transposition. The EU Directive on Victims' Rights (2012/29/EU) and homophobic and transphobic crime victims*. Human Rights Centre, University of Essex, 2013, p. 7.

22 [Directive, 2012], supra note 17, Art. 26 para 1.

points who are advised to share their best practices and cooperate via networks of national contact points through several platforms within the EU.²³ The network fulfills this aim of the Victims' Directive by enabling member states to share their knowledge and best practices, stimulate cooperation in cross-border cases and organize meetings of contact points for these purposes. This requirement flows also from Art. 47 of the EU Charter of Fundamental rights that guarantees to all the right to effective access to justice.²⁴

3 The project of the European Network for Victims' Rights

3.1 General Information

The project of creation of the ENVR was initiated by the Netherlands, leading the project together with their co-founders Slovakia, France and Ireland.²⁵ Support and establishment of ENVR was stated in an 18 month Trio presidency programme.²⁶ The existence of the network is based on the action grant that will end in May 2017. According to Article D Para 10 of the Council conclusions the ENVR should evaluate its work in consultation with the Commission in order to decide on the need of its continuation.²⁷ In this respect we need to point out that the idea of the permanent ENVR is not excluded. The support of this idea could be found also in the fact that Commission is opening together two new calls for proposals offering action grants to support transnational projects to enhance the rights of victims of crime.

23 European Union: European Commission, *DG JUSTICE GUIDANCE DOCUMENT related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 2013, p. 49.

24 Art. 47 reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." European Convention, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 2 October 2000, Art. 47.

25 Slovak Republic, as one of the partners joined to the Netherlands' initiative in accordance with the 18 month TRIO PRES programme that calls for supporting the establishment of a European Network on Victims' Rights.

26 European Union: Council of the European Union, 18 month programme of the Council, 1 January 2016–30 June 2017 [online]. Available at: <data.consilium.europa.eu/doc/document/ST-12396-2015-INIT/en/pdf> Accessed: 28.07.2016

27 European Union: Council of the European Union, Council conclusions establishing an Informal European Network on Victims' Rights, 9 June 2016, Article D Para 10 [online]. Available at: <<http://data.consilium.europa.eu/doc/document/ST-9997-2016-INIT/en/pdf>>. Accessed 28.07.2016. [Council Conclusions, 2016].

The priorities of the first project could be found on the website of the Commission²⁸, but mostly they are concerned on the implementation and practical application of the instruments that corresponds with the aims of the ENVR. Furthermore, it should be concentrated on:

- development of ways how to give relevant information about their rights, procedures, support, compensation system,
- finding a best way for cooperation in cross-border cases,
- improvement of procedures taking into account individual assessment.

The second project should be focused on discussions about new possible legislation, mainly on:

- identification of the needs that are missing in current legislation,
- exchange of good practices among the Member States,
- analytical work regarding to collection of data, preparation of surveys.

Taking into account the Commission prepared the new call for proposal we can presume its interest in duration of the ENVR. Basically, meetings of ENVR have proved useful and replaced the expert meetings organized by the Commission. Member States have significant problems to transpose the Victim's Directive and it is logical they are reserved to present it in front of Commission. Therefore, the idea of the establishment of ENVR came up where Member States can discuss these problems and share their best practices. However, some of Member States objected the presence of the Commission at meetings of the contact points of ENVR. As to the fact Commission awards the action grant it was not possible to exclude it from meetings. Finally, the agreement was reached and the role of the Commission is not omitted, but limited only to the specific parts of the meeting.

Talking about the duration of ENVR, the interest of Member States is also evident that are now in the middle of discussions who will hold the leadership next. With regards to the fact that Malta, likewise Netherlands, has not nominated contact points of ENVR, hypothetically Estonia could be taken into account as the future presidency who also supported the existence of ENVR together with Hungary who showed a significant interest.

The role of the ENVR is to strengthen the rights of victims and to enhance the cooperation of the Member States in the area of victims' rights. It is a network of government officials, instrumental in enabling standards of the relevant EU legislation to work in day to day practice. It means that it serves to the public authorities in order to exchange their best practices concerning the implementation of the EU legislation in the area of victims' rights and cooperation in cross-border cases.

28 For priorities regarding the project kindly consult <<http://ec.europa.eu/research/participants/portal/desktop/en/opportunities/just/topics/19097-just-jacc-vict-ag-2016.html>>

Among the most relevant legislation concerning victims the attention may be drawn to the Directive on minimum standards rights, support and protection of victims of crime (2012/29/EU)²⁹ and Directive relating to compensation to crime victims (2004/80/EU)³⁰. We would like to expand this short list on Directive European Protection order (2011/99/EU)³¹ and Regulation on mutual recognition of protection measures in civil matters (606/2013).³² This point of view was also presented within the European network for victims 'rights that deals with all of the abovementioned instruments during its sessions and it was also confirmed by Council conclusions establishing an Informal European Network on Victims' Rights in its Article A Para 2.³³ Moreover, the preamble of the abovementioned Council Conclusions reacts to the numerous terrorist attacks. Therefore, the new draft of the directive on combating terrorism will be taken into account and the Article reflecting the rights of victims of terrorism is being discussed.³⁴ This initiative reacts also on the Joint Statement of EU Ministers for Justice and Home Affairs and representatives of the EU Institutions adopted on 24 March 2016.

The difference of the ENVR from other networks is that it was created for competent public authorities implementing the relevant EU legislation in practice. With regard to the meetings of the contact points, these have been organised by the support group composed of Netherlands, Slovakia, France and Ire-

29 European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 14 November 2012, L 315/57 [online]. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>> Accessed: 28.07.2016.

30 European Union: Council of the European Union, directive 2004/80/EC relating to compensation to crime victims, 29 April 2004, L 261/15 [online]. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0004:0012:en:PDF>> Accessed: 28.07.2016

31 European Union: Council of the European Union, directive 2011/99/EU of the European Parliament and of the Council on the European protection order, 13 December 2012, L 398/2 [online]. Available at: <http://ec.europa.eu/justice/criminal/files/directive_2011_99_on_epo_en.pdf> Accessed: 28.07.2016

32 European Union: Council of the European Union, regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, 12 June 2013 [online]. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0015:0018:en:PDF>> Accessed: 28.07.2016.

33 European Union: Council of the European Union, Council conclusions establishing an Informal European Network on Victims' Rights, 9 June 2016, Article A Para 2 [online]. Available at: <<http://data.consilium.europa.eu/doc/document/ST-9997-2016-INIT/en/pdf>> Accessed: 28.07.2016. [Council Conclusions, 2016].

34 See e.g. European Union: European Commission, Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, 2015/0281 (COD), 2 December 2015, Title V.

land, later joined by Hungary. The Member States have had a chance to discuss different topics leading to finding solutions for best implementations of the relevant EU legislation during the meetings, for instance, individual assessment, interpretation and translation, cross-border cases or access to information.

The preliminary meeting in Luxembourg and the first official meeting of the ENVR in Amsterdam was organised by the Netherlands with the assistance of the support group. The most important problems were identified and discussed in Amsterdam and suggestions were presented how to solve them. The second official meeting will take place in Bratislava under the Slovak presidency of the Council of the European Union that will concentrate more on practical solutions to the recognised problems. This meeting intends to concentrate on Article 4 of the Directive on minimum standards rights, support and protection of victims of crime (2012/29/EU) relating to the access to information in order to exchange of knowledge between national authorities, in particular, how they provide information to victims about their rights.

This approach partially covers information related to cross-border cases and system of compensations. The first step was already done in February at the meeting in Amsterdam during which this topic was classified as one of the most problematic issues. The focus of the Bratislava meeting will be put on finding concrete and practical solutions on exercising of victims' rights that are closely linked with the access to information that need to be easy and accessible. Moreover, it needs to be said that e-justice portal is sometimes unknown even among lawyers and besides that is too chaotic. That is why this e-justice portal will be part of the discussion.

3.2 The framework of the ENVR

The framework of the discussions of Member States is open but until now it was more or less concentrated on the access to information, individual assessment and cross-border cases.

3.2.1 Access to information

The directive constitutes 11 items of information that has to be offered to victims without unnecessary delay and from their first contact with a competent authority. On the same time, the way how they are communicated to victims must reflect their specific needs and expectations. Therefore, ENVR started discussions about the access for information with the intention to find the best way how to address them all to victims in a useful and proper way.

3.2.2 Cross-border cases

As far as cross-border cases, it is important to ensure that any victim can rely on the same basic level of rights whatever their nationality and wherever in the

EU the crime takes place.³⁵ It is even more difficult for victims to exercise their rights in cross-border cases. The way in which these rights may be exercised in practice requires *inter alia* a more detailed elaboration, expertise and engagement of more actors in order to achieve the whole picture. For instance, the right of a victim to report a crime that was committed in a foreign jurisdiction differs from State to State. Victims of serious crimes may face difficulties to report their victimisation to competent authorities. ENVR is a good platform where these particularities can be discussed.

3.2.3 Compensations

Apart from the difficult access to information, victims are often unaware of their rights and they do not have sufficient knowledge where to find support and assistance in terms of compensation services. This topic was opened during the Netherlands Presidency and deserves further discussions leading to simplification of the process of making a complaint or applying for compensation.

3.2.4 Individual assessment

Article 22 of Directive on minimum standards rights, support and protection of victims of crime (2012/29/EU) has the key role in Victims' directive and causes the huge practical problems for member states to implement it. That is why ENVR organised workshops during Amsterdam meeting to open discussions about individual assessment. This article is closely connected to provisions 23, 24, 18 and 8 of the directive.

3.3 Council conclusions establishing an Informal European Network on Victims' Rights

Council conclusions that established the ENVR are systematically organized into Preamble and four chapters referring to objective, composition, organization, funding and evaluation of the network.

The first chapter states that network will facilitate and enhance the work of member states in order to fulfil the aims on which it was established regarding cooperation and exchange of best practices of the public authorities.³⁶ The second paragraph refers to the fact that ENVR is composed of contact points of policy officers that will meet on regular basis with participation of the Commission and possibly other European institutions. The next paragraph contains information about organization and funding system of ENVR. The project is funded by the action grant³⁷ and the meeting should be organized twice per year

35 European Union: Council of the European Union, Council conclusions establishing an Informal European Network on Victims' Rights, 9 June 2016, Preamble [online]. Available at: <<http://data.consilium.europa.eu/doc/document/ST-9997-2016-INIT/en/pdf>>. Accessed: 28.07. 2016. [Council Conclusions, 2016].

36 Council Conclusions, 2016, *supra* note 33, para A2.

37 *Ibid.*, para C8.

chaired by Member States. The last paragraph advises that ENVR should evaluate its work in consultation with the Commission.

4 Conclusion

It is right to say in the words of Čírtková as quoted by Havrlentová that it is practically impossible for a victim to prepare for a crisis situation in advance, it is even more difficult to live with this kind of experience and it is often almost impossible to avoid such situation.³⁸ Once victims' are part of this circle, it is hard for them to return back to normal life.

It is indisputable that to the victims of crimes is paid attention from the side of legislators, legal theorists and practitioners as well as the media. On the other hand we consider putting more attention to victims. We also agree with Mendel'ský who finds necessary to put more emphasis on these issues especially to the general public that is directly touched by this issue. He considers victim of crime is a person who is in a position where she has suffered injury or damage without their own fault.³⁹

Therefore, it is important to find concrete and practical solutions for victims, not only at the national but also at the international level, such as the exercising of victims' rights in cross-border cases, maximizing synergies between compensation services, necessity of translation of documents and facilitation of international cooperation between States.

In this light, ENVR intends to pay more attention to the position of victims in cross-border cases. We support the idea relating to the exchange of knowledge between national authorities on the rights, protection and support of victims can make a good contribution to this. ENVR is the result of a need to organise experts' meetings in order to share their knowledge and best practices, promulgate guidelines, develop handbooks, adopt recommendations and gather information via questionnaires leading to uniform approaches and better protection of victims within EU Member States.

Last but not least it is our duty to point out that even though Slovakia is one of the leaders of the ENVR it has not fully transposed the directive. The same applies for our colleagues, despite of the fact they are far ahead. They adopted law reflecting the previous framework decision, but not the directive. However, the explanatory report says something else according to Jelínek as quoted by

38 HAVRLENTOVÁ, Darina. Victim from psychological point of view. In *Obete kriminality a ich práva: Zborník príspevkov zo seminára z medzinárodnou účasťou konaného dňa 6. novembra 2014 na Fakulte práva Paneurópskej vysokej školy v Bratislave*. Žilina: Spoločnosť pre trestné právo a kriminológiu, 2015, p. 65.

39 MEDELSKÝ, 2015, p. 216.

Mendelský⁴⁰. According to opinion of various experts this separate law does not include the Victims 'directive and that is why it needs to be amended soon.

Certainly, we may agree with Medelský and many other authors that the Slovak Republic has to take a giant step in front, which ultimately will help to ensure that victims of crime could effectively implement individual rights.⁴¹ This commitment arises not only from the directive itself or from the fact that leads the ENVR, but also from the moral perspective.

40 *Ibid.*, p. 220.

41 *Ibid.*, p. 221.

THE MEANING OF SOFT LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

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Summary: The growth in the amount of international arbitrations, the value of the disputes and expenses invested into the arbitral proceedings have escalated the pressure to succeed in dispute. The arbitrators face to guerrilla tactics or threats of annulment of arbitral awards based on the violation of a right to a due process. Soft law regulating the arbitral procedure endowers the effectiveness of the arbitration, however, in the recent years the critical voices can be heard which warn against overregulation and its judicialization. On the following pages the impact of the soft rules prescribing the arbitral proceeding on the effectiveness of the international commercial arbitration is examined. Firstly the author deals with the right to a fair trial and the discretionary power of arbitrators in the framework of the notion of soft law and then the binding character of this soft law is determined. The aim of this article is to answer the question whether the regulation of the arbitral proceedings by soft law is still welcomed or if it represents a threat for the discretionary powers of the arbitrator and arbitration as such.

Keywords: Soft law, international commercial arbitration, judicialization

1 Introductory remarks

The roots of arbitration can be found in depths of history. The first relevant evidence of the existence of arbitration appears in the ancient Rome and in ancient Greece. Even if this ancient kind of arbitration reflects a lot of differences to the recent attitude, the common features can be still recognized.¹ The most important ones are the less formal and flexible conduct of the proceedings and party autonomy, mainly vested in the arbitration agreement. An arbitration agreement usually in the form of an arbitration clause does not only constitute the power of the arbitrators to decide on the merits of the case, but the parties may either regulate several procedural questions by it. The arbitration agreement represents the hypothetical peak of the norms regulating the arbitral proceedings. In the case of ad hoc arbitration the arbitral proceedings are further regulated by *lex loci arbitri* and if institutional arbitration is chosen by the parties, the

1 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 10–11.

rules of the chosen institution are also relevant. Nevertheless, it is still the arbitral tribunal – mainly the presiding arbitrator – that has wide discretionary power to manage and influence the arbitral proceeding.

The discretionary power of the arbitrators is one of the basic characteristics of arbitration. Commercial arbitration is a real alternative to court litigation for which the expeditious decision is a crucial task. At the same time the party autonomy and partial responsibility of the parties for the outcome of the arbitration are conditional for arbitration. Thus the arbitrator is, namely, chosen by the party or parties according to their needs, confidence and trust. It is also the reason why national laws state that only in exceptional situations any restrictions or conditions for the potential arbitrators can be applied, to allow the parties to select a person according to the present case. By this selection the parties express not only a trust that the chosen arbitrator is able to issue an appropriate decision but he or she will manage the arbitral proceedings in a just way and ensure that the right for a fair trial will be guaranteed. On the other hand these high requirements that are put on the parties are one of the reasons why arbitration is not recommended in the cases where the position of the parties is not in balance and one of the parties is considered to be the weaker party, e.g. consumer cases.

The expansion of arbitration is eminent if the judicial power is paralyzed and the court proceedings are not effective, e.g. they are expensive and lengthy. During the French Revolution arbitration was elevated to constitutional status in the Constitution of 1790 and the Constitution of 1795.² The development of commercial arbitration in the second half of the 20th century is influenced by the upturn in foreign trade. The businessmen are on one side seeking the opportunities how to eliminate the uncertainty connected with the different legal orders, the determination of jurisdiction of national courts and the impact of national procedural rules, but on the other they insist on a decision that would be recognized and enforceable not only in the state where it has been rendered, but also in the state where the assets of the debtor is located.

The expansion of arbitration and the necessity of the validity and enforceability of the awards lead to the growth of the norms regulating arbitral proceedings. Nowadays the term judicialization of arbitral proceeding is known both to the theory and arbitral practice.³

2 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 18.

3 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. [online]. Available at: <<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Redfern-06-006>> Accessed: 14.4.2016. PARK, William. *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*. In MISTELIS, Loukas, LEW, Julian D. M. *A Pervasive problems in international arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, 146. HORVATH, Günther J. *The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures*

On the following pages the impact of the soft rules prescribing the arbitral proceeding on the effectiveness of the international commercial arbitration is examined. Firstly the author deals with the right to a fair trial and the discretionary power of arbitrators in the framework of the notion of soft law and then the binding character of this soft law is determined. The aim of this article is to answer the question whether the regulation of the arbitral proceedings by soft law is still welcomed or if it represents a threat for the discretionary powers of the arbitrator and arbitration as such.

2 The right to a fair trial in international arbitration and the importance of soft law

The growth in the amount of international arbitrations, the value of the disputes and expenses invested into the arbitral proceedings have escalated the pressure to succeed in dispute. The arbitral awards are not reviewable on the merits by the court in most of the jurisdictions.⁴ As regards to the invalidity of arbitral awards, based on the grounds concerning its merits in commercial disputes, the incompatibility with the public policy in the situs is usually the only reason for it being made invalid. The procedural reasons might be divided into two groups. The first group includes grounds concerning the lack of jurisdiction of the arbitrators, e.g. the invalidity of the arbitration clause or non-arbitrability of the dispute.⁵ The irregularities of the arbitral proceedings then represent the second group of grounds justifying the annulment or unrecognition of the arbitral awards. The deviation from the arbitration agreement concluded by the parties and the breach of the right to a fair trial are one of the most common reasons.⁶

In the case of international arbitration the definition of a fair trial is provided by the national law of the situs of arbitration. Nowadays the seat theory is considered to be the leading theory governing the international arbitration and the delocalization or anacionalization of international arbitration takes back seats.⁷

into International Arbitration Risk a Denial of Justice in International Business Disputes? In KRÖLL, Stefan Michael, MISTELIS, Loukas A. et al. (eds.). *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*. Alphen aan den Rijn: Kluwer Law International, 2011, pp. 251–271.

4 One of the rare exemptions represents the English Arbitration Act of 1996 which in § 68(1) states that the party may appeal an arbitral award on a point of law, unless the parties have agreed otherwise.

5 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration*. New York: Cambridge University Press, 2012, p. 195.

6 There are essentially three broad areas in which an arbitral award is likely to be challenged – jurisdictional, procedural and substantive grounds. BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. [online]. Available at: <<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Redfern-06-015>> Accessed: 14.4.2016.

