Recent Challenges of Public Administration
Papers presented at the conference of
‘Contemporary Issues of Public Administration’
on 26th April 2017

Lectiones Iuridicae
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PREFACE

Public administration is bureaucracy in the positive sense of the idea. Max Weber defined bureaucracy in his typology of powers as the most effective organizational form. His critics aimed to demonstrate that bureaucracy could never be effective, because it is unfit for correcting itself compared with committed defects. 'Modern' public administration is a concept of qualities and values that contains the capacity of self-correction. 'Modern' public administration reflects more than a 'contemporary' or an 'actual' sense; it is also able to take into adaptations and innovations. 'Modern' public administration implements the *sine qua non* elements of the ideal type of bureaucracy, but in addition to this, it uses the new forms of public cooperation and communication at the same time, and creates limited scope for changes and flexibility.

The needs of innovation and adaptation in public administration have many sources. First, the metamorphosis of the infrastructural and technical conditions of the administration is worth mentioning. To use a medical analogy: the 'diagnostical' potential of the public administration increased on a huge scale. It must be evident that the potential power and organization of the public administration should be in harmony with growing possibilities. The quality of the public administration of a rule-of-law-state still depends on the relation between possibility, capacity, and effectivity.

The motive for change and adaptation is in transformation along with the territorial dimension of the public administration. Public administration still belongs to the nation state but in a different manner as it used to be. The phenomenon of globalization could be followed by the public administration, if it spills over limits of the national state. The regionalization and self-governments make a new constitutional situation, from which the nation state seems as a confederation of several administrative bodies. The basic question is therefore if this kind of fragmentation correspond to the basic function of public administration.

For public communities, which are sometimes identical with the national state, sometimes wider or less than the state, is an earnest of success that the public administration would be equal to the requirements of changing conditions. The recognition of the needs and conditions, and the searching for methods of adjustment to them is not futurology, but is a special field of scientific thought. Every initiative which makes this aspects for the matter in dispute is welcome.

The *Department of Public Administration Law of the Faculty of Law and Political Sciences in Szeged* is devoted to a comprehensive approach of facts and development of public administration. The manifestation of the mission of our department was a round-table conference organized recently by any enthusiastic colleges. The edited version of the presentations is here accessible for the gentle readers. It is to be hoped that the below published studies contribute to the better understanding of 'modern' public administration.

Benevolo lectori salutem!

Szeged, 17TH July 2017

Dr. habil. Albert Takács, CSc.
Head of Department of Public Administrative Law

EDITOR'S NOTE

The idea of having collegial gatherings to share some thoughts related to public administration has long been desired. Research work should not be *l'art pour l'art*; it is important to get to know each other's results, to explore the matching points to introduce the new waves to the scientific profile of the Department. Last but not least, it is also our mission to give students the possibility to set the frames for expanding their knowledge beyond the obligatory material on public administration and public administrative law and show some actual challenges of the and recent developments in legal literature.

This volume is the first manifestation of such event which was organised to welcome our Polish Erasmus partner, *Dr. habil Krystyna Nizioł* from the University of Szczecin. Her visit gave the opportunity to come together and discuss some actual challenges of public administration via our own research fields. On 26th April 2017 lecturers and PhD students presented interesting topics on financial, domestic, and international aspects of public administration. Our future aim is to continue this kind of scientific programs and by time involve a bigger number of participants from both sides to create a less formal but rather fruitful gathering with academic persons and interested and hard-working students who wishes to expand their knowledge and taste the academic life.

As organiser, I would like to thank to the participants for their valuable contributions to the event and the dynamic chairing of our Head of Department, *Dr. habil Albert Takács* who encouraged and supported the event from the very first moment of planning. I would also like to express my gratitude to our Dean, *Prof. Dr. Elemér Balogh*, former Head of department, who supported our work and made the publication of the volume possible.

The dice is set, the foundation stone is laid and we look forward to having many more pleasant and fruitful afternoons and valuable volumes in the future.

Szeged, 17th July 2017

Dr. Erzsébet Csatlós, PhD
Senior lecturer
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PANEL I – FINANCIAL LAW

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THE ECONOMIC AND LEGAL CONSEQUENCES BETWEEN CHOOSING PUBLIC DEBT OR INCREASE TAX BURDEN

I. Introduction

There are two ways of limiting budget deficit by the authorities. The first one is to take public debt and the other is to increase tax rates. Each of these methods entails specific economic consequences. In case of taking the public debt the most important factor is the subject and object scope of it and the limits of the public debt (so called fiscal rules). The other way of increasing budget incomes is to increase tax rates. Tax is an obligatory tribute. Therefore, the taxpayer is obliged to pay it. What must be taken into consideration by the authorities is the economic consequences of both these ways of increasing budget revenues. Therefore, the choice between taking the public debt and increasing tax burden depends on many different features, such as: the contemporary economic situation, the economic policy, or the limits of public debt (if they are close to be exceeded it is difficult to take another public loans).

The article analyzes the issues connected with the public debt and taxation, such as: economic, financial, and legal definitions of public debt (especially in Polish and European financial law), limits of the public debt and chosen economic consequences of public debt and taxation.

II. Economic, financial, and legal definitions of public debt

II.1. Economic and financial definition of the public debt

There are multiple definitions of public debt in the economic literature. *D. Begg, S. Fischer, R. Dornbusch* define public debt as the sum of the state's borrows which are to repay[1]. According to another definition, public debt is the amount of interest-bearing liabilities the state toward the society[2]. In Polish economic literature, public debt are financial liabilities

[1] Begg, David – Fischer, Stanley, Dornbusch – Rudiger: *Ekonomia* [Economics], Vol. 2, Warsaw, 1995.68.p.

[2] Barro, Robert: *Makroekonomia* [Macroeconomics], Warsaw, 1997. 638. p.

of the authorities (*i.e.* state, municipal and local) connected with loans[3]. Another definition defines the public debt as total liabilities of legal entities belonging to the public sector to entities outside the public sector or the total amount of liabilities, which must be repaid from public funds[4].

In Polish finance literature, public debt was also defined in many ways. For example, *M. Bitner* and *E. Chojna – Duch* define it as aggregated and consolidated value of the liabilities of entities belonging to the public sector (from different titles)[5]. Another author, *C. Kosikowski* defines the public debt as liabilities the entities belonging to the public sector connected with financing of the deficit of the public sector and the budget deficit[6]

II.2 The legal definition of public debt in the Polish finance law (the Constitution of the Republic of Poland[7], Polish Finance Act[8])

The legal definition of public debt is "the state public debt". For the first time, this definition has been used in the article 216 paragraph 5 of the Constitution of the Republic of Poland of 2ND April 1997. Consequently, this definition was used in all Public Finance Acts, which were issued afterwards (in 1998, 2005 and 2009). Currently, the Act of 29th August 2009 on Public Finance is in force (further referred to as PFA). The definition of state public debt related to, among other things, a way of calculating and financing of public debt. The method for calculating the debt referred to in Article 73 paragraph 1 of PFA, according to which public debt is calculated as the nominal value of the liabilities of public sector entities after the elimination of mutual obligations between individuals in the sector (after consolidation).

In PFA public debt is classified as State Treasury debt and National/State debt. State Treasury Debt is the debt taken by the State Treasury (*i.e.* the central government sector). National/state public debt is the debt taken by the all entities belonging to the public sector (i.e. central government sector and the local government sector).

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[3] Owsiak, Stanisław: *Finanse publiczne. Teoria i praktyka* [Public Finance. Theory and Practise], Warsaw, 2006. 330. p.

[4] Malinowska-Misiąg, Elżbieta – Misiąg, Wojciech: *Finanse publiczne w Polsce* [Public Finance in Poland], Warsaw-Rzeszów, 2006. 637. p.

[5] Bitner, Michał – Chojna-Duch, Elżbieta: *Dług publiczny i deficyt sektora finansów publicznych* [Public debt and the deficit of the public finance sector] In: Prawo finansowe [Finance Law], E. Chojna-Duch _ H. Litwińczuk (ed.), Warsaw, 2007. 121. p.

[6] Kosikowski, Cezary: *Finanse publiczne i prawo finansowe* [Public Finance and Finance Law], Warsaw, 2001. 214. p.

[7] The Constitution of the Republic of Poland of 2nd April, 1997, Journal of Laws (Dziennik Ustaw) No. 78, item 483 with amendments.

[8] The Act of 29th August 2009 on Public Finance, Journal of Laws (Dziennik Ustaw) from 2013, item 785 with amendments.

II.3. The definition of public debt in the European finance law (Growth and Stability Pact[9])

In the EU financial law, the term 'public debt' may be defined in connection with excessive deficit procedure (further referred to as EDP). The excessive deficit procedure is applied to all European Union member states[10]. It was established by Article 126 of the Treaty on the Functioning of the European Union[11] (further referred to as TFEU). One of the reference values of this procedure is the 60% criterion for the ratio of government debt to gross domestic product at market prices (GDP), set in Article 1 of the Protocol regarding the excessive deficit procedure and annexed to TFEU (further on called 'Protocol'). In Article 2 of the Protocol the terms 'public' and 'debt', relating to this ratio, were specified. 'Government' means 'general government, that is central, regional or local government and social security funds, to the exclusion of commercial operations', as defined in the ESA 95 system (currently it is ESA 2010[12]) but regulation concerning this matter has not been changed yet. On the other hand, 'debt' means "total gross debt at nominal value outstanding at the end of the year and consolidated between and within the sectors of general government" as defined above. Thus, it has been clearly stated that the matter in question is the gross public debt and moreover, all mutual obligations between the sectors of general government were eliminated, that is only the consolidated value was considered. In this way, as 'government' the general government (S.13)[13] was identified, that is 'central government' (S.1311), 'state government' (S.1312), 'local government' (S.1313) and 'social security funds' (S.1314), to the exclusion of commercial operations as defined in ESA 95/ESA 2010 (which means that the general government sector is constituted solely by entities whose main activity is providing non-market services). This Regulation defines the 'government debt' as "the total gross debt at nominal value outstanding at the end of the year of general government (S.13), with the exception of those liabilities the corresponding financial assets of which are held by the sector of general government (S.13)".

III. The legal regulations applied to Poland and UE[14]

The Constitution of the Republic of Poland bans on contracting loans and granting guaranties and sureties resulting in the public debt exceeding 3/5 of GDP (Article 216 paragraph 5).

In the Polish Public Finance Act were established regulations on public debt such as: definitions, basic principles of issuing public debt and debt management, prudential and remedial procedures applied to public debt levels, definition of the scope of the public

[9] Further referred to as GPW.

[10] The pinpointing of this procedure was stated in the Stability and Growth Pact applied by all EU member states. Though, its restrictive part does not refer to states which are not members of the Economic and Monetary Union, being subject to derogation in that respekt. Orędziak, Leokadia: *Finanse Unii Europejskiej* [European Union Finances], Warsaw. 2004. 59-66. p.

[11] Journal of Laws UE C 115 from 9.5.2005, p. 47.

[12] Regulations No 549/2013 of the European Parliament and the Council of 21 May 2013 on the European system of national and regional accounts in the European Union, called ESA 2010.

[13] The codes given in brackets refer to ESA 95.

[14] The Public Finance Sector Debt Management Strategy in the years 2014-2017, Warsaw, 2013. *passim*.

finance sector. In the Treaty on the Functioning of the European Union were regulated down the level of general government debt and restrictions applied to general government deficit constitute the criterion on the basis of which the Commission examines the compliance with budgetary discipline in Member States (Article 126) – specifies the so called Excessive Deficit Procedure (EDP). In the Protocol on the excessive deficit procedure annexed to the Treaty Establishing the European Community and the Treaty on the Functioning of the European Union were established the definition of general government debt and reference value of debt to GDP ratio at 60%. The Council Regulation on the Application of the Protocol on the Excessive Deficit Procedure annexed to the Treaty Establishing the European Community includes the definition of general government debt with specification of categories of liabilities which constitute it. In the European System of Accounts (ESA 95/ESA 2010[15]) were established the definition of categories of financial liabilities and definition of general government sector.

IV. The main differences in general government debt – Polish and EU definition

The first difference is the scope of the public finance sector. Public Finance Act defines limited catalogue of units included in the public finance sector. The funds formed within *Bank Gospodarstwa Krajowego* (BGK), *e.g.*: the *National Road Fund* (KFD), the *Railway Fund* (FK) are excluded from the Polish public finance sector. In the EU regulations funds formed within *Bank Gospodarstwa Krajowego*, *e.g.*: the *National Road Fund* and the *Railway Fund* are included in the general government sector. Moreover, the public corporations that do not cover at least 50% of its costs by its sales are excluded from the Polish public finance sector. In ESA 2010 the scope of general government sector was no limited catalogue of units is defined.

Another difference between these two legal acts is connected with the liabilities which constitute public debt. In PFA were established liabilities such as securities (excluding shares); loans (including securities whose disposal is limited); deposits; matured payables (*i.e.* liabilities due but not settled). In EU regulation, there are liabilities such as matured payables; unnamed contracts connected with financing of services, goods or construction works that produce economic effects similar to loan. The restructured or refinanced trade credits (including those with original maturity of one year or less) are included in loan category.

The third difference is connected with the contingent liabilities in treatment of contingent liabilities in debt-to-GDP ratio. In Polish regulations, there are not included. The EU limitations do not take directly into account contingent liabilities generated by issued sureties and guarantees. When specific criteria are met (in line with ESA'95 rules) contingent liabilities should be treated as debt assumed by the entity which issued surety or guarantee.

[15] The ESA 2010 was applied for the first time to data transmitted from 1st September 2014.

V. Supranational public debt and deficit limits

The instruments which are used to limit the public debt or budget (or public) deficit are fiscal rules. Fiscal rule is defined as permanent limitation of fiscal policy, usually defined in form of synthetic total index (*i.e.* admissible) of fiscal result (budget)[16]. The aim of fiscal rules is *i.e.* limitation of increase of defined economic values above established limit (*e.g.* public debt, public deficit, public expenses). That is why fiscal rules can be used as one of instruments of fiscal consolidation. Literature provides with traits, which should an optimal fiscal rule possesses in order to be effective in praxis. The above-mentioned criteria refer to fiscal rules of supranational nature[17].