7 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration*. [online]. Available at: <<http://www.klu->

The procedure of an arbitration may be, and generally is, regulated by the rules chosen by the parties; but the procedural law is that of the place of arbitration and, to the extent that it contains mandatory provisions, is binding on the parties whether they like it or not.⁸

Moreover the arbitral proceedings are governed by the *lex arbitri* even without the intention of the parties. Mandatory norms of *lex arbitri* are applicable automatically.⁹ Similarly Lord Mustill in the Channel Tunnel decision explained that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.¹⁰ Contrary to this approach the French courts adhere to the principle that the parties are allowed to choose the procedural rules of an arbitral institution and these rules represent a self-contained system of law.¹¹ These conclusions are deemed highly controversial since the difference between rules of law and *lex arbitri* must be recognized. Parties may choose the rules but the procedural law is that of the place of arbitration.¹²

However, the seat theory does not prescribe that the arbitrators strictly obey the procedural law of the *situs*. As has been already stated, the design of the arbitral proceedings is primarily in the hands of the parties and application of the *lex arbitri* is thus often restricted only to the mandatory provisions declaring the right to a fair trial. On the other hand there is no universal definition of the right to a fair trial and each state created its own definition by the judicature of its national court.

Given that, the content of right to a fair trial in the case of international arbitration is proclaimed in article 18 UNCITRAL Model law which states that the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case. This general clause is further explained by article 19 which provides the subject to the provisions of this Law,¹³ the parties are free to

werarbitration.com/CommonUI/document.aspx?id=KLI-KA-Redfern-06-008> Accessed: 14.4.2016.

8 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration. Fifth Edition*. New York: Oxford University Press, 2009, p. 180.

9 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration. Fifth Edition*. New York: Oxford University Press, 2009, p. 185.

10 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 234.

11 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 243.

12 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan, HUNTER, Martin. *Redfern and Hunter on International Arbitration. Fifth Edition*. New York: Oxford University Press, 2009, p. 180.

13 Besides article 18 of UNCITRAL Model law articles 23 (1), art. 24 (2) and (3), art. 27, art. 30 (2), art. 31 (1), (3) and (4), art. 32, art. 33 (1), (2), (4) are considered mandatory.

agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Article 19 UNCITRAL Model Law thus grants the parties the greatest possible discretionary power.¹⁴

On the top of that neither the choice of foreign procedural law, allowed according to some jurisdictions,¹⁵ may exclude the application of mandatory rules of *lex arbitri*.¹⁶ However the theory recognized more than one definition of the right to a fair trial, the common ground is built on the right of the party to present its case,¹⁷ the right of the parties to be threatened equally and the right to respond to the arguments presented.

Nonetheless, it is important to state, that the level of protection of the right to a fair trial in international commercial arbitration is different to court litigation. Court litigation is based on strict and formal rules vested into the obligatory norms regulating the behavior not only of the judge but also of the parties and third persons involved. This approach how to secure the right to a fair trial would not be in accordance with the informality of the arbitral proceeding and the expectations of the parties. As professor Bělohávek has mentioned: “However, even principles incorporated in the so-called fair trial doctrine both under Article 6(1) of the ECHR and under the individual national laws need not necessarily apply to arbitration at all, or they may not apply to arbitration to a limited extent.”¹⁸ And further Born has expressed: “In theory, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”¹⁹ The difference is significantly vis-

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- BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition*. London: Sweet & Maxwell, 2010, p. 282.
- 14 BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition*. London: Sweet & Maxwell, 2010, p. 281.
- 15 For example under the article 182(1) of the Swiss Private International Law Act the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.
- 16 BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition*. London: Sweet & Maxwell, 2010, p. 35. WAINCYMER, Jeff. *Procedure and Evidence in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2012, p. 189.
- 17 See art. V (1) (b) NY Convention states: (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- V (1) (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.
- 18 BĚLOHLÁVEK, Alexander J. Arbitration from Perspective of Right to Legal Protection and Right to Court Proceedings (the Right to Have One’s Case Dealt with by a Court): Significance of Autonomy and Scope of Right to Fair Trial. In BĚLOHLÁVEK, Alexander J., ROZEHNALOVÁ, Naděžda (eds.). *Czech (& Central European) Yearbook of Arbitration. The Relationship between Constitutional Values, Human Rights and Arbitration*. New York: JurisNet, 2011, p. 58.
- 19 BORN, Gary B. *International Arbitration. Cases and Materials*. New York: Aspen Publish-

ible with the comparison of the content of the right to a fair trial in litigation and in arbitration according to Czech law. The right to a fair trial in the litigation sense includes the principle of independence and the impartiality of the courts and judges, the principle of legal justice, the principle of equality, the principle of private nature, the principle of oral proceedings, the principle of a hearing with the parties, the right to be heard and the adversarial principle, the principle of negotiation without undue delay, the ne bis in idem, the prohibition denegatio iustitiae, the principle of foreseeability of judicial decisions, the right to a properly reasoned decision.²⁰ On the contrary the right to a fair trial in arbitration involves the principle of independence and impartiality of the arbitrators, the principle of the equality of the parties, the principle of private nature, the principle of oral proceedings, the right to decide on the basis of principles of justice and progress without unnecessary formalities.²¹

Dealing with international commercial arbitration the infringement of the right to a fair trial is even more an issue, since more jurisdictions are concerned and involved. Nevertheless it is the *lex arbitri* that should have attracted the prime attention of the parties and arbitral tribunal. On the other hand the seat of the arbitration is often chosen according to non-legal priorities and the main attention is paid to the neutrality of the forum. Thus some of the arbitration favorable locations attempt to diminish the influence of the local law to arbitral proceeding. French law, for instance, distinguishes the regulation applicable to domestic and international arbitration where only basic principles are stipulated.²² According to some laws and based on the agreement of the parties the judicial review of the arbitral award by the local judicial bodies might be excluded.²³ An extraordinary solution has been incorporated into Belgian legislation when the Belgian courts lose its authority to review any arbitral awards rendered in international arbitration in any case. Surprisingly this attitude led to a decrease in the popularity of Belgium as a seat for international arbitration, since the parties lost its right to apply for the annulment of the arbitral award also if its right

ers, 2011, p. 726.

20 SVOBODA, Karel, ŠÍNOVÁ, Renáta, HAMULÁKOVÁ, Klára et al. *Civilní proces. Obecná část a sporné řízení*. Praha: C.H.Beck, 2014, p. 17.

21 ŠÍNOVÁ, Renáta, PETROV KŘIVÁČKOVÁ, Jana et al. *Civilní proces. Řízení nesporné, rozhodčí a s mezinárodním prvkem*. Praha: C.H.Beck, 2015, p. 260.

22 French Code of Civil Procedure, Book IV, Title V – International Arbitration, §§ 1504 et seq.

23 Article 192(1) of the Swiss PILA grants parties the right to waive, in advance, any challenge of an award rendered by an arbitral tribunal sitting in Switzerland before Swiss courts. Exclusion agreements are possible only if neither party had 'its domicile, its habitual residence or a business establishment in Switzerland' when the agreement was made. GEISINGER, Elliott, MAZURANIC, Alexandre. Challenge and Revision of the Award. In GEISINGER, Elliott, VOSER, Nathalie (eds). *International Arbitration in Switzerland: A Handbook for Practitioners. Second Edition*. Aphen aan den Rijn: Kluwer Law International, 2013, p. 255.

to a fair trial has been infringed.²⁴ Nowadays the review of the arbitral award by the Belgian courts may be excluded only by the agreement of the parties. As has been recently declared by the the European Court of Human Rights in a decision in the case of *Tabbane v. Switzerland*,²⁵ that such provisions are not, per se, incompatible with the article 6(1) of the European Convention on Human Rights. Additionally, concerning the right to a fair trial as a ground for annulment, other jurisdictions may prescribe application of transnational universal public policy principles²⁶ or special mandatory provisions, e.g. obligatory registration of the arbitral award.²⁷

The further question is at hand: How to determine and identify the mandatory rules defining the right to a fair trial? The answer must be viewed by the lens made on the grounds for annulment and the restriction of the enforcement of arbitral awards. General regulations of the annulment of arbitral awards may be found in article 34 (2) (a) (IV) UNCITRAL Model Law and as the grounds for restriction of recognition or enforcement are concerned, article V (1) (b) and (d) and article V (2) (b) New York Convention, are relevant. The distinction between the mentioned articles of the New York Convention is in governing law and hence the applicable public policy. Section 1 of the article V of the New York Convention is based on the law of state where the arbitral award has been issued whereas section 2 of the article V New York Convention leads to application of the law of the state where the recognition and enforcement of the arbitral award is sought. Nevertheless, as the practice of application of article V New York Convention shows, these grounds are quite difficult to prove and defense of the losing party is rarely successful since judges only in limited number of cases admit its relevance due to its *de minimis* character.²⁸

However, the described threat of annulment of the arbitral award or its potential unenforceability, combined with the duty of the arbitrators to render a valid and enforceable decision, invented a state sometimes entitled “due process paranoia”.²⁹ The attention payed to the maintenance and protection of the right

24 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 251.

25 Decision of the European Court of Human Rights from 24 March 2016, *Tabbane v. Switzerland*, application no. 41069/12.

26 TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of commercial disputes: international and English law and practice*. Oxford: Oxford University Press, 2005, p. 238.

27 WAINCYMER, Jeff. *Procedure and Evidence in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2012, p. 185.

28 Paulsson states „if a violation of due process was minor and did not affect the outcome of the arbitration, such a violation may be characterized as *de minimis* and should not lead to refusal of enforcement of the award.“ PAULSSON Marika R. P. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 174.

29 E.g. see 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration is the sixth survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, conducted

to a fair trial on the one side and the necessity to keep the arbitral proceeding informal and flexible on the other, leads to the growth of the so called guerrilla tactics which aims at blocking and distracting the arbitration. The crucial issue is to find the appropriate balance, that will keep the arbitral proceedings effective and the decision of the arbitrators valid and enforceable. This situation opens the space for soft law regulations, since it is one of the features of soft law, i.e. be relevant in determining the content of the general principles of law; the right to a fair trial particularly.

3 The binding character of soft law in international commercial arbitration

As has already been mentioned the basic feature of arbitral proceedings is its flexibility. The sign of flexibility of the arbitral proceeding is expressed by the statements included in the status such as “ the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate.”³⁰ The legal regulation of arbitral proceedings is usually very fragmented and limited to establishing the obligation to observe the right to a fair trial.³¹ However the arbitrators have to obey only the norms considered mandatory regardless of its substantive or procedural nature.

3.1 The meaning of soft law within the arbitration rules

The primary decision of the parties to seek a settlement of the dispute in an ad hoc arbitration or to go to an arbitral institution has had a significant impact on the design of the arbitral proceeding. In the case of ad hoc arbitration the contours of arbitral proceedings are designed only by mandatory norms of *lex arbitri* and by the arbitration agreement. When the decision of the parties to go to an arbitral institution is made, usually more procedural rules are involved.

with the support of White & Case. [online]. Available at: <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> Accessed: 18.4.2016.

30 See article 17 (1) Uncitral Model Rules.

31 For example Act No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards (The Arbitration Act) states in Section 19 that

(1) The parties may agree as to the manner in which the proceedings shall be conducted. Procedural issues may be decided by the presiding arbitrator, if the presiding arbitrator was so authorized by the parties or by all of the arbitrators.

(2) If there is no agreement according to Sub-section (1), or a procedure according to Sub-section (4) is not determined, the arbitrators shall conduct the proceedings in an appropriate way. The proceedings shall be conducted with no unnecessary formalities while providing the parties with an equal opportunity to exercise their rights in order to reveal factual issues pertinent to deciding the case.

(3) Unless otherwise agreed by the parties, the proceedings shall be oral. The proceedings shall never be public.

(4) The parties may also determine the procedure in the rules for the arbitration proceedings, if these rules are attached to the arbitration agreement. The application of the rules of the permanent arbitration court remains thereupon unaffected.

Besides the arbitration agreement and mandatory norms of *lex arbitri*,³² or eventually the law chosen by the parties, the procedure is governed by the institutional rules invented by the relevant arbitral institution or arbitral court.³³ Previously, most of the provisions of the rules were dispositive; however, in recent years the attempts to limit party autonomy in favor of specious and cost effective arbitral proceedings are more common. Some of the institutional rules expressly determine which rules are considered mandatory and may not be excluded even by an agreement concluded by the parties.³⁴ Moreover the recent LCIA Rules empowers the arbitrators to disobey the agreement concluded by the parties if it may endanger the efficiency of the procedure.³⁵ This development strengthens the position of the arbitral tribunal, especially the presiding arbitrator, who is responsible for the conduct of the procedure.

However, the general approach of the arbitral institution on the regulation of arbitral proceedings is letting the arbitral tribunal and mainly the presiding arbitrators to fit the conduction of the procedure to a concrete need of the present case. Since usually the duty to apply the appropriate soft law is not prescribed by the rules, the arbitrators may decide upon its application within its discretionary powers.³⁶ Soft law are considered to be part of the procedural measures that the arbitrators consider appropriate.³⁷ Nevertheless ICC Rules allow its application

32 Article 21. 1. DIS Arbitration Rules provides: “...statutory provisions of arbitral procedure in force at the place of arbitration from which the parties may not derogate, the Arbitration Rules set forth herein, and, if any, additional rules agreed upon by the parties shall apply to the arbitral proceedings. Otherwise, the arbitral tribunal shall have complete discretion to determine the procedure.”

33 Article 4 (3) CIETAC Arbitration Rules states: “...where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties’ agreement shall prevail unless such an agreement is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties.”

34 Article 2 (2) CAM Arbitration Rules 2010 states: “...In any case, mandatory provisions that are applicable to the arbitral proceedings shall apply.”

35 See article 14 LCIA Rules and commentary to this provision which states that: “...this change can be understood to promote a time and cost efficient procedure and to support the Tribunal in making decisions – even potentially against the parties’ agreement – where such agreements might endanger a timely (and cost-efficient) resolution of the dispute.” SCHERER, Maxi, RICHMAN, Lisa et al. *Arbitrating under the 2014 LCIA Rules: A User’s Guide*. Alphen aan den Rijn: Kluwer Law International, 2015, p. 206.

36 For example Article 19 (1) ICC Rules provides: The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

37 See VIAC Arbitration Rules article 28 (1) The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties but otherwise in the manner it deems appropriate. The arbitral tribunal shall treat the parties fairly and shall grant the parties the right to be heard at every stage of the proceedings.

only after consultation with the parties and if they are not contrary to any agreement of the parties.³⁸ As has been stated it is the presiding arbitrator who has the power to manage the procedure but the approval of the co-arbitrators may be required.³⁹ In the situation when the issue is not regulated by the agreement of the parties or by the rules of the institutions, the solution should be sought in the international arbitration practice rather than in *lex arbitri*. As has been stated in the Secretariat's Analytical Commentary:

“...where the parties are from different legal systems, the arbitral tribunal may use a liberal ‘mixed’ procedure, adopting suitable features from different legal systems and relying on techniques proven in international practice.”⁴⁰

Given that, it must be firstly proven that the relevant soft law regulation represent the recognized international practice. However, the research provided by Queen Mary shows that doubts about international practice should evoke only IBA Rules on the Taking of Evidence.⁴¹

Soft law can also be used as a tool for uniform interpretation of the rules of arbitral institution, that are often drafted without any connection to the seat of the institution, because their character should be international since the seat of arbitration is usually determined by the parties. The interpretation of the rules should be based on the international practice, particularly vested into the soft law. Furthermore, it is common that the rules of the arbitral institutions contain references to the right to a fair trial without any determination of the governing law.⁴² Accordingly to some authorities recommend interpreting New York Convention along with the international procedural standards rather than by the national law.⁴³

38 See Article 22 (2) ICC Rules.

39 Article 35 section 5 CIETAC states: “Unless otherwise agreed by the parties, the arbitral tribunal may, if it considers it necessary, issue procedural orders or question lists, produce terms of reference, or hold pre-hearing conferences, etc. With the authorization of the other members of the arbitral tribunal, the presiding arbitrator may decide on the procedural arrangements for the arbitral proceedings at his/her own discretion.”

40 BINDER, Peter. *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions. Third Edition*. London: Sweet & Maxwell, 2010, p. 285.

41 See 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration is the sixth survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, conducted with the support of White & Case. [online]. Available at: <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> Accessed: 18.4.2016.

42 Article 23 (5) CEPANI Arbitration Rules states that in any event, the Award shall be deemed to conform to rules of due process.

43 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3504.

3.2 Soft law and arbitration agreement

Sometimes the parties find it necessary or helpful to mention some rules of soft law in their arbitration agreement. For instance when the parties come from different legal backgrounds and they want to narrow some problematic procedural issues, such as document production. The question is then obvious – is this contractual provision binding for the arbitrators and what if they decide to disregard this stipulation and invent a different solution that might be even more appropriate due to the specific circumstances. Will the arbitral award be set aside or unenforceable? Arbitration agreements are regularly drafted prior to any dispute and the procedural rules agreed on may not fit to the legal issues that will have occurred during the arbitral proceeding, or the regulation drafted by the parties might be impractical.⁴⁴

Ostensibly a simple solution might be seen in a case when the agreed provision in the arbitration agreement would contradict the right to a fair trial, e.g. a provision that would allow nomination of an arbitrator only by the claimant. Some authorities, however, surprisingly conclude that arbitrators are bound by any agreement of the parties concerning the conduct of the proceedings, even if it might be in contradiction to the mandatory norms of the *lex arbitri*, i.e. the stipulation would have violated the right to a fair trial and it is very likely that the arbitral award would be annulled or unenforceable.⁴⁵ The arbitrators would have only one option to get rid of this obligation that is to refuse his or her nomination.⁴⁶ This conclusion is however very controversial. These provisions of the arbitral agreement would be void according to many national laws, because even party autonomy is restricted by the mandatory norms of *lex arbitri* and must be in accordance with the right to a fair trial. This finding clearly flows from article 34 UNCITRAL Model Law that as one of the grounds for annulment of arbitral awards states that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this law. Thus, the arbitrators have primary discretionary power to decide on the procedure to follow and mandatory norms of *lex arbitri* should be applicable prior to agreement of the parties. On the contrary, Born having provided an analysis of New York Convention comes to a different conclusion and states that where a conflict is unavoidable (between the mandatory rules of *lex arbitri* and arbitration

44 For example, the arbitration clause states that the disputes are to be settled by the Court of Arbitration of Budapest Hungary in accordance with the Rules of the International Chamber of Commerce. Hungarian Chamber of Commerce and Industry Award Vb/99130/2000/2002 Rev Arb 1019. PETROCHILOS, Georgios. *Procedural Law in International Arbitration*. New York: Oxford University Press, 2004, pp. 173–174.

45 PETROCHILOS, Georgios. *Procedural Law in International Arbitration*. New York: Oxford University Press, 2004, p. 173.