An optimal fiscal rule should be *i.e.* simple, easy for verification, maintain financial liquidity of public authorities, should not determine optimal size of public sector, should enable functioning of automatic stabilizers of economic situation and not encourage to use tools of procyclical interaction, should have long-term character, take into consideration diverse situation of Economic and Monetary Union of the EU, should have universal character i.e. be used at the level of economies of respective EMU countries, and the whole Eurozone, be credible, be used unbiased and consistently[18]. One of conditions of efficiency of a fiscal rule is aim defined numerically i.e. as limitation of national fiscal policy in form of general budget results such as expenses, loans, debt. Moreover, these rules should be also connected with procedural reforms of budget institutions, which are conducive to responsible fiscal behavior. Empirical researches confirm that connection of these both kinds of rules supports maintaining budget discipline effectively[19]. Other requirements which should be met by a fiscal rule are *i.e.* precise determination of a budget index to which a given rule refers; providing it with a respective legal importance by standardizing it in constitution, or an act; clear premises of the fiscal rule, which is understood by the public; determination of sanctions against not obeying it and body responsible for imposing them; choice of a rule in accordance to chosen economic and financial strategy of a country in the medium and long term perspective[20].

Fiscal rules are classified basing on different criteria. At present one can distinguish fiscal rules of supranational character (fiscal criteria concerning deficit of general government sector and public debt) and national fiscal rule (in particular EU countries). Fiscal rules can be also classified as: quantity rules (based on the numerical aim) and quality ones (concerning *i.e.* budget procedure), rules concerning determined economic category *e. g.* budget expenses, budget deficit, public debt, rules defined at the fiscal central and local level. Fiscal rules in a given EU country are usually determined both at the fiscal central and local level. Similar solution was applied in the Polish Fiscal Law, which standardized both fiscal rules concerning public debt (including liabilities of the whole sector of public

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[16] Kopits, George – Symansky, Steven: *Fiscal Policy Rules*, IMF, Occasional Paper 1998/162. 2. p.

[17] Buiter, Willem: *The commandments for a fiscal rule in E(M)UM*, London, 2003. 6-8. p.

[18] Buiter 2003, 6-8. p.

[19] Buti, Marco – Guidice, Gabriele: *EMU's fiscal rules: what can and cannot be exported*, European Commission, 2002. 3-6. p.

[20] Marchewka-Bartkowiak, Kamila: *Fiscal rules*, Analyses of the Bureau of Research of Sejm 2010/ 7. 3. p.

finances also units of local authorities), as well as limit of debt referring to respective units of local authorities[21].

Two fiscal rules of supranational character were standardized in the EU financial law. These are fiscal convergence criteria concerning public debt and public deficit. They are bound with so called procedure of excessive deficit defined in the Article 126 of the Treaty of Functioning of the European Union. The requirements of budget discipline (Art. 126 TFEU) are like follows. Firstly, the ratio of planned or real budget deficit to the GDP should not exceed 3% GDP, unless: the ratio decreases considerably, is stable and reaches the level close to reference value, exceeding reference value is exceptional and temporary and the ratio remains close to reference value. Secondly, the ratio of public debt- to-the-GDP should not exceed 60% of the GDP unless: the ratio decreases sufficiently and approaches reference value in satisfactory pace.

In Polish financial law, there is also the constitutional public debt rule (Article 216 paragraph 5 of the Constitution of the Republic of Poland), which is one of the main fiscal rule in Polish finance law. According to this Article "It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product." The Polish Ministry of Finance controls if above rule is obeyed.

In PFA were also established, mentioned above, the caution and sanative procedure (article 86-88 PFA).

They are activated in case when public debt exceeds the threshold of 55% and 60% GDP. Procedures mainly limit the amount of state budget deficit, local authorities' deficit, and the possibility of providing new guarantees. When debt-to-GDP-ratio exceed 55% or 60% the Council of Ministers prepares the recovery program. It shall contain: specification of the reasons for the development of the state public debt ratio (*i.e.* 55% or 60% GDP), a program of measures designed to lead to a lowering of above mentioned ratio, taking into account the analysis of quantitative limits and other legal circumstances, a three-year forecast concerning the ratio of the state public debt to the gross domestic product along with the predicted macroeconomic developments of the country. The provisions shall not apply in the case of the introduction of a state of emergency, making impossible or significantly hampering the execution of the recovery program.

VI. Fiscal rules as an instrument of fiscal consolidation

Fiscal consolidation of public finances is connected with notion of fiscal adjustment. Periods of fiscal adjustments base on observed changes of budget deficits in relation to GDP. Nevertheless, these criteria are contractual, because fiscal consolidation can also be determined for every year in which there is positive change of budget balance[22]. Decrease

[21] Nizioł, Krystyna: *Prawne aspekty długu publicznego*, [The legal aspects of public debt], Szczecin. 2013. *passim*.

[22] Gupta, Sanjeev – Clements, Benedict – Baldacci, Emanuele – Mulas-Granados, Carlos: *Expenditure Composition, Fiscal Adjustment, and Growth in Low – Income Countries*, IMF Working Paper 2002/77. 22. p.

of basic structural deficit by at least 1.5% GDP within a year, or at least 1.2 % GDP within two years can set as an example of expansive fiscal consolidation[23].

Fiscal consolidation, in a wide sense, aims at decreasing amount of budget deficit as well as amount of the public debt[24]. Issues concerning fiscal consolidation have become a very crucial problem at the times of economic crisis, which has led to debt crisis in many countries. However, the increase of the public debt is not only consequence of the economic crisis, but also fiscal policy of a given country, especially amount of expenses for health care and retirement pensions[25].

Social and economic consequences of the economic crisis initiated number of changes in the EU Fiscal Law including ones connected with consolidation of public finances. One should pay attention to *i.e.* changes which aim at strengthening coordination of economic policies in the EU which are made on the way of strengthening of the preventive and corrective part of the Stability and Growth Pact, strengthening budget supervision in the Eurozone, as well as introduction of new frames of institutional, macroeconomic supervision. Execution of new requirements concerning preventive and corrective part of SGP by EMU countries has been strengthened, through introduction of new sanctions included in frames of the budget supervision (*i.e.* duty of placing on deposit equal to 0.2 % GDP, which could turn into fine)[26]. Moreover, new frames of macroeconomic supervision were introduced. Procedure of excessive disturbance of balance within which a warning mechanism is to be worked out, basing on the identification of disturbances of macroeconomic balance established on the basis of tables of macroeconomic indexes created for every EU country with indication of alarm thresholds is to be a new tool of this supervision. Sanction (reaching 0.1% GDP in the previous year) was also introduced in this case, if disciplinary actions which are undertaken earlier are not effective and successful. Introduction of so called European Semester, which aims at assuring closer coordination of economic procedures and achieving stable convergence of economic results of the member countries, constitutes subsequent change. The Council leads multi-sided supervision for coordination of economic policy in accordance with aims and requirements foreseen in the TFU, which includes such actions, as an assessment of stability program, or program of convergence of member stated, supervision which aims at prevention of disturbance of macroeconomic balance and its correction within the frames of the European Semester[27].

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[23] Bukowski, Maciej – Kowal, Paweł – Lewandowski, Piotr – Zawistowski, Julian: *Structure and level of expenditures and revenues of the sector of public finances and the situation at the labour market. International experiences and conclusions for Poland* [Struktura i poziom wydatków i dochodów sektora finansów publicznych a sytuacja na rynku pracy. Doświadczenia międzynarodowe i wnioski dla Polski], National Bank of Poland, Warsaw, 2005. 131-133. p.

[24] The OECD Economic Outlook: Sources and Methods, OECD 2001, http://statp.oecd.org/glossary/detail.asp?ID=984 (04.06.2017).

[25] Sutherland, Douglas – Hoeller, Peter – Merola, Rosanna: *Fiscal consolidation: How much, how fast and by what means?* OECD Economic Policy Papers 2012/1. 11-13. p.

[26] Regulation of the European Parliament and Council (UE) No 1176/2011 of 16th November 2011 in case of prevention of disturbances of macroeconomic balance and their correction (J.L. L of 2011 No 306, item. 25).

[27] Regulation of the European Parliament and Council (UE) No 1174/2011 of 16th November 2011 in case of enforcement of correction means of excessive of disturbances of macroeconomic balance in the Eurozone (J.L. L of 2011 No 306, item. 8).

Guidelines for EU member states, which are taken into consideration by these countries in shaping their economic, budget, employment policies before making crucial decisions concerning national budget for subsequent years, are made after assessment of these programs. If a member state does not comply with above mentioned guidelines it exposes to defined sanctions, such as ex. warning of Commission issued on the basis of Article 121 item 4 of TFU[28]. These are not all changes, which aim at counteracting the debt crisis in the EU countries. Fiscal rules are instrument which was created for it. One of changes in the EU financial law in introduction of these rules along with rules of supranational character concerning public debt and deficit, also at the national level in EU countries[29].

VII. Limits on the public debt-to-GDP ratio in the Polish Public Finance Act

In the PFA were established the legal procedures regarding limits on public debt to GDP ratio. There are two thresholds connected with the debt-to-GDP ratio. If one of them will be exceed there are established some restrictions. The first threshold is established for the ratio if in year x the public debt is greater than 55% and lower than 60%. In that case *e.g.*: it is assumed the lack of deficit or the difference between state budget revenues and expenditures in draft budget act adopted by the Council of Ministers for the year x+2 must ensure the decrease in State Treasury debt to GDP ratio as compared to the ratio announced for the year x, in draft budget act adopted by the Council of Ministers for the year x+2; no increase in salaries of public sector employees is assumed, revaluation of pensions must not exceed the CPI[30] level in the budgetary year x+1, ban on granting new loans and credits from the State budget is introduced. Moreover, in that case the Council of Ministers make a review of: State budget expenditures financed by foreign credits, long- term programs. The Council of the Ministers make also a review of regulations in force to propose possible legal solutions which influence state budget revenues, including VAT rates, increase of VAT[31] rates for subsequent 3 years is introduced. The second ratio is established for the ratio in year x is equal to or greater than 60% *e.g.*: in that situation when above mentioned procedures (in case of the ratio greater than 55%, and lower than 60%) are used, budgets of local government units for the year x+2 must at least be balanced; a ban on granting new sureties and guarantees by public finance sector entities is introduced. Moreover, the Council of Ministers presents to the Parliament a remedial program with the main objective to prepare and implement actions aimed at reducing the public debt-to-GDP ratio below 60%.

[28] Article 2a Regulation of the Council No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic Policies, OJ L 209, 2.8.1997, p. 1–5.

[29] Article 2a Regulation of the European Council No 1466/97, Council's directive 2011/85/UE of 8th November 2011 in case of requirements for budget frames of member states (J.L. UE L of 2011 No 306, item. 41).

[30] Consumer Price Index – one of the index of the inflation.

[31] Value Added Tax.

VIII. The reasons of taking public debt (*inter alia* budget deficit)

In Polish financial and economic literature[32] as the reasons of taking the public debt usually are featured as *e.g.*: taking the public debt for the unusual economic and social purposes such as investment expenses. For example, that kind of public expense connected with the need of building the state's structure after regaining the independence of Poland in 1918. In the 1921-26 over 90% of the public debt had been incurred for this reason[33]. Another investment expense, which explains incurring of the public debt are this, which are necessary to build some objects for the society such as hospitals, schools, roads etc. and there are no current incomes to budget for financing this aims. Basically, the public debt should be taken for "productive" reasons in economic sense. It means it should not been incurred for consumption reason such as financing expenses which in the future will not give incomes to the budget.

In theory, the State should follow the principle of balanced budget, which tells that the budget balance is the difference between budget's revenues and spending. A positive balance is called a budget surplus, and a negative balance is called a budget deficit. It means, that the budget expense should equal budget incomes over the course of an accounting period, usually one year. Unfortunately, in many cases the source of the public debt is the budget deficit which is the difference between income and expenditure of the state budget. In fact, the main source of the public debt in Poland is the deficit of the public finance sector (equivalent of general government sector in European financial law), which is negative difference between public income and public expenditures of the public finance sector (after consolidation *i.e.* after eliminating cash flows between entities belonging to this sector).

In Polish financial law, there is also another legal category connected with the public debt. In Polish Finance Act the budget deficit is an element of the loans needs of the State budget. The loan needs of the State budget are the financial resources necessary for financing the state budget deficit, other expenditure required for repayment of commitments drawn earlier *e.g.* repayments of acquired loans and credits, redemption of securities and other financial transactions. The main two components of the loan needs of the State budget are budget deficit and repayment of commitments drawn earlier. A deficit of the state budget may be covered with revenues derived, *inter alia*, from: the sale of Treasury securities on the domestic and foreign market, credits drawn in domestic and foreign banks, loans, from privatization of assets of the State Treasury, a surplus of the state budget from previous years.

Article 72 paragraph 1 PFA established that state public debt shall consist of commitments of the public finance sector under the following: issued securities for cash liabilities, drawn credits and loans, accepted deposits, payable commitments of budgetary units, resulting from laws and court decisions, extended guarantees and other.

In PFA Treasury securities are divided into those that may be issued as: short-term Treasury securities with an original maturity of no longer than one year (among other T-bills) and more than one year (among others government bonds). Treasury securities may be issued within the indebtedness limit defined in the Budgetary Act. The State Treasury

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[32] See for example Głąbiński, Stanisław: *Wykład nauki skarbowej* [The Lecture of Fiscal Science], Lwów, 1902. 572-574. p., Radziszewski, Henryk: *Nauka skarbowości państwowej i gminnej*, [Fiscal Science], Warsaw, 1917. 458 – 460 p.

[33] Zajda, Józef: *Długi państwowe Polski*, [The Polish Public Debts], Warsaw, 1927. 3-5. p.

may draw loans and credits only for financing the needs. The amount of drawn loans and credits may not exceed the limit of debt increase defined in the Budgetary Act.

IX. Economic consequences of public debt and taxation

Economic consequences of public debt and taxation are similar. Choosing one of them depends on, *inter alia*, contemporary rate of taxation, the public spending we want to finance in this way and its economic consequence.

Incurring public debt *inter alia*: we receive financial means at once and the cost of servicing public debt is spread in time[34], but it usually leads to increase of tax rate, creditors can choose the amount of obligations they want to buy, creditors can choose the time of buying obligations, transfers budget incomes form tax to the creditors – in form of debt servicing costs, debt burden for the next generations, causes decrease of global spending power, public debt can be an instrument of changing the structure of economy (*e.g.* financing of capital spending)[35].