46 *Ibid.*

agreement), it is the parties' agreed arbitral procedure that prevails over local mandatory law for purposes of Article V(1)(d).⁴⁷ And further adds that there is no basis for concluding that the parties' agreement on arbitral procedures is void because it violates the mandatory requirements of the arbitral seat.⁴⁸

Nonetheless, whether the failure to comply with the agreement of the parties having been expressed in the arbitration agreement may result in the annulment or unenforceability of the arbitral award is not clear. The legal practice in some jurisdictions is to set aside an arbitral award only if the breach of the arbitration agreement would result in the violation of the fair trial simultaneously.⁴⁹ As it is explicitly stated in article V (1) (d) of the New York Convention the arbitral award may be unenforceable if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. It is the common position of legal practice and as well as doctrine that the New York Convention and particularly article V should not be applicable too formalistically. The Spanish Supreme Court recognized an arbitral award rendered by a sole arbitrator, even if it should have been decided by two arbitrators nominated by each party. Since the defendant has refused to nominate its arbitrator, the arbitrator nominated by claimant was, in accordance with the English Arbitration Act, established as the sole arbitrator. The failure of the respondent to participate in the arbitration led the Spanish court to the conclusion that the procedural rights of respondent should not have been violated.⁵⁰ Similarly, merely the fact that the arbitral award has been rendered after the expiration of the time allocated in the arbitration agreement or that the hearings took place in a different place than stipulated by the parties could not be accepted as grounds for unenforceability of the arbitral award.⁵¹ On the other hand, the party autonomy must not be underestimated, since it is one of the significant features of the arbitration and arbitrators should have conduct the proceedings according to the procedural rules designated by the parties. However, the arbitral award would have been unenforceable only when the award debtor proves that deviation from the agreement of the parties materially affected the party's rights.⁵²

47 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3574.

48 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 2185.

49 DRLIČKOVÁ, Klára. *Vliv legis arbitri na uznání a výkon cizího rozhodčího nálezu*. Brno: Masarykova univerzita, 2013, p. 61.

50 PAULSSON Marika R. P. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 191. Decision of Supreme Court of Spain from 3rd June 1982, X v. Naviera Y S.A., no. 8.

51 Decision of the High Court of Justice, England and Wales from 19 January 2001, Tongyuan International trading Group v. Uni-Clam Limited, no 1143. See also BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3567.

52 BORN, Gary B. *Arbitration International. Cases and Materials*. New York: Wolters Kluwer, 2015, p. 3564. Decision of United States District Court, Southern District of New York from 21 December 1992, P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co., no. WL

As it flows from the previous lines even if the parties assert application of particular soft law rules, the arbitrators still have discretionary power that is limited by the right of the parties to a fair trial which must not be infringed.

4 Conclusion

Soft law regulating the arbitral procedure endowers the effectives of the arbitration, however, in recent years the critical voices can be heard which warn against overregulation, the risk of restricting independent thinking and the limitation of discretionary powers of the arbitrators.⁵³ Firmly, some arbitrators may tend to apply the guidelines and other instruments of best practice as hard law, since they want to ensure the validity and enforceability of the arbitral awards. Nevertheless, according to a 2015 survey provided by the Queen Mary University of London a clear majority (70%) of respondents expressed that international arbitration currently enjoys an adequate amount of regulation, thereby indicating a preference for the status quo.⁵⁴ It may be concluded with the words of Giuditta Codero-Moss: “The theory of a harmonized transnational law seems to be based on the misconception that commercial parties desire a flexible system that the interpreter (judge or arbitrator) can adapt to their needs. Practitioners, however, emphasize that they desire a predictable legal system that can be objectively applied by the interpreter.”⁵⁵

Moreover as it flows from the previous lines the national courts are very cautious and conscientious while deciding on the annulment or the unenforceability of arbitral awards. They usually interpret the right to a fair trial narrowly allowing the arbitrators to tailor the rules of the proceeding according to the specific needs of the present case. Thus the soft law should be used mainly as a tool for the predictability of a decision in international commercial arbitration on the one side and on the other arbitral tribunals should have maintained the courage to accommodate the procedure and also invent rules that would satisfy the needs of each case.

400733 (S.D.N.Y.) (failure to follow AAA Rules, as incorporated by arbitration agreement, not grounds for denying recognition of award).

53 See DRAETTA, Ugo. The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization. *ASA Bulletin*, 2015, vol. 33, issue 2, pp. 327–342. PARK, William. The Procedural Soft Law of International Arbitration: Non-Governmental Instruments. In MISTELIS, Loukas, LEW, Julian D. M. *A Pervasive problems in international arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, pp. 141–154.

54 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration is the sixth survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, conducted with the support of White & Case. [online]. Available at: <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> Accessed: 18.4.2016.

55 CORDERO-MOSS, Giuditta. Limitation on Party Autonomy in International Commercial Arbitration. In Hague Academy of International Law. *Recueil des Cours 372 (2014)*. Leiden/Boston: Martinus Nijhoff Publishers, 2015, p. 262.

ACCESS TO A COURT IN MATTERS CONCERNING DISPUTES OF AN INDIVIDUAL WITH THE PUBLIC ADMINISTRATION IN THE REPUBLIC OF POLAND VS. THE STANDARDS OF THE COUNCIL OF EUROPE

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Summary: This paper focuses specifically on the fundamental part of the right to a fair trial, namely access to a court. The aim of this article is an attempt to analyse the difference between the requirements of European standards and how they are reflected in Polish legislation. First of all, I am going to analyze basic European standards specified in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, Recommendation Rec(2004)20 on the judicial review of administrative acts and in the jurisprudence of the European Court of Human Rights. Then I will focus on selected aspects of the problem of judicial review of administrative acts specified in the Act of 30th August 2002 Law on Proceedings before Administrative Courts. I will discuss several specific topics from this field, which can be considered as crucial in relation to access to court, namely: definition of terms for access to justice by an individual, exhausting administrative remedies before judicial review, locus standi and legal aid.

Keywords: administrative acts, judicial review, administrative court, access to a court, locus standi, Poland, the Council of Europe.

1 Introduction

Judicial review of administration is considered to be a fundamental requirement for the protection of human rights and an integral part of rule of law. Its standards are set not only by constitutional rules of a country, but also by binding international agreements. In this area, one must point to Article 14(1) of the International Covenant on Civil and Political Rights, adopted on 19 December 1966¹, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950², and Article 47

1 Journal of Laws 1977, No. 38, item 167.

2 Journal of Laws 1993, No. 61, item 284. Hereinafter: the Convention, the CPHR, the European Convention on Human Rights.

of the Charter of Fundamental Rights of the European Union³. The particular impact on the organization and functioning of judicial review of the administrative acts in Europe have standards of the Council of Europe included in the European Convention on Human Rights and recommendations contained in *soft law*. The latter indicate directions of organization of judicature so that courts and court procedures satisfy the requirements of the Convention. The basic act, in which the Committee of Ministers of the Council of Europe referred to the minimum rules for the protection of individual's rights in relations with the administration, is the Recommendation Rec(2004)20 on the judicial review of administrative acts adopted on 15 December 2004.

The purpose of this article is to present access to a court in matters concerning disputes of an individual with the public administration in the Republic of Poland vs. the standards of the Council of Europe. I will focus specifically on issues of access to a court, namely: definition of terms for access to a court, exhausting administrative remedies before judicial review, *locus standi* and legal aid. Consequently, I will attempt to determine the extent to which the requirements of European standards are reflected in Polish legislation.

2 The essence of the right of access to a court

The European Convention on Human Rights provides that everyone has the right to a fair trial in both civil and criminal cases. In accordance with the established jurisprudence of the European Court of Human Rights (hereinafter: the Court, the ECHR), on the right to a court comprises in particular: the right of access to a court, the right to adequate court procedure, the right to a trial within a reasonable time, the right to an independent and impartial tribunal established by law and the right to a court decision. In the case of *Delcourt v. Belgium*, the Court stated that “in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision”⁴.

One of the fundamental part of the right to a fair trial under Article 6(1) is the right of access to a court, that is the right to institute proceedings before a court having competence in civil matters⁵. It is not explicitly laid down in the text of Convention, but Article 6 is a subject to teleological interpretation. The European Court of Human Rights attempts to give practical effect to the purpose of the provision, with a view to protecting rights that are practical and effective

3 OJ 2007 C 303, p. 1.

4 Judgment of the ECHR of 17 January 1970, *Delcourt v. Belgium*, no. 2689/65, Series A no. 11.

5 Judgment of the ECHR of 21 January 1975, *Golder v. the United Kingdom*, no. 4451/70, Series A no. 18.

(principle of effectiveness) rather than theoretical and illusory⁶. As a result of non-literal interpretation of Article 6(1), the right of access to a court has been found to exist among a number of implied requirements of this provision. It is worth mentioning that the right of access to a court was first articulated in the *Golder v. United Kingdom* judgment. The ECHR basing itself on the object and purpose of the Convention and its underlying principle of the rule of law, arrived at the conclusion that the right of access to a court was implicitly guaranteed in Article 6 of the Convention. In the opinion of the Court, „it would be inconceivable that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. In this way, that provision embodies the right to a court, of which the right of access constitutes one aspect only”⁷. Nevertheless, it is an aspect that makes it in fact possible to benefit from the further guarantees laid down in Article 6(1). The fair, public and expeditious judicial proceeding is indeed of no value at all if such proceeding is not first initiated⁸.

However, the right of access to a court does not have an absolute character. The ECHR determined that “Article 6(1) guarantees to litigants an effective right of access to courts for the determination of their civil rights and obligations, it leaves to the state a free choice of the means to be used towards this end. [...] The contracting states enjoy a certain margin of appreciation in that respect, but the ultimate decision as to the observance of the Convention’s requirements rests with the Court”⁹. However, the limitations cannot restrict or reduce access to a court in such a way that the very essence of that right will be impaired. In the case *Kreuz v. Poland* the ECHR underlined that “a restriction placed on access to a court will not be compatible with Article 6(1) unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved”¹⁰.

It should be noted that the Convention was not originally intended to apply to the administrative field. However, a lack of reference *expressis verbis* to rights and obligations of an administrative nature does not mean that an individual was deprived of the judicial protection offered by provision of Article 6(1). It should be pointed out that the concept of “civil rights and obligations” has an autonomous meaning and it cannot be interpreted solely by reference to the respondent state’s domestic law¹¹. In the *Ringeisen* judgment of 16 July 1971, the Court stated the following: “for Article 6(1), to be applicable to a case it is not necessary

6 Judgment of the ECHR of 2 November 2010, *Sakhnovskiy v. Russia* [GC], no. 21272/03.

7 Judgment of the ECHR of 21 February 1975, *Golder v. the United Kingdom*, no. 4451/70, Series A no. 18

8 Ibid.

9 Judgment of the ECHR of 9 October 1979, *Airey v. Ireland*, no. 6289/73, Series A no. 32.

10 Judgment of the ECHR of 19 June 2001, *Kreuz v. Poland*, no. 28249/95.

11 Judgment of the ECHR of 8 July 1987, *Baraona v. Portugal*, no. 10092/82, Series A no. 122.

that both parties to the proceedings should be private persons (...). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with competence in the matter (ordinary court, administrative body, etc.) are therefore of little consequence. [...] It is enough that the outcome of the proceedings should be “decisive for private rights and obligations”¹². Accordingly, how the right or obligation is characterised in domestic law is not decisive. This guideline is specifically important for cases involving relations between an individual and the state. In such a situation, the Court has stated that whether the public authority in question had acted as a private person or in its sovereign capacity is not conclusive¹³. Taking the above into consideration, the ECHR pointed out that the right of access to a court applies to administrative matters as long as the relevant part of administrative law falls within the scope of the concept civil rights and obligations¹⁴.

The Constitution of the Republic of Poland adopted on 2 April 1997 guarantees a higher standard of judicial protection¹⁵, because encompasses all rights and obligations, including administrative decisions which are not protected by Article 6 of the Convention. Article 45(1) of the Constitution, which expresses the principle of a fair trial, reads as follows: “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”. The Polish legislator, shaping this provision, waived the conditions defining the subject matter of adjudication, specified in Article 6(1) of Convention¹⁶. In its interpretation of the principle of a fair trial, the Polish Constitutional Tribunal has indicated that the content of the said principle comprises, in particular: the right of access to a court – an organ of the state with particular characteristics (impartial and independent); the right to a proper court procedure which complies with the requirements of a fair and public hearing; the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court¹⁷.

12 Judgment of the ECHR of 16 July 1971, *Ringeisen v. Austria*, no. 2614/65, Series A no. 13.

13 Judgment of the ECHR of 28 June 1978, *König v. Federal Republic of Germany*, no. 6232/73, Series A no. 27.

14 Judgment of the ECHR of 23 September 1982, *Sporrong i Lönnroth v. Sweden*, no. 7151/75, 7152/75, Series A no. 52. The Court has recognised a number of such rights and obligations as being civil, for example: consolidation and planning proceedings, procedures concerning building permits and other real-estate permits (*Sporrong and Lönnroth v. Sweden*, judgment of the ECHR of 23 September 1982), a withdrawal of an alcohol licence from a restaurant (*Tre Traktörer Aktiebolag v. Sweden*, judgment of the ECHR of 7 July 1989), a licence to run a medical clinic (*König v. the Federal Republic of Germany*, judgment of the ECHR of 28 June 1978).

15 Journal of Laws 1997, No. 78, item 483, as amended.

16 KMIĘCIAK, Zbigniew. *Postępowanie administracyjne i sądownoadministracyjne a prawo europejskie*. Warszawa: Wolters Kluwer Polska, 2010, p. 100.

17 The judgments of the Constitutional Tribunal of: 2 April 2001, no. SK 10/00, OTK ZU No. 3/2001, item 52; 20 September 2006, no. SK 63/05, OTK ZU No. 8/A/2006, item 108; 24

The above-mentioned principle is assisted by the various kinds of mechanisms and guarantees outlined in the section “Means for the Defense of Freedoms and Rights” (Articles 77–78) and Chapter VIII “Courts And Tribunals”. According to Article 77(2): “Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights”. Article 78 states that „each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute”. A party that has doubts as to the validity of the conclusions reached in a ruling issued in first instance has the right to appeal against the ruling in order to verify (review) the validity of the ruling¹⁸. More specifically normalized this issue Article 176(1), which stipulated that court proceedings shall have at least two stages. It should be noted that Article 176(1) of the Constitution has a twofold character. On the one hand, it is a systemic provision, as it specifies the way of organising court proceedings, and thus the way of organising the system of courts. On the other hand, Article 176(1) of the Constitution is a guarantee provision since – by supplementing the provisions of Article 78 – it specifies the content of the individual’s right to two stages of court proceedings¹⁹.

3 Court and the level of its jurisdiction

The European Convention on Human Rights and the Recommendation on judicial review of administrative acts do not specify how judicial review should be organised. The states are free to organise judicial review in administrative cases in accordance with their specific legal tradition and culture: by specialised administrative tribunals, by the ordinary courts or by a combination of both²⁰. Regardless of how the judicial system is structured, requirements of impartiality and independence under Article 6(1) must be fulfilled.

In Poland control over the performance of public administration is performed by two-instance administrative jurisdiction. Specialized administrative courts are a part of the judiciary power in a Polish legal system. Article 236(2) of the Constitution of the Republic of Poland established the duty to introduce a system of two administrative instances within 5 years of its coming into force. On its basis, the following legal acts were passed: the Act of 25 July 2002 Law on the System of Administrative Courts²¹, the Act of 30 August 2002 Law on Pro-

October 2007, no. SK 7/06, OTK ZU No. 9/A/2007, item 108.

- 18 The judgments of the Constitutional Tribunal of: 16 November 1999, no. SK 11/99, OTK ZU No. 7/1999, item 158; 18 May 2004, no. SK 38/03, OTK ZU No. 5/A/2004, item 45.
- 19 *Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union, (2003–2014)*. Warszawa: Biuro Trybunału Konstytucyjnego, 2014, pp. 267–268.
- 20 Principle B.1.b of Explanatory memorandum to Recommendation Rec(2004). See: GALERA, Susana (ed.). *Judicial Review: A Comparative Analysis Inside the European Legal System*. Strasbourg: Council of Europe, 2010, p. 320.
- 21 Journal of Laws 2014, item 1647.

ceedings before Administrative Courts²², the Act of 30 August 2002 Rules introducing the Law on the System of Administrative Courts and Law on Proceedings before Administrative Courts²³. These acts came into force on 1 January 2004. In the new structure, 16 voivodeship administrative courts have acquired almost the full scope of the competencies of the Supreme Administrative Court, and the new Supreme Administrative Court considers appeals against judgments by the voivodeship administrative courts.

The scope of the jurisdiction of administrative judiciary is defined in the Article 184 of Constitution: “The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to judgments on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration”. The administrative courts control over the performance of public administration in all the cases envisaged in Article 3 of LPAC, including complaints against e.g.: administrative decisions; orders made in administrative proceedings, which are subject to interlocutory appeal or those concluding the proceeding, as well as orders resolving the case in its merit; other acts or actions made within the area of public administration concerning the rights or obligations ensuing from provisions of law; written interpretations of the provisions of the tax law, issued in individual cases; local legal enactments; failure to act by the public administrative bodies.

The fundamental role of administrative courts in Poland is examination and determination of the lawfulness of acts or actions by administrative bodies. The review of administrative courts consists in examining whether an administration body has violated the law to the extent that could affect the outcome of the proceedings. The control of the legality of performance of public administration is conducted in three aspects: a) evaluation of compliance of acts or actions with the material law; b) observing the procedure stipulated by law; c) respecting the rules of jurisdiction²⁴. Basically, an administrative court is a court of cassation which investigates the compliance with the provisions of law of an act or action by an administrative body²⁵. In accordance with Article 132 of the LPAC the court resolves the case by a judgment. If the court decides that an act or action does not comply with the law, it revokes it or declares it void. The mentioned criterion and methods of judicial review fulfill the standards of the Council of Europe²⁶.

22 Journal of Laws 2016, item 718.

23 Journal of Laws 2002, No. 153, item 1271.

24 KUCZYŃSKI, Tadeusz, MASTERNAK-KUBIAK, Małgorzata. *Prawo o ustroju sądów administracyjnych. Komentarz*. Warszawa-Kraków: Lex a Wolters Kluwer business, 2009, p. 9.

25 Exception is a situation specified in Articles: 146§2, 145a, 154 § 2, 188 of the LPAC.

26 According to point 5a of the Recommendation Rec(2004)20 “if a tribunal finds that an

4 Standing to bring proceedings

4.1 Anyone who has a legal interest

Standing to bring proceedings is the right to submit a complaint to a court or tribunal with the jurisdiction to examine points of fact and law relevant to the dispute before it, with a view to adopting a binding decision²⁷. As it has been indicated by the European Court of Human Rights, where a decision affecting “civil” rights is made by an administrative body, there must be a structural right of appeal to a judicial body in the domestic law²⁸.