In fact, the choice between public debt and taxation depends on *e.g.*: the contemporary economic situation, the amount of public debt, the aims of economic policy.

The other consequences are connected with taxation. It must be stressed that tax is an obligatory imposition. Taxation *inter alia* causes: lack of cost connected with servicing of public debt. Moreover, after paying a tax taxpayer can spend less money for buying goods (his disposable income is smaller). The exceeding the limit of taxation burden could cause the decrease of budget's tax incomes (dependence illustrated by curve of Laffer). Taxation also leads to impoverishment of taxpayer, tax burden of contemporary generation and the increase of indirect taxation is inflation (tax shifting to prices of foods)[36].

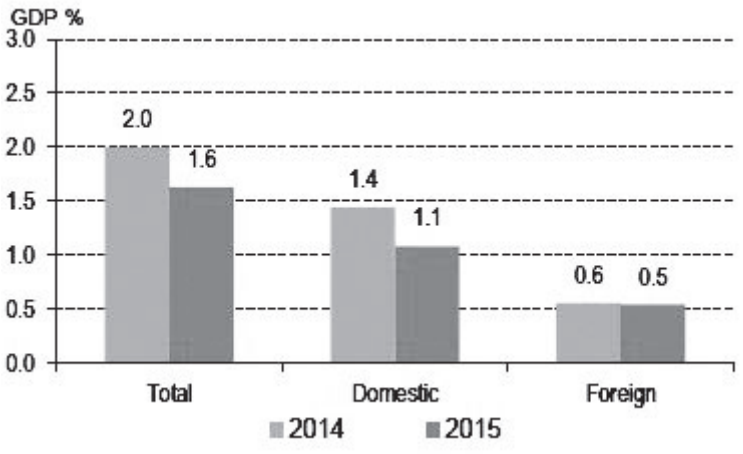
X. Statistical data

One of the important consequence of taking public debt are debt servicing cost connected with it. Below Figure no 1 shows the State Treasury debt servicing costs in Poland in years 2014-2016. In the year 2015, they were 2% of GDP and decreased to the level of 1,6% of GDP in the year 2016.

[34] For example, in PFA there is legal definition of expenditures for servicing the State Treasury debt. Expenditures for servicing the State Treasury debt shall in particular consist of state budget expenditures due to interest and discount on treasury securities, interest on drawn credits and loans as well as payments related to guarantees granted by the State Treasury.

[35] Rybarski, Roman: *Nauka skarbowości* [The Science of Finanse], Warsaw, 1935. 363-364. p., Gaudemet, Paul Marie – Moliner, Joel: *Finanse publiczne* [Public Finance], Warsaw, 2000. 358-363. p.

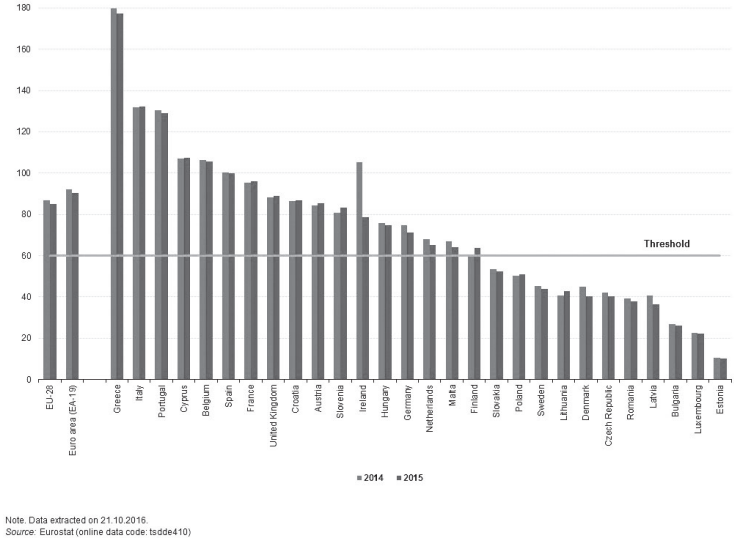
[36] Dalton, Hugh: *Zasady skarbowości*, [The Principles of Public Finance], Łódź, 1948. 216. p.; Gaudemet, Moliner 2000, 358-363. p.



1. The State Treasury debt servicing costs in Poland in years 2014-2016. Source: The Public Finance Sector Debt Management Strategy in the years 2017-2020, Warsaw 2016.

Figure no 2 presents the general government consolidated gross debt in the EU member states in the years 2014-2015 (% of GDP). Only in eleven EU member states the amount of public debt is under the fiscal criterion of debt-to-GDP. In other EU member states the criterion is exceeded. Also, the average amount of public debt in the UE-28 and Eurozone exceeded the public debt limit.

Figure no 3 shows total revenue from taxes and social contributions in the EU-28 and Eurozone-19 in the years 1995-2015.

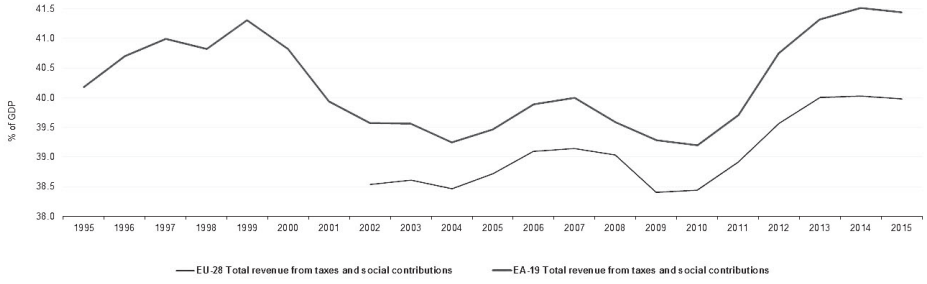


Note. Data extracted on 21.10.2016.
Source. Eurostat (online data code: tsdde410)

2. General government consolidated gross debt in the member states of the EU in the years 2014-2015 (% of GDP). Source: Eurostat.

Figure no 3 shows total revenue from taxes and social contributions in the EU-28 and Eurozone-19 in the years 1995-2015. In the year 2008, after the financial crisis, the total

revenue and social contributions decreased. Since the year 2010 they started to increase. It can imply, that (especially since the year 2011) in many EU member states the taxation was higher than before the financial crisis and that the economic situation was improving (and, in the result, the taxpayers paid more taxes to the budget).