The judicial review has been defined in the Recommendation Rec(2004)20 as the examination and determination by a tribunal of the lawfulness of an administrative act and the adoption of appropriate measures, with the exception of review by a constitutional court (principle A.2). The Committee of Ministers has emphasised that the judicial review should be available at least to natural and legal persons in respect of administrative acts that directly affect their rights or interests (principle B.2.a). This means that there must be a close link between the act and the rights or interests concerned. If the link between the challenged act and the right asserted is too tenuous and distant, the Recommendation does not apply²⁹. Such acts must therefore adversely affect the applicant and have the effect of altering his legal situation. In the case *Boulois v. Luxembourg*, the European Court of Human Rights found that „the dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play”³⁰.

In line with this concept is the structure of *locus standi* in the Polish legal system³¹. First of all, it should be noted that a complaint may be submitted to an administrative court by anyone (e.g. a natural person, a legal person, entities

administrative act is unlawful, it should have the powers necessary to redress the situation so that it is in accordance with the law. In particular, it should be competent at least to quash the administrative decision and if necessary to refer the case back to the administrative authority to take a new decision that complies with the judgment”. The case-law of the Court does not require the administrative tribunal to substitute an act held to be unlawful. See: judgment of the ECHR of 4 October 2001, *Potocka and others v. Poland*, no. 33776/96.

27 Judgment of the ECHR of 21 October 1982, *Le Compte, Van Leuven and De Meyere v. Belgium*, no. 6878/75, 7238/75.

28 Judgment of the ECHR of 10 February 1983, *Albert and Le Compte v. Belgium*, no. 7299/75, 7496/76, Series A no. 58.

29 Judgment of the ECHR of 26 August 1997, *Balmer-Schafroth v. Switzerland*, no. 22110/93.

30 Judgment of the ECHR of 3 April 2012, *Boulois v. Luxembourg*, no. 37575/04; judgment of the ECHR of 15 October 2009, *Micallef v. Malta* [GC], no. 17056/06.

31 See: KMIĘCIAK, Zbigniew. *Postępowanie administracyjne i sądownoadministracyjne a prawo europejskie*. Warszawa: Wolters Kluwer Polska, 2010, p. 113; CHLEBNY, Jacek. *Sądowa kontrola administracji w świetle rekomendacji Rady Europy. Państwo i Prawo*, 2005, no. 12, pp. 24–25.

that do not have legal personality) who has a legal interest in doing so (Article 50 § 1 of the LPAC). Whether an individual has a legal interest to lodge a complaint is determined by the provisions of the law. In the Polish literature on the subject, some of the representatives of the doctrine have argued that individual legal interest is derived from administrative material law³². However, it could also be procedural or systemic provisions³³. The Supreme Administrative Court, in its judgment of 24 November 2004, has held that a substance of legal interest is found in its connection to a particular legal norm. The Supreme Administrative Court explained that a norm of any branch of the law may constitute grounds on which an entity, in the certain factual circumstances, may request the materialization of its rights or “demand conducting a review of an act or action in order to protect its rights”³⁴. The Voivodeship Administrative Court in Warsaw expressed similar opinion in the case IV SA/Wa 198/06. The Court stated that the entitlement to lodge a complaint has an entity who proves a connection between legal interest protected by the provisions of the law and an act or action of the public administration body³⁵. Therefore, a term “own case” has been understood as stipulated in the provisions of the administrative law possibility of materialization of the rights or obligations of the parties to an administrative relationship³⁶.

As it has been indicated above, the basic requirement to lodge a complaint is the possession of a legal interest. A factual interest is not protected by administrative courts. In accordance with the established jurisprudence “to have legal interest means to determine a legal rule generally applicable on the basis of which one can effectively demand actions from the body with an intent to satisfy a need or demand that actions of the body contradictory to the needs of a given person be abandoned or limited”³⁷. “Legal interest must be directly related to the legal sphere of the subject. Lack of direct influence of the case on the person’s legal sphere makes it impossible to recognize it as a party”³⁸. As explained the Supreme Administrative Court, the legal interest cannot be merely expected to arrive in the future, or be purely hypothetical. It is emphasised in the jurisprudence that a legal interest must be in particular an individual, direct, actual,

32 ZDYB, Marian. *Prawny interes jednostki w sferze materialnego prawa administracyjnego. Studium teoretyczno-prawne*. Lublin: Uniwersytet Marii Curie-Skłodowskiej, 1991, p. 43.

33 The judgments of the Supreme Administrative Court of: 29 December 2005, no. II OSK 507/05; 19 December 2005, no. II OSK 341/05.

34 Judgment of the Supreme Administrative Court of 24 November 2004, no. OSK 919/04.

35 Judgment of the Voivodeship Administrative Court in Warsaw of 17 October 2006, no. IV SA/Wa 198/06.

36 Judgment of the Voivodeship Administrative Court in Warsaw of 29 June 2007, no. I SA/Wa 603/07.

37 Judgment of the Supreme Administrative Court of 22 February 1984, no. I SA 1748/83.

38 Decision of the Supreme Administrative Court of 30 May 1984, no. II SA 789/84; SIENKIEWICZ, Tomasz. Solving the conflict of interests – of the public interest and citizens’ legitimate interest – as regards administrative restrictions and administrative police, using selected norms of the Polish Code of Administrative Procedure as an example Markets. *A Review of Business and Legal Issues*, 2011, vol. 3, no. 1, pp. 16–38.

specific³⁹ and its existence finds confirmation in the factual circumstances that constitute premises of application of a provision of the law⁴⁰.

In practice it may be difficult to determine one's legal interest. The issue of the existence of legal interest in lodging a complaint is examined by administrative courts. The Supreme Administrative Court has made clear that in examination of the standing to bring proceedings court may not base solely on the determinations made by public administration bodies⁴¹. In its judgment of 27 January 2004 in the case III SA 1617/02, the Voivodship Administrative Court in Warsaw held that a person named as a party in a decision, who in fact has not been a party in administrative proceedings, is entitled to lodge a complaint to the administrative court⁴². In the later case the Supreme Administrative Court stated that "even an erroneous determination of a particular entity as a party to the administrative proceedings does not deprive this entity of its right to lodge a complaint against the final decision issued in such proceedings"⁴³. It is uniformly supposed that a body performing administration in a case covered then by an action cannot be a party of this action⁴⁴.

It is important to add that special provisions sometimes reduce significantly complaint legitimacy defined in Article 50 § 1 of the LPAC. Pursuant to Article 101 § 1 of the Act of 8 March 1990 on commune self-government⁴⁵, everyone whose legal interest or entitlement have been infringed by a resolution or a decision of a local district council, in a case relating to the area of public administration, may, if the demand for the cessation of the infringement is not met, appeal against the resolution to an administrative court. The usage of the term "whose legal interest or entitlement have been infringed", instead of the term "who has legal interest", means that the fact of having legal interest is not enough to lodge a complaint in an effective way, because an additional condition must be fulfilled, namely the infringement of legal interest by an appealed act. *Ipsa facto*, this institution does not have the capacity of *actio popularis*, because even illegality of a resolution does not authorize to lodge a complaint if this act does not infringe the legal interest of a complainant.

4.2 A public prosecutor and the Ombudsman

In order to protect collective or community interests that have been jeopardised by an administrative act, the Recommendation encourages the member

39 Judgment of the Supreme Administrative Court of 29 June 2011, no. II OSK 618/11.

40 Judgment of the Supreme Administrative Court of 17 April 2007, no. I OSK 755/06.

41 Judgment of the Supreme Administrative Court of 30 January 2007, no. II OSK 247/06.

42 Judgment of the Voivodship Administrative Court in Warsaw of 27 January 2004, no. III SA 1617/02.

43 Judgment of the Supreme Administrative Court of 20 September 2006, no. I OSK 1274/05.

44 See decisions of the Supreme Administrative Court of: 26 May 1982, no. SA/Gd 165/82, ONSA 1982, issue 1, item 49; 27 September 1996, no. I SA 1312/96.

45 Journal of Laws 2016, item 446.

states to take into consideration the possibility of granting associations or other persons or bodies empowered to protect these interests the capacity to bring proceedings before a court (principle B.2.a). The reference is to administrative decisions which adversely affect not just one individual but also those which affect any community. Such decisions, which might relate, for instance, to the environment or consumers' rights, could be eligible for judicial review without the direct interests of any particular individual being at issue (Explanatory Memorandum, point 37).

The above-mentioned standard fulfills only to a certain extent a regulation of the Act of 30 August 2002 Law On Proceedings before Administrative Courts. Pursuant to Article 8 of the LPAC a public prosecutor⁴⁶ and the Commissioner for Citizens' Rights (the Ombudsman) may participate in any proceedings already pending and may also lodge a complaint, a cassation appeal, an interlocutory appeal and a complaint for the reopening of proceedings, if, according to their view, this is necessitated by the need to protect the rule of law or human and civil rights. In such an event they shall have the rights of a party. The same rights has the Ombudsman for Children. He may also participate in any proceedings already pending, lodge a complaint, a cassation appeal, an interlocutory appeal and a complaint for the reopening of proceedings if, according to his view, this is necessitated by the need to protect the children's rights.

A public prosecutor may participate in each conducted proceedings, regardless of its stage. He decides whether his participation is necessary, by joining the proceedings, making a statement to that effect, and the court cannot refuse to participate in judicial proceedings. Also the Ombudsman has a legal measures with which he could impact on administrative activity. Pursuant to Article 14 of Act of 15 July 1987 on the Commissioner for Citizens' Rights⁴⁷, the Ombudsman may lodge complaints against decisions to administrative court and participate in such proceedings with the rights enjoyed by the prosecutor.

A complaint lodged by a public prosecutor (or the Ombudsman) is not lodged in favour of any particular entity. The prosecutor's power to lodge a complaint to an administrative court does not have any material limitations, provided that such complaint is lodged in a case that is subject to proceedings before administrative courts. This means that a prosecutor and the Ombudsman are not obliged to prove a legal interest. Furthermore, a prosecutor may lodge a complaint against unlawful legal acts issued by local self-governing authorities and government administration bodies of regional level. It should be noted that both a public prosecutor and the Commissioner for Citizens' Rights have certain

46 The participation of the prosecutor in the proceedings before the administrative courts is regulated by the provisions of the Regulation of the Minister of Justice on the internal office work of the Public Prosecutor's Office from 7 April 2016, Journal of Laws 2016, item 508.

47 Journal of Laws 2014, item 1648.

privileges in administrative court proceedings. First of all, they do not have to exhaust the means of review before lodging a complaint (Article 52 § 1 of the LPAC). Unless, they have participated in an administrative proceeding with the rights of a party. In this case, they have to exhaust all internal remedies with the administration in order to gain access to judicial review. Moreover, they enjoy longer, than generally stipulated, time limits for lodging a complaint (Article 53 § 1 of the LPAC). A public prosecutor or the Ombudsman may submit a complaint within six months of the date on which a party to an individual case received a reply, and in other cases within six months of the date on which the act or deed which justified the complaint came into effect. This time limit shall not apply to lodging complaints against local enactments of bodies of local self-government and local government administrative bodies (Article 53 § 3, 2nd sentence of the LPAC).

4.3 A social organisation

A social organisation is also entitled to lodge a complaint to a voivodeship administrative court, within the scope of its statutory activity, and in matters affecting legal interests of other persons, in case it has taken part in administrative procedure (Article 50 § 1 of the LPAC). This being so, it follows that the basic requirement is a participation in the administrative proceedings with the rights of a party. Article 31 of the Code of Administrative Procedure⁴⁸ states that a social organisation may participate in the proceedings with the rights of a party only when the public authority considers that the interest of the society requires the participation of the social organisation.

A special standing to bring proceedings has the environmental organization. According to Article 44 of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of 3 October 2008⁴⁹, environmental organizations may take part in the proceedings with a right of a party, but – contrary to other social organisations – they do not need to prove that social interest requires their participation. The wider rights in administrative proceedings, which requires the society participation, result automatically in the wider right of access to administrative courts. *Ipsa facto*, environmental organizations have a right to lodge a complaint to a voivodeship administrative court, if it is justified by their statutory purposes, even if they did not participate in an administrative procedure.

4.4 Other authorized entities

The circle of entities from Article 50 § 1 of the LPAC, which are entitled to lodge a complaint, is not complete. Paragraph 2 of this provision states that

48 Journal of Laws 2016, item 23.

49 Journal of Laws 2016, item 353.

entitled to lodge a complaint is also another entity if acts grant it this right. An example of a special statute is the Act of 26 January 1984 – Press Law⁵⁰, which grants of *locus standi* to the editor-in-chief. Pursuant of Article 4 state organs, state enterprises and other state organisational units, and in the range of social and economic activity also cooperative organisations and persons running business activity on their own account are obliged to supply information to the press about their activity. On the request of the editor-in-chief a refusal is delivered to the interested editorial staff in a written form in the term of three days; the refusal should include indication of an organ, organisational unit or a person it comes from, the date of a refusal, editorial office it concerns, indication of information being its object and the reason for a refusal. Refusal or failure in meeting the requirements specified in said regulation can be appealed to the administrative court in a term of 30 days.

5 Exhausting administrative remedies before judicial review

It is interesting that Recommendation Rec(2004)20 allows the possibility to introduce by a national legislator the requirement of exhaustion of certain protection measures before lodging a complaint to a court (Principle B.2.b). Obligation to conduct pre-trial proceedings is justified by the necessity of counteracting an excessive workload for courts and, ultimately, providing appropriate efficiency to exercised by them control⁵¹.

It should be noted that obligation to exhaust other remedies cannot prevent from seeking judicial review of the administrative act (Explanatory memorandum, point 43). The length of such proceedings should not last too long. In the case law of ECHR, there is a well-established opinion that the length of pre-trial proceedings – when its conducting is a condition of lodging a complaint to a court – is taken into consideration while identifying the complaints of an infringement of Article 6(1) of the Convention in terms of an obligation to examine the case within a reasonable period of time. *Ipsa facto*, when assessing the existence of the lengthy conduct of proceedings, one should take into account the time of appealing to a competent administrative body, not the later date of lodging a complaint to an administrative court⁵².

In Polish jurisdictions, there are legal requirements to exhaust all means of appeal in administrative proceedings prior to initiating proceedings before a court. It is one of the basic condition for permitting the submission of a complaint to an administrative court. The exhaustion of means of appeal is understood as a situation where a party has no further means of appeal envisaged in

50 Journal of Laws 1984, No. 5, item 24.

51 See: KMIECIAK, Zbigniew. *Koncepcja zintegrowanego systemu odwoławczego w sprawach administracyjnych. Państwo i Prawo*, 2010, no. 1, pp. 25–38.

52 Judgment of the ECHR of 28 June 1978, König v. Federal Republic of Germany, no. 6232/73, Series A no. 27.

the law, such as a complaint, appeal or request for a reconsideration of his case, at his disposal (Article 52 of the LPAC). This regulation expresses a rule that administrative court proceeding should not replace administrative proceeding.

An administrative act is final when all possibilities of appeal to a higher administrative body have been exhausted. Article 15 of the Code of Administrative Procedure applies the principle of double instance. A party who is dissatisfied with a decision may appeal to the appellate body, which is typically an organ of higher standing in the hierarchy of the administrative apparatus. Only those decisions issued in the first instance by the central authorities cannot be appealed. In such a situation, a dissatisfied party may apply only for a reconsideration to the organ that issued the decision. Administrative decisions that can no longer be appealed within administrative proceedings are called final.

If a party has no recourse to resources of appeal in a case that is the subject of the complaint, a complaint against acts or actions may be submitted after the relevant body has been requested in writing to remedy its breach of the law. Thus, if the administrative act has the right to appeal, then lodging a complaint against this act is inadmissible. As it has been indicated above, only a public prosecutor and the Polish Ombudsman are generally exempt from this requirement. In other cases, failure to exhaust the methods to appeal provided by law results in rejection of a complaint under Article 58 § 1 of the LPAC.

6 Legal aid

The access to a court is connected with the access to professional legal aid. In the case *Airey v. Ireland* the European Court of Human Rights held that “Article 6(1) may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to a court either because legal representation is rendered compulsory, as is done by the domestic law for various types of litigation, or by reason of the complexity of the procedure or of the case”⁵³. Convention does not create the right to legal aid as such. Legal aid is required only when legal representation is compulsory (so called “obligatory assistance of an attorney”) or because of the complexity or nature of the proceedings.

In Poland, in proceedings before a voivodeship administrative court there is no obligation to have a legal representative. Only a complaint of cassation or an appeal against a rejection of a complaint of cassation, submitted to the Supreme Administrative Court, must be prepared by a attorney or a legal counsellor. However, this obligation does not apply if these means of appeal are prepared by a judge, prosecutor, notary public, professor or doctor *habilitatus* who are a party to proceedings or a representative or attorney thereto, or if the appeal is submitted by a prosecutor or by the Polish Ombudsman (Article 175 of the LPAC).

53 Judgment of the ECHR of 9 October 1979, *Airey v. Ireland*, no. 6289/73, Series A no. 32.

In administrative court proceeding an application of the right of access to a court is an institution of the right to aid, laid down in Articles 243–263. It aims to enable persons in a difficult material situation to exercise their interests. According to Article 244 of the LPAC legal aid takes the form of an exemption from court fees or the appointment of a attorney, legal counsellor, tax advisor or patent attorney. Legal aid is granted to a party either to a full extent or a partial extent. Legal aid is granted to a natural person to a full extent if he demonstrates that he cannot afford to pay any costs of proceedings whatsoever, and to a partial extent if he demonstrates that he cannot afford to pay some of the costs of the proceedings without affecting his financial existence and that of his family (Article 246 § 1 of the LPAC). Legal aid may also be granted to a legal person, as well as an entity devoid of legal personality, to a full extent if he demonstrates that he cannot afford to pay any costs of proceedings whatsoever, or to a partial extent if he demonstrates that he has insufficient resources to cover the full cost of the proceedings (Article 246 § 2 of the LPAC).

It should be mentioned that the Polish legislator granted access to free legal aid to persons with insufficient resources not only in legal proceedings, but also at the pre-litigation stage. Since 1 January 2016, attorneys and legal counsellors, paid by the state budget, provide legal assistance to natural persons. Free legal aid is available to: senior citizens aged 65+, people up to the age of 26, holders of the Big Family Card, persons who take advantage of welfare under certain conditions, those at risk or affected by a natural disaster or a technical breakdown and veterans⁵⁴. It should be noted that access to legal aid at the pre-litigation stage is connected with actual and effective access to justice, supported by international documents, including Recommendation No. R(93) of the Committee of Ministers on effective access to the law and to justice for the very poor adopted on 8 January 1993.

7 Conclusion

The Polish concept of access to a court in matters concerning disputes of an individual with the public administration is more far-reaching than the standard specified in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. First of all, Article 45 of the Polish Constitution, which expresses the right to a court, does not include any objective restrictions connecting it with particular categories. The legislator submitted for judicial review all acts and actions of administrative bodies, including administrative acts which are not encompassed within the interpretation of Article 6(1) of the Convention. The administrative courts control over the performance of public administration in all the cases envisaged in the Law on Proceedings before Administrative Courts and in others acts of law.

⁵⁴ Act of 5 August 2015 on free of charge legal aid and legal education, Journal of Laws 2015, item 1255.

The Polish Constitution and the Act of 30 August 2002 Law on Proceedings before Administrative Courts ensure an effective access to judicial review. However, the protection of the access to administrative court must be still enhanced, especially in the area of exhausting administrative remedies. Polish practice concerning examination of appeals against decisions of public administrative bodies provides many examples of exceeding a time limit for resolving the matter within a reasonable period of time.

The normative construction of *locus standi* is based on the legal interest. The possibility of submit a complaint to an administrative court in public or community interest by an individual is excluded. Under certain conditions, it is permissible to initiate legal proceedings by a social organization. The issue of *locus standi* must be perceived in the more general institutional context. The Polish legislator has taken the approach that *locus standi*, in isolation from legal interest, should be offered only to precisely defined state bodies, guarding respect for the rule of law or protection of freedom and human rights. The protection of public interest is a duty of authority and can be the object of public prosecutor's or Ombudsman's complaint. It can also be noticed that the right to initiate legal proceedings in isolation from own legal interest somewhat contradicts the rule of access to a court. The constitutional right to a court means, first of all, the right to handle own matter, which means only a matter concerning rights or duties of an individual. This perspective does not differ from the concept of the right to a court, which is also expressed in the Convention for the Protection of Human Rights and Fundamental Freedoms.

MULTI-DOOR COURTHOUSE ESTABLISHED THROUGH THE EUROPEAN MEDIATION DIRECTIVE?

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Summary: The article deals with the systematical problem of an acceptance and implementation of foreign law instruments in EU, incoming from Anglo-American law system. Supporting partial methods of the ADR, European legislative is focusing on the mediation and using this method in civil procedure law, especially in family law matters. The practitioners have accepted the idea of mediation as a part of civil law procedure without analyzing or studying the real nature of this method or instrument. The study is looking into the problematics of the Multi-Door Courthouse model and comparing it with European situation in the member states. It is also trying to find the best possible future ways for the development in the area of mediation with the reflection of the results of the implementation of the European mediation directive.

Keywords: Multi-Door Courthouse, European mediation directive, mediation, dispute resolution, appropriate dispute resolution, alternative dispute resolution, European Union member states, pre-steps to the court, benefits of arbitration, mediation pledge.

1 The idea of the Multi-Door Courthouse

The first person who has articulated the idea of Multi-Door Courthouse was an American professor of the Law School of the University of Harvard Frank Sander.¹ His idea was formulated in the year of 1976 during a conference following the new ways in the administration of justice.² During this conference an idea was introduced, covering the Courthouse as a Dispute Resolution Center offering a multiple choice of options or ways enabling fast resolution of legal disputes. Today we are discussing the nature of alternative dispute resolution, especially the nature of the real alternative to the dispute resolution by the state courts. The academic sphere and also the platform of practitioners in the field of arbitration are very often discussing the problem of the real alternative – of the only one alternative in the relation to arbitration and state court procedure.

1 KESSLER Gladys, FINKELSTEIN, Linda J. The Evolution of a Multi-Door Courthouse, *Catholic University Law Review*. 1988, vol. 37, no. 3, pp. 577–579.

2 KESSLER Gladys, FINKELSTEIN, Linda J. The Evolution of a Multi-Door Courthouse, *Catholic University Law Review*. 1988, vol. 37, no. 3, pp. 577–579.

As the results of those discussions new shortcuts are established, actually new meanings of the old established shortcuts.³ So we can understand today the ADR as a way of appropriate dispute resolution or amicable dispute resolution. The most of European scientists in the field of alternative dispute resolution are concentrating their interests on the secondary questions. Analyzing only theoretical aspects without knowledge about the right way of using an instrument is not helping very much. If the European legislative has to come forward, the academic sphere should *concentrate* their interests on the functional understanding of the problem of the ADR as a part of a Multi-Door Courthouse system, as a part of a system transplanted to different low culture, in coming from Anglo-American law to the continental system.⁴

From European perspective it is naturally a systematical problem of an acceptance of foreign instruments incoming from Anglo-American law system. Currently we are using partial methods of the ADR, European legislative is focusing on the mediation and using this method in civil procedure law, especially in family law matters. The practitioners have accepted the idea of mediation as a part of civil law procedure without analyzing or studying the real nature of this method or instrument. The right way, how to make the procedure at the state courts faster and easier is not only in the implementation of the mediation, we should concentrate on implementing the whole system of ADR.⁵

Coming back to the system of Frank Sanders, his idea was recognized as a functional instrument with a number of benefits for citizens in a part of the United States and its court systems. Some participants, judges and attorneys hoped that through this new system a new availability of alternative ways of resolving disputes could be built.⁶ Some of them presented the Multi-Door Courthouse system as a system which would present justice more accessible. More accessible especially by using all presented resolution techniques, with the possibility to design a new agreements, which could accelerating case processing and help the whole justice system. If we understand the Multi-Door Courthouse as the system of a reduction of the number of the bench and jury trials in the Anglo-American system, it could be also used in the European civil procedure systematic. Using not only mediation but also all the other amicable or appropriate dispute resolution after analyzing the nature of the dispute is transferring the old way of under-

3 Compare with Amicable Dispute Resolution: The Mediation Alternative and the Alberta Environmental Appeal Boardf, Ron Goltz in <http://www.eab.gov.ab.ca/pub/Amicable%20Dispute%20Resolution.pdf>

4 LEIPNITZ, Desiree. *Mediation im deutschen Arbeitsrecht und deren praktische Bedeutung – unter besonderer erückichtigung der US-amerikanischen Anwendung*. Berlin: HWR Berlin, 2015, p.10; BIRNER, Marietta. *Das Multi-Door Courthouse: ein Ansatz zur multi-dimensionalen Konfliktbehandlung*, Köln: Otto Schmidt Verlag, 2003, pp. 205–208.

5 SCHWÄRZLER Helmut. Schiedsgerichtsverfahren und Mediation als Alternativen zur öffentlichen Gerichtsbarkeit, *Liechtenstein-journal*, 2011, vol. 3, no. 4, p. 115.

6 BIRNER, Marietta. *Das Multi-Door Courthouse: ein Ansatz zur multi-dimensionalen Konfliktbehandlung*, Köln: Otto Schmidt Verlag, 2003, p. 242.

standing of the civil procedure into the new and may be fast and modern dispute resolution method.

2. Mediation and arbitration as pre-steps to the court

Before even thinking about implementation of the Multi-door Courthouse systematically, the mediation and arbitration shall be analyzed and introduced as pre-steps to the court proceedings.⁷ Mediation is appropriate dispute resolution method with a very rich history. Combined with the history of international private law and the historical aspects of international business we can find a lot of mediation methods also in the historical and political events.

Mediation is voluntary procedure, it should be confidential and aimed at dispute resolution and out of court way. Mediation involves a third-party as a person called the mediator. A person mediator as an independent third-party, that assists the parties to the dispute in reaching an acceptable settlement. In mediation the parties resolve the dispute on their own they are assisted by the mediator, so the mediation is based on parties' interests and not on the applicable law as a highest imperative. Mediation is much less formal, more flexible and much more controlled by the parties than the court or arbitration procedure. Why has the mediation been already used for a long time and what are the advantages of mediation?⁸

It was already mentioned that the mediation is a voluntary procedure, which is controlled by the parties. The parties are in the process of mediation directly engaged in the negotiations for dispute resolution, so that the parties have control over the dispute and its outcome. The aspect of voluntarism is presented in the mediation concerning the parties, which are not obliged even if they have agreed to refer the dispute to mediation, to continuing the mediation after the first meeting. So the parties always control if the mediation continues, or not. During the mediation resolution cannot be imposed on the parties. Parties, if they agreed with alternative dispute resolution, should also agree with the discovered possibility of a dispute resolution. Mediation, as an appropriate dispute resolution method, is fast. Most of the mediation cases are realized in a few days.⁹ If the mediation is fast it is also cheaper.¹⁰ Mediation is less expensive compared to litigation or arbitration procedure. Reducing expenses and the time

7 BIRNER, Marietta. *Das Multi-Door Courthouse: ein Ansatz zur multi-dimensionalen Konfliktbehandlung*, Köln: Otto Schmidt Verlag, 2003, p. 239–242.

8 GOLDBERG, Stephen B., SHAW, Margaret L. The Past, Present, and Future of Mediation as Seen through the Eyes of Some of Its Founders. *Negotiation Journal*, 2010, vol. 26, no. 2, pp. 237–253.

9 GOLDBERG, Stephen B., SHAW, Margaret L. The Past, Present, and Future of Mediation as Seen through the Eyes of Some of Its Founders. *Negotiation Journal*, 2010, vol. 26, no. 2, pp. 237–253.

10 Compare to study of LEATHES, Michael: *2020 Vision Where in the world will mediation be within 10 years?* International Mediation Institute, 2010, <https://immediation.org/home>

for resolution saves funds of the parties. Mediation also helps parties overcome hostility in the relations and in some cases to establish grounds for a future relations base not only on layman's point of view and mutual interests but also on better understanding of the opposite party. The relationship between parties is secured also thanks to the confidential nature of the mediation. Mediation is confidential regarding all circumstances, documents and information's that become known to the participants in the mediation procedure. Mediation is not only confidential, it is also impartial. Impartial means that the parties are assisted by an impartial mediator. His role is to facilitate and actively assist the parties to communicate better and to seek and evaluate possible resolution of their dispute on their own. Very often mediators helped to explore options which exist, but have not been considered by the parties yet or ever. Mediation is also convenient; it is realized in a friendly and comfortable environment at the time convenient to the parties. Mediation is not only effective so that many cases result in agreement which is voluntarily executed by the parties it is also a win-win procedure. In the mediation both parties win because they reach a mutually acceptable agreement created by them.¹¹ This agreement corresponds to the needs and interests of the parties so it could be called a win-win agreement. Mediation also brings benefits to the court and to the civil procedure rules, it is reducing the workload of the court which gives the time to the court to focus on the more complicated cases. If it is combined with civil procedure rules it enables faster and favorable conclusion of court procedures. What is more important and very often forgotten is that mediation creates a new kind of culture in personal and business matters or communication if they are becoming a part of the dispute.¹² Resolution of conflicts in the faster non-aggressive manner is establishing the bright field of conditions for successful interstate and international business activities and also protects legal and social stability.¹³

Mediation is a process of conflict management, where those who seek the assistance in a conflict, or accept an offer of help from an outsider, doesn't matter if it is an organization, group, state or individual. Mediation is practiced widely in international relations and as described above it is non-judgmental and it is particularly suited for the reality of international relations. Mediation is also used in political questions and in the international public law in so-called peace-making. Mediation could have one very important role in the interstate relations, the importance of mediation and the international public law is however often forgotten. Mediation has a very important role in the context of intractable con-

11 GOLDBERG, Stephen B., SHAW, Margaret L. The Past, Present, and Future of Mediation as Seen through the Eyes of Some of Its Founders. *Negotiation Journal*, 2010, vol. 26, no. 2, pp. 237–253.

12 HOLÁ, Lenka a MALACKA Michal. *Mediace a reflexe jejich aktuálních trendů*. Praha: Leges, 2014, p. 33.

13 LEIPNITZ, Desiree. *Mediation im deutschen Arbeitsrecht und deren praktische Bedeutung – unter besonderer erücksichtigung der US-amerikanischen Anwendung*. Berlin: HWR Berlin, 2015, pp. 17–20.

flicts, where the parties in conflict lack direct channels of communication. There, were the states and other actors' guard the autonomy and independence, where the war conflict actually begun, there is a place for mediation.¹⁴

It is the free will of the parties that is the essential element of mediation. Only in a few jurisdictions party autonomy is limited since the court can compel parties to a legal dispute to engage in mediation. So the parties may use the autonomy to enter into binding consensual agreements to mediate. In most jurisdictions the settlement agreement between the parties can be concluded in a form which guarantees an enforceability of the resolution agreed upon. The strength of mediation lays in the very way it primary targets social conflicts, and in that the legal resolution has merely an auxiliary function.

Mediation is an appropriate dispute resolution mechanism. Distinguishing mediation from other forms of out-of-court conflict resolution brings some problems in the definition. As mentioned above ADR, so-called alternative dispute resolution represents a non-court system of dispute resolution. In most legal systems is or are the ADR presented as an alternative to the court. From analyzing the nature of arbitration mini trial, binding advice, the ombudsman procedure, conciliation, facilitation, and negotiation it becomes clear that there is only one real alternative to the court procedure.¹⁵ With the binding decision it is the arbitration which is the real alternative to the court procedure. As already mentioned the other methods, where one party is acting as a neutral element with different intensity level should be called appropriate dispute resolution methods. When distinguishing mediation from arbitration, the distinction is generally seen in the decision-making powers of the independent person. Before the state court it is the judge and in the arbitration the mediator arbitrator, who processes unilateral adjudicatory powers, while mediator does not. The difference is very important, but not as important as are the similarities. Various types of dispute resolution are systematically combined in the practice, so the parties sometimes combine mediation and arbitration in the form of med arb, so they can adjust the conflict resolution procedure to their needs. This is actually the point where we can start with the multidoor system implementation into the civil procedure rules. If the method of mediation and arbitration is and can be combined, there is no obstacle for establishing a system where the state court could or can decide what dispute has to be handled in mediation or in arbitration following his nature, before it goes to the court. In a lot of legal systems

14 FALK, Gerhard. Zur Geschichte der Mediation. In *Manuskript zur Ausbildung der Österreichischen Rechtsanwälte*, 2008, p. 3. Available at: <http://docplayer.org/14793445-Zur-geschichte-der-mediation.html>.

15 Concerning the the decision-making powers compare with VENZKE, Ingo. *Die Schiedsgerichtsbarkeit löst die Rechtfertigungsprobleme internationaler Rechtsprechung nicht*, Available at: <http://voelkerrechtsblog.org/> and SCHWÄRZLER Helmut. Schiedsgerichtsverfahren und Mediation als Alternativen zur öffentlichen Gerichtsbarkeit, *Liechtenstein-journal*, 2011, vol. 3, no. 4, p. 112.

the mediation, if it is not successful, switches to the court procedure. It is also used and known practice that the parties are switching the mediation to arbitration if the mediation is not successful and a binding decision is needed. What is the relationship between mediation and arbitration? Actually it is symbolical that the relationship between mediation and arbitration mirrors the relationship between mediation and the court proceedings.¹⁶ Mediation is and can be the first step of the structure of the dispute resolution and it has been already analyzed that if it is not successful it could be transformed to or followed by arbitration. In the relationship of mediation and arbitration the sequence can be agreed between the parties. In the relationship of mediation and court proceedings is the situation more difficult. Framework rules on mediation and arbitration often try to combine these two procedures to get the best of both methods. In some institutional arbitration courts the rule is that arbitration fee is reduced if the parties reach a settlement in mediation or if a pre-mediation was not successful. Some jurisdictions in Europe have integrated the mediation methods and techniques in the civil procedure rules.¹⁷ Even more some jurisdictions have established a mixed form of mediation and arbitration, so that they have developed the dispute resolution procedures not in the sense of a combination of both mechanisms but in using the basics of both methods.¹⁸ So it is possible for the intermediary to render a decision if the parties to the dispute failed to reach a settlement, the decision in this case will be binding only if the parties conclude a respective settlement agreement.

The benefits of mediation have been mentioned above. Also the benefits of arbitration are easy to mention because of lots of studies analyzing the profits for parties using arbitration as a dispute resolution method. Arbitration is preferred thanks to some significant advantages as party control, length of time, expense, flexible process, confidentiality, possibility of the selection of the arbitrator, finality, enforcement of international arbitration agreements and of awards¹⁹.

Arbitration is a created on contract, so the parties can by and thanks to the agreement designing the process, the parties autonomy of will is a very important aspect of the arbitration, not only in the relation to the nature and scope of discovery, or to the conduct of the hearing in the first place and the relationship of the applicable law, procedure rules and other basics of arbitration. According to statistics of international arbitration institutions the length of arbitration from

16 SCHWÄRZLER Helmut. Schiedsgerichtsverfahren und Mediation als Alternativen zur öffentlichen Gerichtsbarkeit, *Liechtenstein-journal*, 2011, vol. 3, no. 4, p. 112.

17 DAVIS, Laura. *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice*. New York: Routledge, 2014, pp. 28–33.

18 LEIPNITZ, Desiree. *Mediation im deutschen Arbeitsrecht und deren praktische Bedeutung – unter besonderer erücksichtigung der US-amerikanischen Anwendung*. Berlin: HWR Berlin, 2015, pp. 31–35.

19 SCHLOSSER, Peter: *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*. 2. Aufl.. Tübingen: Mohr Siebeck, 1989.

the start to the final award was eight months on average.²⁰ Compared to the length of civil case following international statistics the arbitration is 40 times quicker than a civil procedure dispute resolution by a state court. As a benefit of the arbitration the expense is often mentioned. Arbitration attorney's fees and expenses are minimized because arbitration is generally concluded in a far less time than is the case in the court. So this benefit is combination of a flexible procedure and the length of time spent. The benefit of flexible process brings the possibilities for the parties to schedule hearings and deadlines to meet the objectives and their convenience. The flexibility of arbitration allows parties to save time and money by choosing the location of the hearing, taking of evidence such as testimony of witnesses, doing a conference with witnesses unable to attend, using written witness statements and so on.²¹

Very important benefit is the confidentiality of arbitration procedure. Arbitration hearings are held in private and are attended only by those designated by the parties and their counsel. This is a strong contrast to the proceedings held at the court because of their public nature. Confidentiality is an important aspect for many of corporations in the cases where their disputes involving intellectual property or trade secrets combined with concerns about publicity or damage to reputation. Second very important benefit of arbitration is the possibility to select the arbitrator. The parties can select the arbitrators with qualifications following the nature of the case. The qualification of an arbitrator includes number of years of experience, number of arbitration chaired, reputation of competence, also qualification and knowledge of foreign languages.²² Arbitration decision is prepared and resolved quickly and finally. Arbitration provides finality quickly and economically compared with state courts. In international commercial disputes so-called cross-border disputes is an arbitration agreement enforceable around the world thanks to the New York Convention²³ signed by more than 140 states, in contrast judgments of national courts – not in European Union thanks to the harmonization and unification – but globally are more difficult and often impossible to enforce in other countries.

After the presentation of the benefits of mediation and arbitration let's return back to the Multi-door Courthouse model. The idea of Frank Sender is based on directing dispute in court to multiple dispute resolution doors providing the sense of options for the parties. This does not happen automatically, it is nec-

20 Controlling Time and Costs in Arbitration, ICC Publication 861-1 ENG, pp. 10–15. Available at: www.iccwbo.org.

21 Österreich, Internationales Schiedsgericht der Wirtschaftskammer: Handbuch Wiener Regeln: Ein Leitfaden für die Praxis. 1. Aufl. : Service-GmbH der Wirtschaftskammer Österreich, pp. 256–282.