3. Total revenue from taxes and social contributions, EU-28 and EA-19 % of GDP, 1995-2015. Source: Eurostat.

XI. Closing Remarks

It is commonplace that the budget balance rule is not respected. The most frequent reason for such state is the budget deficit. It means that the budget spending exceeds the budget revenues (in a period of one year). It can be caused by various factors, for example the economic policy which aims at stimulating the economic activity in the period of global depression. Regardless of the reasons that lie behind the budget deficit, there are two possibilities of limiting it. The first one is to take public debt. One of the biggest drawbacks of that solution is the cost of servicing public debt. The other issue is the reason for taking public debt. It must be stressed that the reasons for taking public debt should be" productive" in economic sense (it means not consumption but investment). Moreover, public debt cannot be taken, if the public debt limits are exceeded (or are close to it). The aim of these limits is the fiscal consolidation (so, in fact, keeping the amount of public debt at the level which is optimal for the national economy). The other solution for increasing state budget revenues is to increase tax rates. This solution also bears specific economic consequences. They depend on the kind of tax (*e.g.* indirect tax such as VAT is a better source of improving budget income than direct tax such as personal income tax). It should be also noticed that the tax rate and budget income depend on theoretical dependence which is illustrated on Laffer's curve - exceeding the limit of taxation burden could cause a decrease in budget tax income. In fact, the choice between public debt and taxation depends on *e.g.*: contemporary economic situation, the amount of public debt, the aims of economic policy. Therefore, the best summary of these problem is the following citation: 'The best proves for original, different character of both kinds of financing – public loan and tax – is that the choice one of them is the most delicate problem of the finance policy. Its solution depends on the justification of the reason of taking the public loan.'[37]

[37] Gaudemet, Moliner 2000, 363. p.

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TAXATION AND EMOBILITY – ALTERNATIVES IN THE FIELD OF TAX TREATMENT OF COMPANY CARS IN HUNGARY

I. Foreword

In 2015, world leaders pronounced that after a quick negotiation, an ambitious agreement was managed to be established in Paris by nearly 200 countries. The main goal of the Paris Agreement[1] is to hold the increase in global average temperature well below 2 degrees Celsius (i.e. above the pre-industrial level).[2]

The approach of the Kyoto Agreement was changed, where the main aim was to limit the emission of Greenhouse Gases (GHG). On the contrary, the Paris Agreement focuses on the results of the efforts of the Parties. It must be underlined that however the implementation of the agreement is based upon equity and the principle of common responsibility, the responsibilities and the respective capabilities are differentiated in light of the different national circumstances. Thus, in the progress of environmental protection under the Paris Agreement, fulfilling the accepted commitments should be considered pretty seriously.

II. Introduction

According to the data of the European Automobile Manufacturers Association (ACEA), 13.7 billion cars have been registered in the EU 28 and the increase of the number of the registered cars can reach 9.3 % compared to the previous year.[3] Hungary shows a more dynamic increase in this field with 19 %.[4] Furthermore, there are 256.1 million passenger cars on Europe's routes, which is a significant contribution to the GHG emission of this sector.

[1] The 2015 UN Climate Change Conference took place in Paris and that was the 21st Conference of the Parties to the 1992 UN Framework Convention on Climate Change. The Conference negotiated the Paris Agreement which aimed to limiting the global warming to less than 2 degrees Celsius. This goal is linked to the reduction of the level of the GHG emission and compared to the level of the GHG emission in 1990.

[2] Paris Agreement 2015 Article 2. Paragraph 1.

[3] The Automobile Industry Pocket Guide 2017-2018.

[4] Calculating mine. Based on the official report of the number of the new registered passenger cars, sorted by manufacturers. Retrieved from the Official Website of the Hungarian Central Statistical Office (http://www.ksh.hu/docs/hun/xstadat/xstadat_evkozi/e_ode001b.html, (21.07.2017.).

Similar historical booms on the market of the passenger cars had significant environmental and other social impacts as well. The numbers of passenger cars used for commuting results in congestion and heavy traffic and the wear-and-tear of the public roads cause more and more accidents including injuries and damages on the routes, while neutral tax treatment allows the employer to reduce the costs of wages by shifting the remunerations to pretty generous tax-rated fringe benefits. This competitive advantage of larger firms modifies the perspectives of capital-intensive companies to get better-qualified workers on the labor market and of course, means higher income for the employees.[5] On the other hand, increasing local pollution, such as air, noise and also vibration, also should be taken into account as the root cause of the rising of other social costs.

This paper is concerned with the root causes of the development of the number of passenger cars and the increasing ratio of exhaust fumes.

Although all the OECD countries, except Mexico, levied income tax on the personal usage of company cars, Hungary shows a neutral treatment on such personal income in kind. This neutral tax policy also raises questions regarding the achievement of the environmental goals of the Paris Agreement in connection with GHG emission not only in connection with missing fiscal revenues.

III. Natural treatment of income taxation after personal usage of company cars in Hungary

Before 2009, company car tax as a personal income tax in kind was levied after the personal use of company cars.[6]

The tax base depended on the acquisition value of this kind of asset and the time of procurement. The base of this tax was separated, calculated upon the term since the acquisition thereof, and the lower tax base was to be considered after the 5th year of purchase. The tax was to be paid by the employer as the owner of the company car. After 2009 it was clarified, that company car tax should be considered as a special wealth tax and personal income tax (PIT) was not imposed anymore.[7] According to the current regulation of PIT, the use of a motor vehicle supplied by a payer or non-resident legal person for private purposes, including the related road passes or tickets provided by the said payer or non-resident legal person, falls under exemption of taxation.[8]

It should be emphasized that there are narrow differences between the distortion created by tax loopholes, tax subsidies and direct government outlays.[9] It also means that the exemption affects the whole system of income taxation of wages and causes inequality.

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[5] Harding, Michelle: *Personal Tax Treatment of Company Cars and Commuting Expenses: Estimating the Fiscal and Environmental Costs*. OECD Taxation Working Papers No. 20., Paris, 2014. 9. p. (.http://dx.doi.org/10.1787/5jz14cg1s7vl-en (21.07.2017.).

[6] Section 70 Act CXVII of 1995 on Personal Income Tax.

[7] The modifying Act placed the regulation related to company cars tax into the Chapter IV Act LXXXII of 1991 on vehicles tax. Naturally, company car tax shall be considered in dealing with the current topic, but here, it must be underlined that the subject of the income taxation is different from it.

[8] Subparagraph 3 paragraph (2) Section 238 of Act LXXXI of 2008 on Modifying of Certain Acts on Tax and Contributions.

[9] Pechman, Joseph A.: *Tax Reform: Theory and Practice*. Economic Perspectives. (1) 1987. 13. p.

In Hungary, the revenues from wages constitute a consolidated tax base with the average tax rate[10] of 33,5 percent.[11]

Certain incomes after such revenues are taxed separately, including fringe benefits, which are subject to higher tax rates. In such environments, the importance of tax-free remuneration is high, thus capital-intensive employers, which can provide company cars for personal purposes or other diversified remuneration, obtain huge competitive advantage on the labor market thereby. Furthermore, it is an incentive for both employer and employee to shift the costs of the wages in the direction to the tax-free solution. That is why small individual entrepreneurs also choose this method to make themselves more desirable for employees.

On the employee's side, the system differentiates between workers from the point of view of commuting expenses to and from work. While the usage of private cars for commuting purposes is bound by strict conditions for tax exemption, e.g. location of residency and maximum rate of the reimbursement of 15 HUF per kilometers[12], employees can use the company cars for the same purposes without paying taxes. What's more, if an expense of reimbursement after the usage of private cars for commuting to and from work does not meet these additional criteria, the amount of reimbursement in excess is considered as income from wages.[13] Besides this, the tax-free reimbursement of the expenses of public transportation for commuting purposes is also limited to 86 percent of purchase value of tickets and passes. The system of personal income taxation in Hungary does not encourage employees to choose public transportation to commute. It is also not questionable that higher-waged employees benefit from this because they can afford to operate a private car to commute and higher-paid executives are offered to get company cars for personal purposes.