22 INGEN-HOUSZ, Arnold: *ADR in Business: Practice and Issues Across Countries and Cultures*. München: Kluwer Law International, 2011.

23 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")

essary to establish a system where the parties are referred to different dispute resolution options, after the consultation by the court they are able to select an option which is best suited to the needs of the particular dispute. In the model of Multi-door Courthouse are appropriate dispute resolutions and alternative dispute resolutions court annexed mediation, case evaluation, eerily neutral evaluation, arbitration and the continuation of litigation.²⁴ In the United States where the project was established it resulting into programs of collaboration between judges, lawyers and volunteers willing to establish court annexed alternative dispute resolution.

The Anglo-American system serves with wider scale of opportunities and possibilities. So are for example in Georgia²⁵ established Multi-door Courthouse dispute resolution centers where the citizens in dispute have input into the methods used to resolve the dispute. The goal of these centers is to offer alternative path to dispute settlement without experiencing the stress, expense and delay inherent in litigation. The centers offer mediation, case evaluation and arbitration. If one of the choices offered by the dispute resolution center is selected by the parties, a state registered and court approved mediator, evaluator or arbitrator will be appointed to assist the parties in resolving their dispute. By these procedures the appointed persons will remain neutral and for the future will not act as an advocate or attorney for either party. What is very important the costs of the center in respect to dispute resolution services are covered through the ADR trust fund, at the reduce rate to parties. All conferences are confidential, the proceedings are less formal and significantly more relaxed than at the courtroom. Parties are given an opportunity to present their case in whatever method they welcome as the most appropriate. The services of Multi-door Courthouse center are reflecting the free will of the parties, all parties must agree to the dispute resolution process and after they agreed the center staff is available to assist in providing information in order for parties to make their decisions.²⁶

Very important effect of this model is that the judges have increasingly become interested in Multi-door Courthouse program. It is clear that this new effort has proven its value and utility. Very important was also that the first step or first alternative program was conducted on small claims cases and thus the larger number of judges learned about mediation because of the rapid rotation

24 SANDER, Frank. A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse. *University of St. Thomas Law Journal*, 2008, vol. 5, no. 3, pp. 665–674. Available at: <http://ir.stthomas.edu/ustlj/vol5/iss3/4>

25 EDWARDS, Barry. Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs. *Harvard Negotiation Law Review*, 2013, vol. 18, no. Spring, pp. 284–294.

26 EDWARDS, Barry. Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs. *Harvard Negotiation Law Review*, 2013, vol. 18, no. Spring, pp. 295–298.

of judges in small claims assignment. The assistance of attorneys was also very important. Bar association's support was a strategic influence for this program because decisions in Multi-door Courthouse program have been made only with consulting attorneys.²⁷ Attorneys also assisted in the development of guidelines to this program they also supported educational and public relations efforts. We can now find a lot of articles and bar journals describing new model of Multi-Door Courthouse program. All the support was a strong help in search for mediators and arbitrators.

The role of mediation is very important in the Multi-door Courthouse model. Mediation is a technique that can for the future ensure appropriate and successful use in a broad variety of cases. Mediation can be used in small claims cases, also in a wide range of civil dispute involving hundreds, thousands or even millions in value. Even mediation can be however inappropriate in cases when the relationship between the parties has involved physical abuse.²⁸ It is clear that mediators must be well trained for to refer all relevant information and facts, especially in cases involving property, and to protect the rights and interests of the parties as well as the children if the case involves family law matter.

The mediator selection has also very important role in the mediation and in the applied model. The most important factor in determining the success of the mediation procedure is and was the individual neutral involved. It is interesting to analyze the impact of the mediators on mediation outcomes. Some mediators are simply more effective than others. This fact is not based only on the quality of the mediator. It is clear that an average mediator can competently facilitate a simple mediation, but for a difficult case we need an exceptional mediator to settle complex, high conflict case. As a result average mediator may settle cases in a higher rate than exceptional mediator. The parties have the right to choose the mediator, they have to analyze the nature of the dispute and after analyzing, under the advisement of the attorney, choose the right mediator.²⁹

Situation is better and not so complicated in Anglo-American sector thanks to a long tradition and thirty-year practice. In European Union some national legislation regulates mediation and her position in civil procedure law. The EU Directive and national law can set main borders for application of the mediation in the national legal system.³⁰

27 EDWARDS, Barry. Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs. *Harvard Negotiation Law Review*, 2013, vol. 18, no. Spring, p. 299.

28 VALENTOVA, Lucia. Mandatory mediation in family law issues with domestic violence – limits and experience from USA. *International and comparative law review*, 2015, vol. 15, no. 2, pp. 101–120.

29 WERDT, Joseph Duss-von: *Homo mediator : Geschichte und Menschenbild der Mediation*. 1. Aufl. Stuttgart: Klett-Cotta, 2005, pp. 45–52.

30 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3–8

3 Mediation in the European Union member states

The EU Directive No 2008/52/EC is very important and can actually bring Multi-Door Courthouse in the European Union civil procedure. Even with less tradition than in Britain or in the United States ADR methods have been topic of discourse in many European nations since they have been successfully established in Anglo-American sector. Theoretical and practical discussions have been concentrated into the field of civil and commercial disputes. The European Union has noticed the importance of mediation combined with concern about court costs and overcrowding and with the necessary steps to put beside the obstacles in cross-border dispute resolution having influence on existence of the single market. The use of alternatives in civil procedure was voluntary, almost without corresponding legislative. In the year 1999 was the approach of ADR methods followed by a call for support of extra juridical dispute resolution process in the member states. The work on European Union mediation directive started 1999 and ended in 2008.³¹

Mediation directive expressly states that it applies only to cross-border disputes, but nothing should prevent member states from applying provision of the directive also to internal mediation process. The directive should secure a better access to justice. The idea was to secure access to exegetical dispute resolution methods.³² The directive should also ensure a balanced relationship between mediation and judicial proceedings. The last topic, balanced relationship between mediation and court procedure is an interesting idea, but it has to be understood as a wish for the future. Mediation directive had to be implemented in member states by May 2011. Many of member states did not wait until the deadline to implement the directive. In a number of states the mediation directive had already been included in domestic law for a number of years. Especially in those states where the ADR has had a long tradition.³³

In the 2012 European Parliament returned to the focus on mediation process, the legal affairs committee resumed the need to promote appropriate settlement of disputes through mediation. European Parliament declined to answer the question if the mediation directive's objective had been attained with the argumentation of a short time after the implementation. It was already mentioned that in some countries mediation has had a good tradition but in some countries arise the new paradox, so-called European Union paradox, where the existence

31 1999 European Council of Tampere foreshadowed a significant effort to change its 'laissez-faire' approach, when it called for the creation of alternative extrajudicial dispute resolution procedures by the Member States

32 <https://www.mediationaktuell.de/news/adr-richtlinie-und-odr-verordnung-eu-im-ueberblick>

33 LEUTHEUSSER-SCHNARRENBERGER Sabine. Die Mediations-Richtlinie und deren Implementierung. *Zeitschrift für Konfliktmanagement*, 2012, vol. 15, no. 3, pp. 72-74.

of an effective process was established but only a very few people use it or are able to use it.³⁴

Why is the situation so complicated? Are we really talking about paradox way of mediation existence? The situation in European Union is not so bad; also in United States was the approach toward mediation a long time way with slow efforts. But we cannot compare the situation in United States with the situation in the Continental system without mentioning its specifications. The basic problem is the relationship between mediation, promoters of mediation which are mediators, courts and of course policymakers, governmental and nongovernmental organizations who are playing also important role and users of mediation, the parties to the disputes. The group mentioned above, promoters of mediation, somehow failed to convince the users, parties to pay full attention to mediation and take full advantage of its potential. Governments and policymakers have presented all benefits of mediation such as cost-saving, time effectiveness, confidentiality and use of friendly procedure arguments by preparing mediation law and establishing it. And here we are. When establishing national mediation legislature and implementation of the mediation directive, there are some weak points to be noticed. If we concentrate in each member state not only on the answer if the mediation was implemented but also how and with what result we have to also analyze implementation policies, mediation marketing, mediator's behavior and practice and structure of the mediation laws.³⁵

Analyzing the reasons and ideas combined with mediation procedure and establishing it in the system of civil procedure, the argument always mentioned was the overcrowding of the courts and expensive proceedings. ADR methods were also a part of counterculture, people wanted noncompetitive, less costly, and more time effective and less damaging way of solving the disputes.³⁶

Interesting is that the people were not aware of that. Directive has shown that people do not necessarily shun confrontation and competition especially in those cases when they believe they were right and they have to fight. Even mediation, which is in the nature voluntary and supported by politicians the idea of mandatory mediation was born may be because the studies have shown that the satisfaction with mediation is not consistently greater compared to satisfaction with courts. Naturally most of the supporters of mandatory mediation are the mediators themselves, supported by a lot of academics and organizations. There are only a few studies remembering the real nature of mediation, appropriate or amicable dispute resolution method used only after free choice of parties and fol-

34 See to this aspects <http://www.europarl.europa.eu/sides/getDoc.do?type=OQ&reference=O-2012-000169&language=EN>.

35 Czech mediation act report – <http://mediator-praha.cz/docs/zakon-o-mediaci-duvodova-zprava.pdf>, p. 1.

36 <http://kluwermediationblog.com/EU-Mediation-Directive>

lowing their free will.³⁷ If one understands mediation as a method using negotiation and communication and on the other hand we force the people to negotiate, we will see no light in the end of the mediation tunnel. All mentioned interests of mediation advocates, policymakers and professional mediators forcing people into using a service they do not like or found useful are not compatible with the fundamentals of ADR.³⁸

Promoting mediation as a way to ease the load of court was a mistake people actually do not care about. The reason to use mediation should be actually based on comfort and prospect of amicable way of handling disputes, not the systematical mistake or overwhelmed judges juggling the case load. Who will convince the parties to use mediation or go through the mediation open-minded only using the argument, that they have to be good citizens and pay for resolution of the own dispute in order to safe public funds? The promotion of mandatory mediation is a very dangerous in the aspect of the right to unrestrained access to justice.³⁹ Mediation, in her traditional and historical nature is a cost effective way of dispute resolution, but only if we compare it with the civil procedure and judicial way of dispute resolution, not combined! Mediation needs collaboration in the marketing, may be in the same way like Multi-door Courthouse, but not by ordering something what is and has been a misunderstanding. Also the position of mediators in Europe does not help a lot. Not only the mediators are not able to understand day activity and practice of mediation in the same way, also the governments of European Union member states understand the nature and position of the mediator in the different ways.⁴⁰

Implementations of the EU directive in national law systems are really different. The European Union has not only problems of agreeing on a common definition of what constitutes mediation and what does not. The position of the mediator and his rights and duties are in the comparative view established in some countries very well, and in some in very complicated form. In the article 3 of the EU directive is a mediation described as a structured process, however named or referred to, whereby two or more parties to the dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a

37 De PALO, Giuseppe; TREVOR, Mary B. *EU Mediation Law and Practice*. New York, London: OUP, 2012; ESPLUGUES MOTA, Carlos; MARQUIS, Louis. *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*. Berlin, Heidelberg: Springer, 2015, 762 p.

38 BARRETT, Joseph: *A History of Alternative Dispute Resolution : The Story of a Political, Social, and Cultural Movement*, New York: John Wiley & Sons, 2004., pp. 209–239.

39 <http://www.mediate.com/articles/poundconference.cfm>

40 Question for oral answer to the Commission Rule 115 by Klaus-Heiner Lehne, on behalf of the Committee on Legal Affairs O-000169/2012, see also <http://www.mediate.com/articles/PaloResponse.cfm>

member state. In this definition are the member states of the European Union following reasonable and effective definition of mediation. But the definition of the mediator was in some countries misunderstood and written in the law intentionally in the limited form or method.⁴¹

So for example the German law⁴² is describing mediator as an independent and neutral person without decision competencies, which is leading the parties through the mediation. Austrian law is describing the mediator in the same paragraph as the mediation. The mediation is a procedure based on free will of the parties realized by a highly qualified, neutral intermediary, mediator who is using accepted methods of communication between the parties and is systematically leaving them to the resolution found out by the parties. The mediation law of the Czech Republic⁴³ leads completely wrong and is describing mediator as a person belonging to the list of mediators. Mediator is not a natural person subscribed to the list of mediators! It is clear, that this “List-regulation” is a bad legislative construction, because all mediators using mediation as a non-subscribed in the list of Ministry of justice are actually acting against the law. It seems that they cannot use the mediation methods when not registered formally in the list of the Ministry of Justice. The same way, no so wrong way actually, was the definition of mediator established in the Slovak Act on Mediation.⁴⁴ As mediator can act every natural person registered in the registry of mediators, but for to act as a mediator, the person has to accept the function of mediator! This is again an administrative obstacle, destroying the potential of mediation in the wide scale of methods and the disputes.

In Belgium is mediation governed by the federal law.⁴⁵ Mediation procedures are governed by Rules of Civil Procedure what is very important because federal law prevents regional legislation to cause any differences in regions. What is interesting is that mediation is codified in the general Code of Civil Procedure, what is a very good instrument. The most important fact in this codification is that mediation is supposed to be a type of civil and commercial dispute resolu-

41 Compare with BATTELLI Ettore et al. (Eds.). *Pan-european mediation practices*. Eurochambres, 2014, p. 15–33. Available at: http://www.eurochambres.eu/custom/Volume_Pan_European_practises_in_EU-2014-00891-01.pdf.

42 <https://www.gesetze-im-internet.de/bundesrecht/mediationsg/gesamt.pdf>, Mediationsgesetz vom 21. Juli 2012 (BGBl. I S. 1577), das durch Artikel 135 der Verordnung vom 31. August 2015 (BGBl. I S. 1474) geändert worden ist.

43 Mediation act Nr.202/2012 Sb., zákon o mediaci, in the § 2 of the mediation act is the combination of lit a) and lit c) very interesting. The definition of mediation at lit.a) and at lit. c) the definition of mediator construct a definition of mediation – procedure, where only registered subject can act.

44 Mediation act Nr. 420/2004 Z. z. Zákon o mediácii a o doplnení niektorých zákonov, Slovak construction is better, but also not ideal. As mediator can act each natural person, but also registered....

45 http://www.gotomediation.eu/legal-information/countries/belgium/Code_judiciaire/Gerechtelijk_Wetboek

tion. Mediation could be applied at any stage in the proceedings except in proceedings before the Belgian Supreme Court. What is also important is that parties can enter into mediation during the judicial dispute and also before or after the court proceedings. The legislation of mediation had already been enacted in Belgium before the EU directive of mediation was passed. In Belgium the parties may present a demand for referral by submitting a letter to the clerk of the court even before the court proceedings. The parties may present after the commencement of proceedings the mediation demand and the judge will appoint an accredited mediator. In Belgium a federal commission for accreditation has been created.⁴⁶ The commission has the power to accredit mediators according to criteria for the type of mediation. Belgian legislation is working with the term accredited mediator. For a mediator to become an accredited mediator the candidate must illustrate professional experience for the practice of mediation, must provide guarantees of independence and impartiality, the candidate must not have been condemned for a crime and the subject to disciplinary or administrative sanctions incompatible with the function of mediator. Mediators must also absolve education. The education is divided into 40 hours of basic training and 60 hours of specialization training. Very important for the system is that mediation is an instrument in all corresponding civil law matters.

The same situation as in Belgium according to legislation is in Denmark. There is no special Act governing mediation. Mediation is included into the Justice Act⁴⁷ and covers mediation realized through the court system. Even if Denmark is not bound by the directive following the opt-out, the legislation of mediation conforms to the provisions of the EU directive. Interested are the requirements for mediators. Mediators have to have a relevant education with legal background, and that means that judges and lawyers can be appointed as mediators. There is an education census applied.

Following the nature of mediation is legislation of Estonia⁴⁸, establishing the conditions and requirements for mediators following the nature of amicable dispute method. There are no requirements for registration or license to be a mediator. Mediator can be an attorney, notary or natural person. Natural persons acting as mediators do not need special accreditation. What is important in this context is legislation. In Estonian legislation there are no court annexed mediation's procedures mentioned.

Ireland is going further with no registration or accreditation for mediators. Compact with the real nature of ADR, any person may act as a mediator. With-

46 <http://www.cepani.be/en/mediation/belgian-legislation>, see also

https://e-justice.europa.eu/content_mediation_in_member_states-64-be-en.do?member=1

47 ERVO Laura; NYLUND Anna. *The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries*, Heidelberg: Springer, 2014, pp. 157–185.

48 NURMELA Ilona; PÕLDVERE Pirkka-Marja. *Efficiency of Mediation in Commercial Disputes with Emphasis on Estonia*. 2014. Available at http://apilv.ee/static/SAR_2-2014_EfficiencyofMediation.pdf

out being registered, trained or certified and what is more important the position or better the role of mediator is not protected or prohibited by law. Ireland does not have and this is the same situation like an Estonia, court annexed mediation procedures.⁴⁹

The definition of mediation is not the same in the national legislation. It is very complicated to introduce something, to introduce some method, if it is not defined. A lot of mediators are forgetting that they have to serve the parties and they have to choose methods used by mediation according to the nature of the dispute, not according to theoretical school or mediators' preferences. But a lot of mediators are also calling for more rules, common statute of the mediation, for more official structures representing them and for more registrations and evaluations, all against nature of mediation. It seems like all involved subjects have forgotten the same. The most important are the parties; we can also say users of the mediation, all policymakers or legislators and all mediators involved in the mediation establishment procedure should start with the most important, with the parties.

4 Resume

Establishing Multi-door Courthouse method in European Union is a long-term process, that is just at the beginning. We can find in some studies terms like Mediation Pledge.⁵⁰ Inspired by the ADR pledge in the United States, Mediation Pledge in UK and Singapore, introducing mediation as an important instrument for the business dispute resolution are motivating EU to try to reach the same standard. However in the EU we have to be careful not to get the mediation plague instead of the Mediation Pledge. It would be maybe useful to think back about the long way what was needed in the case of arbitration and its use. The differentiation between appropriate dispute resolution and alternative dispute resolution should not destroy the alternative as an option. Mediation is an important instrument but cannot be used in the wrong way. If we remember arbitration definition, as an alternative dispute resolution method chosen freely by parties, where is the ADR spirit in the case of mediation and its placement in European procedure law forgotten? Or is mediation saved by opt-out system? So the party can continue with state court procedure after the first meeting with the mediator which was not successful? If we wish in the European Union massive approach of mediation we have to answer the questions above with yes. For to establish mediation as a real instrument, is the mandatory mediation necessary, but we cannot forget its true nature and for the future it would be better to direct the national legislatives in order to bring them to constructive and traditional

49 <http://mediateireland.com/mediation-law-ireland>

50 See also <http://www.mediatehawaii.org/mediation-pledge/>, http://www.gotomediation.eu/fileadmin/docs/eurochambres_mediation-manifesto_2014-12-10.pdf, <http://kluwermediationblog.com/2013/03/09/new-adr-pledge/>

concepts of mediation. If not, we will only have another kind of civil procedure established without the Multi-door Courthouse possibilities.

THE COUNCIL OF EUROPE AND CONTROL SYSTEM IN LOCAL SELF-GOVERNMENT OF THE SLOVAK REPUBLIC

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Summary: The control system of the public administration of the Slovak Republic is regulated by several laws, on top of which stands the very Constitution of the Slovak Republic. The control activity is carried out by the authorities that are delegated to carry out checks directly from the Act, whose objective is to determine the objective status of the facts, and the management of financial management and other means of public investment. The main objective of the article was to analyze and present effectivity and function of internal control system in the individual municipality size categories in the Slovak Republic

Keywords: Public administration. Municipality. Internal control system. Chief auditor. Legislation on municipality control system.

1 Introduction

The most important international document, that is the basis of modern self-governments of the European states, is the European Charter of the local self-government that was adopted on October 15th 1985 within the Council of Europe. By adopting the charter the highest state institutions present their political willingness to honour the principles of the charter within the local self-government relation.

In such way they confirm their attitude towards the local self-government, towards its significance and position within the society on an international level. The European charter of the local self-government has already been accepted with some reservations as well as without any by forty-four member countries of the Council of Europe. The Slovak Republic accepted the charter with some reservations and it came to force on June 1st 2000.

2 The Council of Europe

Other sections were adopted in 2002 and 2007. Adopting the charter must be approved by the Slovak parliament (NR SR) and it must be ratified by the president of the Slovak Republic. After the adoption, the charter is a part of the

legislation system of the Slovak Republic and all enactments must be in accordance with (European Charter of Local Self-government, 2000). The text of the European charter of the local self-government was published in the Collection of Laws No. 336/2000 as an announcement of the Ministry of Foreign Affairs of the Slovak Republic. Furthermore, with the announcement of the Ministry of Foreign Affairs of the Slovak Republic No. 602/2002 Coll., the Slovak Republic adopted Art.6. par. 2, which refers to services conditions of the local self-government employees and hiring highly qualified people according to their credit and skills, and following this also providing adequate education opportunities, reward system and perspective of promotion. By announcement of the Ministry of Foreign Affairs No. 587/2007 Coll., the Slovak Republic accepted the remaining commitments of all provisions of the charter to which the commitments of states are adopted.

In Article 8, the European charter of the local self-government defines administrative control of the local authorities activity. According to the European charter of the local self-government this control system follows three legal principles: delegation principle, legality principle and proportionality principle. According to Article 8 „*Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute. (Par. 1).*”¹ „*Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.*” (Par. 2)². „*Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.*” (Par. 3)³.

In the Slovak Republic the control system is supported by the Slovak system of law e.g. Supreme Audit Office of the Slovak Republic executes audit in terms of the Act No. 39/1993 Coll. on the Supreme Audit Office of the Slovak Republic as amended control executed in state administration in terms of Act No. 10/1996 Coll. on control in the state administration as amended, control executed within the regional authority in terms of Act No. 369/1990 Coll. on municipal establishment as amended and rules of control activity are administered in terms of Act No. 357/2015 Coll. on financial control and audit and on modification and completion of some laws.

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- 1 KUKLIŠ, Peter, VIROVÁ, Viktória. *Vybrané problémy miestnej samosprávy (v komparácii niektorých štátov Európskej únie). First Edition.* Bratislava: EUROKÓDEX, 2012, p. 10.
 - 2 KUKLIŠ, Peter, VIROVÁ, Viktória. *Vybrané problémy miestnej samosprávy (v komparácii niektorých štátov Európskej únie). First Edition.* Bratislava: EUROKÓDEX, 2012, p. 10.
 - 3 KUKLIŠ, Peter, VIROVÁ, Viktória. *Vybrané problémy miestnej samosprávy (v komparácii niektorých štátov Európskej únie). First Edition.* Bratislava: EUROKÓDEX, 2012, p. 10.

3 Supreme Audit Office of the Slovak Republic

The most significant change extending and significantly enhancing the control competence of Supreme Audit Office of the Slovak Republic also to public resources until then excluded from the competence of Supreme Audit Office of the Slovak Republic, was gained by the amendment of the Constitution of the Slovak Republic that came into force on January 1st, 2006. The constitutional Act No.463/2005 Coll. extended the control competence of Supreme Audit Office of the Slovak Republic to control local self-government refer to property management, property rights, funds, obligations and claims in the municipality, upper-territorial units, legal entities with capital participation of municipalities, legal entities with capital participation of upper-territorial units, legal entities established by municipalities or legal entities established by upper-territorial units or upper-territorial units. However, in order to enable that Supreme Audit Office of the Slovak Republic can within the given competence plan audit of bodies of the local self-government, amending of the Supreme Audit Office of the Slovak Republic Act was necessary. This amending defined the scope and method of audit execution within the municipalities and upper-territorial units or legal entities established by the local self-government and their capital participation.⁴

Amendment of the Act No. 39/1993 Coll. on the Supreme Audit Office of the Slovak Republic as amended by provisions of the Act No. 261/2006 Coll., that came into force on May 13th 2006, significantly strengthened the subject and personal auditing competence of Supreme Audit Office of the Slovak Republic in relation to local self-government.

Supreme Audit Office of the Slovak Republic audit activities pursuant to Article 2 of the Act No. 39/1993 Coll. on the Supreme Audit Office of the Slovak Republic in relation to local self-government refer to property management, property rights, funds, obligations and claims in the municipality, upper-territorial units, legal entities with capital participation of municipalities, legal entities with capital participation of upper-territorial units, legal entities established by municipalities or legal entities established by upper-territorial units, the methods of levying and recovering taxes, custom duties, payments of contributions, charges and fines forming revenues of the budgets of municipalities and upper-territorial units.

Pursuant to Article 4 of the Act No. 39/1993 Coll. on the Supreme Audit Office of the Slovak Republic, the auditing competence applies to municipalities and upper-territorial units, legal entities established by municipalities, legal entities established by upper-territorial units, legal entities with capital participation

4 NAJVYŠŠÍ KONTROLNÝ ÚRAD SLOVENSKEJ REPUBLIKY. 20. výročie Najvyššieho kontrolného úradu SR 1993–2013.[online]. Available at: <http://www.nku.gov.sk/en/publikacie>

of municipalities and legal entities with capital participation of upper- territorial units.

After amending of the Act No. 39/1993 Coll. on the Supreme Audit Office of the Slovak Republic, the auditing competence refers to all public funds of local self-government and property, not only to the audit of funds the self-government received for the settlement of costs for transferred competencies of state administration bodies, allocations from the national budget and funds received within development programmes or due to other similar reasons from abroad. The auditing competence has been extended also to all legal entities established by municipalities and legal entities established by upper- territorial units, as well as to legal entities established by local self-government in order to run business.

The reform of public administration and a new system of its financing was the reason for extending the Supreme Audit Office of the Slovak Republic auditing competence. The volume of financial sources was transferred to the field of self-government, what meant that the state could not release from its responsibility for effective functioning of public administration and effective management of public finances. Internal audit on the level of local self-government was insufficient, as some municipalities did not have and still do not have the main auditor, where if this position is established, there is dependence on a municipality authority, which elects, dismisses, determines salary and working hours of the chief auditor. By extending the auditing competence of Supreme Audit Office of the Slovak Republic to all public finances, i.e. to the own income of municipalities and upper-territorial units, on which the respective administration authorities of these entities decide independently, the absence of independent audit of municipalities and upper-territorial units in full scope was eliminated. At the same time, recommendations of the International Organisation of Supreme Audit Institutions – INTOSAI for the objective assessment of local self-government in full scope were met. Extending the auditing competence of Supreme Audit Office of the Slovak Republic was important from the point of view of needs for NC SR, during its decision making process in the given area, providing information on audit results the other body cannot deliver in sufficient scope. Information can be used also by other bodies (e.g. the state administration authority at decision making on providing allocations from the SR national budget).⁵

4 Chief Municipality Auditor

The chief auditor function is considered to be a basis pillar of the municipality system. It is an elected function, he/she is elected by the municipality authority pursuant to Article 11, (4), (j) of the Act No. 369/1990 Coll. on Municipalities as amended.

5 JASOVSKÝ, Ján. *Kontrolná činnosť NKÚ SR v územnej samospráve v období rokov 2006–2009*. [online]. Available at: <http://www.nku.gov.sk/documents/10157/15a1190e-93db-46aa-90c1-cdc29ec1f69c>

Article 18 of the Act No. 369/1990 Coll. on Municipalities as amended regulates the position of the chief auditor; precondition for the performance of his/her duties; the scope of audit activities; the rules of audit activities; and tasks of the chief auditor.

The chief auditor is an auditing body of the municipality and at the same time he/she is a municipal employee. Rights and obligations of the municipality chief auditor are governed by the Act No. 369/1990 Coll. on Municipalities as amended, as well as by the Act No. 552/2003 Coll. on Performance of Work in Public Interest as amended. The chief auditor as the municipal employee has all rights and duties of a manager.⁶

The chief auditor performs his/her duties with complete impartiality and independence in accordance with the main rules for auditing activities.

The scope of activities of the chief auditor is specified by the Act No. 369/1990 Coll. on Municipalities as amended and Act No. 502/2001 on Financial Control and Internal Audit as amended.

Pursuant to Article 11 of the Act No. 502/2001 on Financial Control and Internal Audit as amended, the chief auditor is the main auditing body performing ex post financial control and verifies:

- the objective condition of inspected facts and their compliance with special regulations, international agreements based on which the Slovak Republic received funds from abroad, decisions issued on the basis of special regulations or internal principles of management focusing at the principles of economy, efficiency and effectiveness when managing public funds,
- meeting the requirements for public funds provision and meeting the requirements of public funds use,
- performance of interim financial review,
- adherence to the defined procedure for interim financial review delivery,
- delivery of measures to remedy the shortcomings found out by financial review and elimination of its causes.

The chief auditor performs ex post financial control in the municipality focusing at meeting the principles of economy, efficiency and effectiveness when managing public funds, the review of compliance with the legal conditions for public funds provision and use.⁷

6 VEVERKOVÁ, Ingrid. *Ekonomické minimum hlavného kontrolóra*. Bratislava: Iura Edition, 2013, pp. 11–12.

7 VEVERKOVÁ, Ingrid. *Ekonomické minimum hlavného kontrolóra*. Bratislava: Iura Edition, 2013, pp. 13–14.

4.1 The Scope of the Chief Auditor Activities

The chief auditor conducts audits to the extent set out in Article 18d of the Act No. 369/1990 Coll. on Municipalities as amended as follows:

- control of legality, efficiency, economy and economic efficiency during management of property and municipality property rights as well as during management of property used by the municipality according to specific regulations,
- control of claims and petitions solving,
- control of municipality incomes, expenses and financial operations,
- control of following generally binding legal regulations including municipality regulations, control of fulfilment of the local council decrees,
- control of internal municipality regulation fulfilment,
- control of other tasks setup by the specific regulation fulfilment.

The chief auditor has the competence to control the municipal office; budget and contribution organisations established by the municipality; legal entities, in which the municipality has an investment, and other entities that manage the municipality property or to which the municipality property was given to use within an extent affecting this property; entities, which received grants for specific purposes or repayable or non-repayable financial support from the municipality budget according to specific regulation within the extent of these funds use.⁸

4.2 Tasks of the Chief Auditor

The chief auditor fulfils other tasks according to § 18f of the Act No. 369/1990 Coll.:

- performs control within the extent of the provision in 18d,
- once in six months submits the proposal of auditing activity plan to the local council which must be published within 15 days prior to its hearing within the local council session, and in a form common within the municipality,
- at least once a year submits a report on auditing activity to the local council, within 60 days from the last day of the calendar year,
- submits report on audit results directly to the local council at its earliest session,
- develops expert statements on municipality budget proposal and account closing prior to its approval within the local council,
- deals with complaints, if states so within the Act No. 9/2010 Coll. on complaints,

8 SLOV-LEX PRÁVNÝ A INFORMAČNÝ PORTÁL. *Zákon č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov.* [online]. Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1990/369/20160701>

- cooperates with state authorities in the matter of management of funds allocated to the municipality from the state budget or structural funds of the European Union,
- fulfils other tasks defined by a specific law, such as e.g. Act No.583/2004 Coll. on budgetary rules of the local self-government as amended by other acts,
- is obliged to perform audit if requested by the local council,
- is obliged to upon request present the results of an audit to a member of local council or the mayor.

The chief auditor participates in the local council sessions and has a consultant role; he/she can participate also in sessions of the commissions established by the local council.

5 The Analysis of the Control System Effectiveness

The following analysis will present some of the negatives within the chief auditors activity. The representative group for the analysis included 93 municipalities taking into account the size and geographic representation of the whole group of municipalities in SR. The data for the analysis were taken from individual protocols (records) of the Supreme Audit Office of the Slovak Republic on the results of the audit on effectiveness and efficiency during the competences execution of the municipalities of the Slovak Republic.

The analysis of the control system effectiveness was aimed to discover whether the municipality had an chief auditor elected according to provisions of § 11 Art. 4 letter j) of the Act on municipality establishment, where the local council elects and withdraws the municipality chief auditor. In terms of § 30a Art. 2, the municipalities where chief auditor is not elected, or within municipalities where chief auditor does not perform its activity of several municipalities, the chief auditor shall be elected in accordance with this act by the 1st January 2005.

From the total number of 93 municipalities, there were 2 municipalities with the number of inhabitants up to 199 inhabitants which did not have elected chief auditor due to the fact that the local council did not announce the elections of chief auditor in terms of the § 18a Art. 2 of the Act on municipality establishment due to the lack of financial resources.

The analysis was also aimed at whether the chief auditor was at the same time an auditor in other municipality/municipalities. In 2013 some chief auditors performed their activities also in other municipalities. The analysis showed that from the total number of 93 municipalities, 48 % had a chief auditor, who performed his activity also in other municipalities. Within the municipalities with number of inhabitants up to 199, 50 % of chief auditor were at the same time a chief auditor also in other municipalities. Within municipalities with the number of inhabitants from 200 to 499, it was 68 % of chief auditor, within

municipalities with number of inhabitants from 500 to 999, it was to 40 % of chief auditor. In municipalities with 1000 to 1999 inhabitants, it was 39 % of chief auditor, within municipalities with the number of inhabitants from 2000 to 4999, it was 44 %, in municipalities with 5000 to 9999 inhabitants, it was 50 %, and within municipalities with the number of inhabitants above 10000, the chief auditor did not perform their activity in another municipality.

Furthermore, the analysis showed that 31 % out of these 93 municipalities had elected chief auditor, who performed his activity for 5 and more municipalities at the same time. The analysis pointed out that the most critical municipalities were those with number of inhabitants up to 999, which forms almost 93 %. One municipality with inhabitants up to 199 showed extreme value as the chief auditor had a 0,025 contract and performed his activity in other 24 municipalities.

The analysis also focused on provisions of § 18b of the Act on municipality establishment, according to which the chief auditor can perform auditing activity for several municipalities. If chief auditor performs activity for several municipalities, the municipalities in question conclude an agreement on this matter for the execution of specific task according to § 20a. chief auditor is elected by the local council of each of the municipalities that are participants of this agreement. The mayor of each municipality concludes a work contract with the chief auditor within the period given in § 18a Art. 7.

The analysis showed that 82 % of municipalities in which chief auditor performed the activity for several municipalities, did not have a common agreement for the performance of specific task. This analysis showed that in the case of the insufficiencies, there was no significance in the size of the municipality.

The analysis focused on the working time of the chief auditors (according to the work contract). The working time of chief auditors in the individual municipalities were different. Chief auditors, who performed their activity in municipalities with inhabitants up to 199, had working time 0,01–0,1. In municipalities with 200–499 inhabitants, the working time of a chief auditor was 0,02–0,2, in municipalities with 500–999 inhabitants, the working time of a chief auditor was 0,05–0,533, in one municipality there was a full-time working contract. In municipalities with 1 000–1999 inhabitants, the working time of chief auditor was 0,067–0,32. The working time of chief auditors in municipalities with 2000–4999 inhabitants was 0,07–0,53, in municipalities with 5000–9999 and above 10000 inhabitants it was a full-time contract.

As the chief auditors working times were low, the analysis was focused on the execution of chief auditor's activity for 2 days within a month or not at all. In the size categories of the municipalities up to 199 inhabitants, the analysis showed that it was 92 % of chief auditors, in municipalities with 200–499 inhabitants it was 65 % of chief auditors, in municipalities with 50–999 inhabitants it was 25 %

of chief auditors. In municipalities with 2000–4999 inhabitants it was 11 % of chief auditors. In the size categories 1000–1999 inhabitants, 5000–9999 inhabitants and in municipalities above 10000 inhabitants chief auditors did not execute his activity less than 2 days in a month.

Furthermore, the analysis showed that in as many as 32 % municipalities from the sample group chief auditors executed their activity less than 2 working days in a month. The highest number of such small working times was in municipalities up to 999 inhabitants, which represent 97 %.

Then the analysis assessed how many ex post financial audits were performed by a chief auditor in 2013. In municipalities with up to 199 inhabitants 42 % chief auditors did not perform any ex post financial audit and 17 % only one ex post financial audit. In municipalities with 200–499 inhabitants 16 % of chief auditor did not perform any ex post financial audit and 20 % of chief auditor performed only one ex post financial audit. In municipalities with 500–999 inhabitants 28 % of chief auditors did not perform any ex post financial audit and 8 % performed only one ex post financial audit. In municipalities with 1000–1999 inhabitants 17 % of chief auditor did not perform any ex post financial audit and 6% performed only one ex post financial audit. In municipalities with 2000–4999 inhabitants of chief auditor 34 % did not perform any ex post.

Further, the results of the analysis showed that in municipalities with 5000–9999 inhabitants there were performed 7–14 ex post financial audits and in municipalities above 10000 inhabitants it was 13–20 ex post financial audits.

The analysis showed that from the selected sample group 24 % of chief auditors did not perform any ex post financial audits. The highest number of these chief auditors was in municipalities with up to 999 inhabitants, which represents 73 %. Then, in 2013, 11 % of chief auditors performed only one ex post financial audit.

Furthermore, the analysis showed that 40 % of municipalities performed other audits that were mostly aimed at control of decrees.

6 Conclusion

With regard to the fact that municipalities manage substantial financial resources and assets, it is essential that the municipal system of internal control is effective and functional.

Problem of the Municipalities Act is that upon approving a working time of a chief auditor, municipal councils are not limited by their minimum working time. Especially small municipalities determine working times on the grounds of their financial conditions, not the need and scope of control activities. Municipalities thus only fill the chief auditor function only formally. Problem is related to the effectiveness and functionality of municipal internal control systems.