Obviously, the tax environment in Hungary is against both the principle of horizontal and vertical equity and reduces the efficiency of the tax.[14] One of the most important criteria of the conception of 'good tax' is horizontal equity, by which it is granted that similarly, not identically, 'well-off' individuals shall face the same tax burden.[15] Well, it is easy to see that those employees for whom company cars for personal usage are offered by the employer pay PIT differently than others who receive remuneration in the same value. On the other hand, in terms of equity, individuals who have greater ability to pay taxes (with more wealth, resource access, and income) shall pay more in proportion to their income (vertical equity).[16]

As the incentives on both sides of the employer and employee are drivers for everyone to use company cars for personal purposes, the efficiency of the income taxation in Hungary is questionable. Additionally, *subjects are in the 'vertical inequity' condition as they are*

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[10] Average tax rate covers the PIT tax rate of 15 % and the social security contributions rate of 18,5 %.

[11] Section 24 Act CXVII of 1995 on Personal Income Tax.

[12] Subparagraph (2) Section 25 Act CXVII of 1995 on Personal Income Tax.

[13] Subparagraph (3) Section 25 Act CXVII of 1995 on Personal Income Tax.

[14] Harding 2014, 9. p.

[15] Elkins, David: *Horizontal Equity as a Principle of Tax Theory*. Yale Law & Policy Review. Vol. 24: No. 1, Article 3. 2006. (http://digitalcommons.law.yale.edu/ylpr/vol24/iss1/3 (07.21. 2017.).

[16] Green, Ronald M.: *Ethics and Taxation: A Theoretical Framework*. The Journal of Religious Ethics, Vol. 12, No. 2 1984. pp. 146-161.

significantly more likely to fully evade taxes than in the 'equity condition',[17] thus the lower-qualified workers with low salaries may get into a moral and economic crisis as a result of taxation policy.

What are the elements of income received from the personal use of company cars? How can we define the revenues from it?

On the one side, the employee gets an asset which can be used for business and personal purposes. The income from the usage of company cars depends on the value of the vehicle, distance traveled and the direct costs of personal usage.[18] As the employee is not forced to purchase the car from his/her own net salary, the price of the company car or the financing costs of leasing shall be considered as a part of capital costs. The capacity of the cylinder (ccm), the age and the state of the mechanical condition of the vehicle are the main factors to determine the value as well.

The expenses saved by the employees (after travel distances), are the second section of the revenues, because the pattern of travel habit of the drivers of the company cars shows differences from the drivers who use privately purchased and maintained vehicles. Additionally, an ability to use company cars for personal purposes changes the customs of the whole household and significantly increases traveled kilometers.[19]

Pursuant to the provisions on company taxation, the companies shall not be able to account the expenditures of the personal use of assets as a cost, thus it is necessary to register the use of company cars for personal and business purposes separately.[20] Probably, calculating the elements of revenues from the use of company cars for personal purposes is the simplest in this case. The third factor is the direct cost of usage, which is typically connected to fuel consumption, parking passes, amortization (wear-and-tear), and maintenance, especially mandatory insurance, expenses of MOT, costs of repairing, or even cleaning of the vehicle, etc.

It should be mentioned that in the OECD countries, the fiscal cost of the benefits from the personal use of company cars reach EUR 19.0 billion being a lower-bound estimation of OECD report.[21] The same report stated that the mid-level of estimated untaxed benefit in Hungary can make EUR 419 million[22] (equal to approximately HUF 129 billion[23]). To compare these figures with the approximate HUF 1166 billion of central budgetary deficit[24], the untaxed benefit from the use of company cars for personal purposes cannot be considered as a marginal factor.

The OECD countries imposed an income tax in various ways. The simplest way to get fiscal revenues is to apply a flat tax, but it can hardly meet the requirements of

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[17] Massimo Finocchiaro Castro - Ilde Rizzo: *Tax compliance under horizontal and vertical equity conditions: An experimental approach*. Int Tax Public Finance. Springer Science+Business Media New York. 2014/21. 561. p.

[18] Harding 2014, 10. p.

[19] Shiftan, Yoram - Albert, Gila - Keinan, Tamar: *The impact of company-car taxation policy on travel behavior*. Transport Policy (19) 2012. p. 142.

[20] Point f) Subparagraph (1) Section 8 Act LXXXI of 1996 on Company Tax and Dividend Tax.

[21] Harding 2014, 16. p.

[22] Harding 2014, 27. p.

[23] Convert into HUF mine with the average rate of 308 HUF/€.

[24] Point c) Subparagraph (1) Section 1 Act XC of 2017 on Central Budget in 2017 of Hungary.

environmental protection goals. The most sophisticated tax policies consider capital costs (with depreciation), traveled distances and direct costs to constitute the tax base of this fringe benefit.

IV. Prevailing provisions in favor of eMobility on company car taxation in Hungary

As it is mentioned above, there is hardly any difference between taxes and direct expenses of state subsidies, since state subsidies are also considered like negative taxes in the literature. Here it is only highlighted that there are existing state aid programs aimed at getting the purchase value of *eVehicles* (EV) lower in Hungary. Including the subsidy for the purchase of EVs, for 2020, the *Ányos Jedlik Plan* aims at reaching 30 000 EVs in Hungary. The other side of the program is given a financial leg to build electric charger stations across the country mostly from EU funds. In this chapter, a short overview will be given in the light of purchase, holding, and selling EVs in Hungary.

In the beginning, three taxes are consociated to *purchase EVs*.[25] Naturally, the most important issue for companies is the question of the deduction of *Value Added Tax* (VAT) after the supply of the EVs. In Hungary, unfortunately, there is no possibility to deduct the VAT[26], except for the purposes of resale.[27] In connection with purchase, *Environmental Protection Product Charges* (EPPC) shall be paid, aiming at preserving natural resources by reusing, recycling and recovering of harmful products and at generating funds to finance the efforts for the prevention and mitigation of potential damage to the environment.[28] To register and enter into service, two mandatory payments should be made in connection with passenger cars. After 2012, the rate of the *Motor Vehicle Registration Duty* (MVRD)[29] is 0 HUF per unit after Environmental Friendly Vehicle (EFVs)[30], including EVs, plug-in hybrids and vehicles with zero emission.[31] After all transfer of assets with special rules on vehicles, a *capital transfer duty* (CTD) shall be collected. Since after 2016, the acquisition of ownership of an EFV, including EVs, is covered by an exemption,[32] under which there is no duty payment after a recent purchase.

The *Company Car Tax* (CCT) is imposed after holding and using passenger cars if any expenditure or cost is accounted after their use. It is good news, that holding and using an EV, as a kind of EFVs, has been covered by tax exemption since 2016.[33] Despite

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[25] Electric and Hybrid Passenger Cars are covered by the *terminus technicus* of Environmental Friendly Vehicles (EFVs) and Electric Vehicles.

[26] Point d) Subparagraph (1) Section 124 Act CXXVII of 2007 on Value Added Tax.

[27] Point a) Subparagraph (1) Section 125 Act CXXVII of 2007 on Value Added Tax.

[28] Subparagraph (3) Section 1 Act LXXXV of 2011 on Environmental Protection Product Charges.

[29] Act CX of 2003 on Motor Vehicle Registration Duty.