We can further state that in the area of effectiveness of the control system, municipalities under the greatest risk were those with up to 999 inhabitants, where chief auditor reported significant bottlenecks especially upon carrying out subsequent financial controls, and upon following the basic legal regulations concerning the work of chief auditor. These were recorded in the work of chief auditor carried out less than two days a month or not at all in 92 % of cases in the municipalities with up to 199 inhabitants, in 65 % in the municipalities with 200–499 inhabitants, and in 25 % of cases in the municipalities with 500–999 inhabitants. Based on this finding, the system of municipal control is ineffective.

A BRIEF INSIGHT INTO DISINHERITANCE¹

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Summary: The article briefly introduces current regulation of disinheritance in the Czech Civil Code. Firstly it deals with the notion and purpose of disinheritance, and consequently it describes reasons for disinheritance and ways of disinheritance, highlighting some interpretation difficulties in this field.

Keywords: Disinheritance, deed of disinheritance, mandatory share, forced heir

1 Introduction

The institution of disinheritance is regulated in Sections 1646 to 1649 of the Civil Code² and it is the only option for the decedent to deprive the forced heir from his right to mandatory share, by the means of disposition mortis causa.³ Disinheritance is understood as the decedent's expression of will, made under conditions stipulated for the creation of a person's will, in which the decedent deprives the forced heir from his mandatory share entirely, or shortens the right to mandatory share. The institution of disinheritance enables the decedents to sanction inappropriate conduct of his descendant, to whom the decedent otherwise would have been obliged by law to bequeath a certain part of his estate or a sum of money. Yet, it is an expression of the principle of autonomy of will as a basic principle of law of inheritance by which the decedent has to have the option to decide what shall happen with his assets in case of death, in the manner prescribed by law. It is noteworthy that current law of inheritance stems from the

1 The article is a partial output of the project IGA_PF_2015_025 "Disposition in case of death", Palacký University, Faculty of Law. The article follows from a paper presented at the conference "Olomouc Debates of Young Lawyers 2015", held at Véska on 11–13 September 2015.

2 Act No. 89/2012 Sb., Civil Code, hereinafter referred to as "the Civil Code".

3 As to the forced heir and mandatory share see e.g. BEDNÁŘ, Václav. *Nepominutelný dědic*. In HAVEL, Bohumil, PIHERA, Vlastimil. *Soukromé právo na cestě. Eseje a jiné texty k jubileu Karla Eliáše*. Plzeň: Aleš Čeněk, 2010, p. 17–28; HORÁK, Ondřej. *Tzv. nepominutelný dědic v novém občanském zákoníku. Právní rozhledy*, 2014, Vol. 11, p. 381–386; KOHOUTEK, Jan. *Nepominutelný dědic jako účastník řízení o pozůstalosti. Ad Notam*, 2015, Vol. 5, p. 3–6.

principle that disinheritance should not be supported,⁴ therefore disinheritance is possible to apply only for reasons exhaustively defined by law.

2 Reasons for disinheritance

The Civil Code enables application of disinheritance only for forced heirs, i.e. children of the decedent or their descendants.⁵ These forced heirs must be mentioned in disposition mortis causa and the decedent must leave them their mandatory share at least, unless the decedent disinherits them for reasons set by law. A decedent may disinherit a forced heir who:

- a) failed to provide decedent with the necessary assistance at a time of need,
- b) fails to show such genuine interest in the decedent as he should,
- c) has been convicted of a criminal offence committed under circumstances which indicate his perverse nature, or
- d) permanently leads a dissolute life.

The decedent has the option to disinherit a forced heir even for fulfilling of more than one reason for disinheritance. The reasons for disinheritance, stated in points a), b) and d), are already traditional ones, the interpretation of which has been satisfactorily clarified in legal theory and practice.⁶ The reason for disinheritance stated under c) was newly introduced to the Civil Code and it differs from the previously used, comparable reason for disinheritance, which reads: *c) has been sentenced for intentional offence to at least one-year imprisonment.*⁷ This reason for disinheritance has been modified for the reason that it too much expanded the option of disinheritance even onto crimes insignificant for family relations, which could tempt the decedent to misusing this reason for disinheritance.⁸ The new formulation requires proving of commitment of the crime under circumstances indicating perverse character of the forced heir, which will require much more exact and complex evidence than was needed according to the previously used regulation. Among others, for the reason that “perverse nature” is

4 *Exheredationes non sunt adiuvandae*. ELIÁŠ, Karel et al. *Nový občanský zákoník s aktualizovanou důvodovou zprávou*. Ostrava: Sagit, 2012, p. 671.

5 The decedent may exclude also other persons than forced heirs from their lawful claim to inherit, in a simplified way, compared to disinheritance. The decedent has the option to make a so-called negative testament pursuant to Section 1649 of the Civil Code, in which he may order that some of the forced heirs shall receive nothing of his decedent's estate. Further, the decedent has the option to exclude forced heirs from lawful claim by making his disposition in case of death, thereby omitting those persons.

6 For further details see e.g. FIALA, Roman, DRÁPAL, Ljubomír a kol. *Občanský zákoník. Komentář. IV. Dědické právo (sections 1475 to 1720)*. Praha: C. H. Beck, 2015, p. 413–424; SVOBODA, Pavel, KLIČKA, Ondřej. *Dědické právo v praxi*. Praha: C. H. BECK, 2013, p. 9–18.

7 Section 469a of Act No. 40/1964 Sb., the Civil Code.

8 ELIÁŠ, Karel a kol. *Nový občanský zákoník s aktualizovanou důvodovou zprávou*. Ostrava: Sagit, 2012, p. 671.

not specifically defined in the Code.⁹ A certain guideline may be aggravating circumstances that are taken into account within criminal proceedings, however, not all of them necessarily prove the perverse character of the disinherited person.¹⁰ A little more complicated will be the use of this reason for disinheritance for the decedent alone, since successful disinheritance will require knowledge of circumstances of the criminal act, which will prove the perverse character of the forced heir, and the mere fact that the forced heir was convicted will not be sufficient. At proceedings relating to decedent's estate, a copy of an entry in the criminal records will not be sufficient to prove the commitment of an offence evidencing the perverse character of the forced heir (as it was possible under the previously used regulation), but the criminal judgement will be needed, if not the whole file. Or, disputes concerning disinheritance will have to be settled in adversarial proceedings, therefore proceedings relating to decedent's estate will get rather extended. The question remains – whether this regulation represents a move forward.¹¹

In addition to the four main reasons for disinheritance, the Civil Code in section 1647 introduces a special reason for disinheritance, where a decedent may also disinherit a forced heir whose indebtedness or prodigal acts raise concern that the forced share will not be maintained for the descendants. However, such a prodigal descendant may only be inherited if the decedent bequeaths the descendant's mandatory share to the children of this forced heir, or, if there are none, to their descendants. Thus, this reason for disinheritance may be applied only to descendants who already have children. The sense of this reason for disinheritance is the protection of the forced heir's family from his reckless conduct as concerns property. Overindebtedness of the forced heir is not required in this case, sufficient is such level of indebtedness that justifies the conclusion that the mandatory share will not remain for his descendants. As far as this reason for disinheritance is concerned, it may be difficult to distinguish adequate and reasonable spending of money from profligacy. When the forced heir spends daily sums that are not common for everyone, it could not, without further evidence, be considered prodigal behaviour when spending corresponds with the financial conditions of the forced heir. Similarly, one cannot be considered a prodigal person when his spending beyond income was caused by the circumstances. On the contrary, otherwise casual spending may cause indebtedness to a person with limited financial possibilities. The Insolvency Act may be a certain guideline in

9 *Perverse nature of the offender must be judged not only from the viewpoint of general morality but also as concerns whether the specific offence affects the decedent and his family's honour (the one convicted of repeated theft as a recidivist will hardly be able to disinherit his descendant who has been convicted of theft also).* ELIÁŠ, Karel et al. *Nový občanský zákoník s aktualizovanou důvodovou zprávou.* Ostrava: Sagit, 2012, p. 672.

10 For details of aggravating circumstances of an offence see Section 42 of Act No. 40/2009 Sb., the Criminal Code.

11 See also SVOBODA, Pavel, KLIČKA, Ondřej. *Dědické právo v praxi.* Praha: C. H. BECK, 2013, p. 14–15.

this situation since it defines terms such as insolvency, bankruptcy or imminent bankruptcy. However, each case will have to be judged individually in the practice, taking in account all circumstances that could have affected indebtedness of the particular person.

Also, forced heir may be disinherited for the reason of incapacity to inherit.¹² Disinheritance for that reason is mainly applied to enable the decedent to get acquainted the other heirs and the judicial commissioner with the circumstances proving incapacity to inherit of the disinherited descendant, which otherwise may not come out. Further, such disinheritance is a clear indicator of the fact that the decedent has not forgiven the incapable heir his conduct. It may come to the situation when the decedent forgives the incapable forced heir his conduct, however, the decedent will want to bequeath less than is the heir's mandatory share. In such a case the decedent may apply incapacity to inherit as the reason for disinheritance.

3 Ways of disinheritance

According to Section 1649 par. 1 of the Civil Code, a declaration of disinheritance may be made, or changed or cancelled, in the same manner as making or cancelling a testament. Written form is required as a rule, i.e. an expression of will recorded in the form of private or public instrument. With respect to the possibility to make a testament made with concessions, it is necessary to admit the option to disinherit orally.¹³ In practice, the deed of disinheritance will constitute a part of another disposition mortis causa, in which the decedent determines the heir of his property.

Disinheritance may be made expressly or in silence. Expressed disinheritance is executed so that, in the deed of disinheritance or in another disposition mortis causa, the decedent states that he disinherits the forced heir, i.e. the decedent

12 Grounds for incapacity to inherit are regulated in Sections 1481 to 1483 of the Civil Code. A person incapable to inherit is primarily the one who has committed an intentional offence to the testator or his relatives, and the heir who has committed condemnable action against the decedent's last will, while the decedent may forgive the heir for his conduct. Further, the Code contains a special provision on incapability to inherit of the spouse who has applied domestic violence towards the testator where a divorce proceeding is in progress on the day of the decedent's death. Finally, incapable to inherit from his child is the parent who has been discharged from parental responsibility for misuse or neglect thereof. The reasons for incapability to inherit, compared to causes for disinheritance, represent a more serious behaviour, for which the offender may be sanctioned by exclusion from the right to inherit, in compliance with the Code, and without the necessity of expression of the decedent's will.

13 As to the form of the testament see Section 1532 et seq. of the Civil Code. It is noteworthy that the provision on private and public instrument may be rather misleading, where each written recording of the testator's will (traditionally quoted is e.g. a testament written on a cuff or on chalkboard) is considered valid testament. See also SVOBODA, Pavel, KLIČKA, Ondřej. *Dědické právo v praxi*. Praha: C. H. BECK, 2013, p. 57 et seq.

excludes the heir from his right to mandatory share, completely or partly. It is possible to implicitly disinherit the forced heir the way that the decedent makes a disposition of his property in the case of death wherein he omits the forced heir, bequeathing no mandatory share or a shortened one to him. If the heir who is disinherited implicitly has committed an act that fulfils legitimate cause for disinheritance, he will be considered disinherited implicitly and by law. Even though both explicit and implicit disinheritance may only be made for reasons set by law, the decedent does not have the duty to give the reasons.¹⁴ The reason for disinheritance has to exist at least at the time of death of the decedent, which give the decedent the option to disinherit in the case that the heir commits inappropriate behaviour, indicated as one of the legal reasons for disinheritance, in the future up to the time of death of the decedent.¹⁵

Implicit disinheritance or disinheritance without giving reason is a suitable way of disinheritance in a situation when the decedent does not wish the disinherited forced heir to acquire anything of the decedent's estate and, at the same time, the decedent has no interest in defaming that heir before others. A problem of implicit disinheritance and disinheritance without reason may be consequent evidence of the reason for disinheritance in the case that the disinherited forces heir will not acknowledge the disinheritance and will claim his mandatory share, stating that no reason for disinheritance exists. Should other heirs have no closer information of the reasons for disinheritance, the reasons could be hardly proven consequently. Therefore, it is appropriate that the decedent will insure the disinheritance in a certain way, for example by telling the particular cause for disinheritance to some of the heirs or executor of the testament, or by producing an instrument to clarify the reason for disinheritance, which would be referred to in the declaration of disinheritance, stating that the instrument shall be presented to the court in the case that the disinherited will deny the cause for disinheritance.¹⁶

In proceedings relating to decedent's estate, yet a different reason for disinheritance may be proved than the decedent indicated (or aimed to). Possible dispute over validity of disinheritance will then raise a key question – whether the reason for disinheritance is stated in the declaration of disinheritance or not. If the reason for disinheritance is stated there, an action to determine the rights

14 *As a rule, there is no reason for the testator to give grounds for his decision on disinheritance in the case that the causes are known to him and the disinherited descendant [...] If the decedent makes a declaration of disinheritance in the testament, which is a rule, too many people will have access to that information, perhaps long after the causes for disinheritance occurred and – e.g. at conviction of the disinherited for serious offence – fell into oblivion.* ELIÁŠ, Karel et al. *Nový občanský zákoník s aktualizovanou důvodovou zprávou*. Ostrava: Sagit, 2012, p. 673.

15 ŠEŠINA, Martin. In ŠVESTKA, Jiří, DVOŘÁK, Jan, FIALA, Josef et al. *Občanský zákoník. Komentář. Svazek IV*. Praha: Wolters Kluwer, 2014, p. 359.

16 SVOBODA, Pavel, KLIČKA, Ondřej. *Dědické právo v praxi*. Praha: C. H. Beck, 2013, p. 11.

to inherit is to be filed by the descendant who insists that he has been disinherited unlawfully. On the contrary, if the reason for disinheritance is not stated, the petition shall be filed by the one who is to inherit instead the disinherited forced heir.

Declaration of disinheritance may be changed or cancelled the same way as it has been established, i.e. the same way as cancellation or change of testament. In practice, a deed with required formal elements may be produced, wherein the decedent indicates that he cancels the previously made deed of disinheritance. Further, the deed of disinheritance may be cancelled by destruction thereof, or release from deposition in the case that the public instrument is deposited at court commissioner. According to Section 1576 of the Civil Code, we may assume that disinheritance can also be revoked implicitly the way that the decedent leaves the deed of disinheritance in validity, but makes a new disposition mortis causa wherein he designates the disinherited forced heir as a true heir, thereby bequeathing the forced heir's entire mandatory share or a part of it. If some parts of dispositions mortis causa are in contradiction, the latter version prevails.

4 Disputes on disinheritance

If the decedent applies disinheritance and the forced heir opposes the disinheritance, dispute on disinheritance occurs. Disputes on disinheritance, analogically to disputes on the right to inherit regulated in Sections 168 through 170 of Act on special court proceedings,¹⁷ may be legal disputes and factual disputes. In the first case, factual statements of the participants of the proceeding relating to decedent's estate will be identical, but the participants will not agree on legal determination of the issue. In such a case it is necessary only to settle the contentious legal matter. In the second case, factual statements of the participants contradict and factual issue must be resolved, which cannot be settled in proceedings relating to decedent's estate, which is a non-contentious proceedings.

4.1 Legal dispute

Legal dispute occurs in a matter of disinheritance when the disinherited person does not deny his performance of an act, which the testator states as the reason of disinheritance, but the disinherited person insists that the act shall not establish a reason of disinheritance.

Contentious legal issue, in relation to disinheritance, may occur for example when the decedent disinherits the forced heir for the reason that he has committed a criminal offence, under circumstances proving his perverse nature. The disinherited person defences himself, stating that although he has committed the

¹⁷ Act No. 292/2013 Sb., On special judicial proceeding.

offence, he was forced to do so by circumstances and there is nothing in the act to prove his perverse nature.

In this case, the contentious issue is based on different legal determination of otherwise non-contentious situation as concerns the facts.¹⁸ Notary as a court commissioner proceeds in this case in accordance with Section 169 of the Act on special court proceedings, therefore he is entitled to legally judge the contentious issue and by a consequent resolution to decide which of the participants will be dealt with in the proceedings relating to decedent's estate, and which one's presence in the proceedings will be terminated. However, this resolution will not solve the issue of disinheritance definitely. It is only a decision substantial for further course of the proceedings, as it determines the participants of the proceedings. However, if appeal against the resolution is filed, the proceedings relating to decedent's estate cannot be continued and completed until the court decides the remedial measure.¹⁹ Further, law explicitly sets forth that the right to inherit of the person whose participation at the proceeding has been terminated shall not extinguish, the right is only not taken in account at the proceedings.

4.2 Factual dispute

Different situation occurs when the disinherited forced heir defends himself, insisting that the statements in the declaration of disinheritance are not true. In such a case they are contentious facts that cannot be solved in the proceedings relating to decedent's estate, and contentious proceedings will have to be conducted. Filing the petition and commencement of the contentious proceedings is ruled by section 170 of the Act on special court proceedings.²⁰ A period to file a petition will be determined, and it must not be shorter than two months. After settlement of the dispute, participant of the proceedings relating to decedent's estate will be the one who won the contentious proceedings. If the relevant participant fails to file a petition within the stated period, it shall be deemed that the dispute was resolved to his detriment, and the court commissioner will terminate his participation in the proceedings relating to decedent's estate.

Contentious fact, related to disinheritance, may occur for example when the decedent disinherits his descendant due to his failure to show such a true interest as he should do. The disinherited person defends himself, insisting that the statement contained in the declaration of disinheritance is not true since he tried to

18 SVOBODA, Pavel, KLIČKA, Ondřej. *Dědické právo v praxi*. Praha: C. H. Beck, 2013, p. 242.

19 SVOBODA, Karel et al. *Zákon o zvláštních řízeních soudních. Komentář*. Praha: C. H. Beck, 2015, p. 347.

20 As a rule, Section 1673 of the Civil Code sets forth who files the petition, if the disinherited person or the one who would inherit instead of him. Decisive is if the reason for disinheritance has been specified: if so, the petition is to be filed by the disinherited person. If the reason for disinheritance has not been specified, the petition should be filed by the person who would inherit instead of the disinherited person.

contact the decedent several times a year, but the decedent always declined any communication with the disinherited.²¹

5 Conclusion

Current regulation of disinheritance in the Civil Code balances the statutory duty of the decedent to bequeath a mandatory share of his property to forced heirs. By disinheritance, the decedent has the option to sanction an inappropriate conduct of the forced heir by excluding the heir from the mandatory share of inheritance or by shortening the heir's mandatory share. At the same time, current Civil Code pursues the principle that disinheritance should not be supported, therefore reasons for disinheritance are exhaustively enumerated by law. The reasons represent a serious breach of moral rules that may be sanctioned by disinheritance. However, interpretation of some of the reasons for disinheritance may cause a problem, both from the point of view of ordinary decedent and legal practice.

21 *The interest in the decedent, which should be shown by the descendant, is necessary to judge with respect to the circumstances of the specific case; if the fact that the descendant permanently fails to show true interest in the decedent is a consequence of the fact that the decedent fails to show interest in the descendant. There cannot be concluded, without further evidence, that the descendant's failure to show an interest could have been the reason for disinheritance thereof.* Supreme Court judgment of November 27, 2007, file No. 21 Cdo 3435/2006.

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