[30] According to the Point 9 Section 18 Act LXXXII on Vehicle Tax and Point 8 Part I Schedule of the Act CX of 2003 on Motor Vehicle Registration Duty, EVs, plug-in hybrids and vehicles with zero-emissions are covered by the *terminus technicus* of Environmental Friendly Vehicle.

[31] Schedule 1 Act CLVI of 2011 on Modifying Certain Acts on Taxation and other Related Acts.

[32] Point w) Subparagraph (1) Section 26 Act XCIII of 1990 on Duties.

[33] Subparagraph (1) Section 17/A Act LXXXII on Vehicle Tax.

this, VAT applied at the preceding stage may not be deducted related to the supply of any goods in connection with the operation or maintenance of a passenger car, including EVs.[34] Furthermore, deduction of VAT applied at the preceding stage after any service used in connection with the operation or maintenance of them is limited to 50 percent of the VAT.[35] On the other hand, local governments are empowered to provide further exemptions for local parking fees.[36]

Hungary does not levy special taxes on *selling company cars*, but a confusing situation occurs if the company buys a used car from an individual who is taxable in connection with VAT and the company intends to sell this used car in the future. The VAT is paid in the previous stage of taxation after the car, while the individual is not authorized to deduct VAT. Despite the tax-free purchase being permitted for a company, at the stage of selling this used car it also taxable regarding VAT, because the tax exemption is only available if the purchase is connected to a title related to non-deduction, not to a title of tax exemption.[37] In this way, VAT is collected twice after the same goods and VAT shall be paid again, while the buyer of the company neither has the right to deduct the VAT paid at that stage.

V. Conclusions

It should be stated that the Government of Hungary made ambitious steps to decrease the emissions of passenger cars by offering tax reliefs after EVs/EFVs and direct state subsidies for purchasing them. Considering the absence of imposing PIT after fringe benefits arising from the use of company cars for personal purposes, it also should be emphasized that tax policy makers shall consider that lower-waged citizens are facing the higher burden of taxation in the proportion of their income. To avoid deepening social impacts of diversified tax policy challenging horizontal equity, personal income tax shall be levied on these revenues in kind at least based on a travel distance measure.

The possibility of deduction of any VAT paid in the previous stage in connection with the purchase of EVs can also be an effective incentive.

As the examples of Norway and the UK show us, the number of EVs/EFVs could be increased on the routes of Hungary by imposing additional taxes on the use of fossil fueled vehicles and offering tax exemptions and other incentives for EVs/EFVs. Furthermore, additional technical solutions could accompany EVs to make the production and consumption of electric power more efficient. As all EVs have relatively huge batteries, they can be considered a significant part of the decentralized system of the storage of electric energy. Since the most important question related to the production of solar energy is the storage of electric power, EVs hand in hand with electric public transportation are to play an important role in Vehicle-to-Grid (V2G) solutions as well.

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[34] Point c) Subparagraph (1) Section 124 Act CXXVII of 2007 on Value Added Tax.

[35] Subparagraph (4) Section 124 Act CXXVII of 2007 on Value Added Tax.

[36] Subparagraph (4) Section 15/A Act I of 1988 on Road Transport.

[37] Point b) Section 87 Act CXXVII of 2007 on Value Added Tax.

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PANEL II – DOMESTIC ADMINISTRATIVE LAW

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LEGAL PROTECTION RULES OF NEW ADMINISTRATIVE PROCEDURE

Subjective and objective legal protection tools are crucial elements of a constitutional state, to promote that the principle of rule of law shall be applicable. These legal instruments of subjective and objective legal protection are also prevailing in public administrative procedure system. The protection of clients concerned in their rights or legal interests, furthermore maintaining the constitutional state and the principle of *rule of law* are essential to the compliance of careful consideration and evaluation of constitutional provisions and requirements. General rules of Hungarian administrative procedure law are being renewed, both of Code on Administrative Procedure and Code on Judicial Review of Administrative Acts were accepted recently.[1]

The study focuses on comparison of former and renewed right protection rules during public administrative proceedings, on those challenges that affected individual rights protection and the protection of the public interest, including the instruments both within the public administration organization system, as well as outside.

Subject of analysis does not involve the historical aspect of Hungarian administrative judiciary, furthermore the judicial institution question and the selection criteria of administrative judges.[2] Especially the judicial organization system and the staff were also subjects of lively political debates, analysis of these matters would go beyond this study.

The possibility of *right to a remedy*'s enforcement and the public interests' protection have determinant guarantee role in the operation of a constitutional state. Ensuring the principle of rule of law has significance during the administrative procedures, since the administrative authorities exercise public power functions. The idea of rule of law presupposes that public administration functions are under the law and it is a dominant principle for the administrative organ's systems and procedures.[3]

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[1] Act CL 2016 on General Rules of Administrative Procedure, Act I 2017 on Judicial Review of Administrative Acts. Both of Codes will enter into force on 1 January 2018.

[2] See furthermore *inter alia*: Herbert, Küpper: *Magyarország átalakuló közigazgatási bíráskodása*. MTA Law Working Papers 2014/59. http://jog.tk.mta.hu/uploads/files/mtalwp/2014_59_Kupper.pdf (26.03.2017). Patyi András: *Közigazgatási bíráskodásunk modelljei. Tanulmány a Magyar közigazgatási bíráskodásról*. Budapest, LOGOD BT. 2002.

[3] The meaning of the principle of rule of law could be determined as follows: 'The rule of law is an ambiguous term that can mean different things in different contexts. In one context, the term means rule according to law. No individual can be ordered by the government to pay civil damages or suffer criminal punishment except in

The *right to a fair trial* generally aimed at ensuring rights, involving *inter alia* the rights to equality before the law and the principle of non-discrimination, the principle of *nullum crimen sine lege et nulla poena sine lege*, right to remedy, publicity of hearing.[4]

The *division of power* is a substantial principle in a modern democratic state, therefore the administrative jurisdiction has crucial function in the supervisory system of administrative acts. The administrative jurisdiction is serving both the protection of individual rights and objective legal order. The primary goal of administrative jurisdiction is disputed, i.e. whether the protection of individual rights or the objective public interest have more importance. The analysis concentrates also the examination whether the objective and subjective legal protection prevails during the review process of administrative decisions. In this sense, in simplified terms, objective legal protection means the establishment and recovery of infringement. By contrast, subjective legal protection means arising of personal injury and the exercise of the right to remedy. Given the fact, that the administrative judiciary has outstanding role in the new right protect system, therefore the constitutional provisions on the administrative jurisdiction are of dominant importance. Presentation of the Hungarian regulation, the temporal scope of comparative aspect has an advantage, the former and renewed legal instruments and the administrative litigation should be considered.

Finally, the study tries to give a concise overview and make some findings, how prevails legal protection as result of new procedural rules.

I. International impacts and theoretical approach of objective and subjective legal protection

In this context, attention is drawn to international and European basic values and principles, furthermore legal norms, that have decisive impact on the regulation of administrative procedural law at international level. Fundamental principle of Public Administration's (PA) operation is that PA shall act and operate to ensure the protection of client's rights against the unlawful decision of authorities and to protect the public interest. The legal protection mechanism can be examined from two aspects, on one hand from the aspect of right to remedy, and on other hand the protection of public interest. During the interpretation process of the content of right to remedy the possible basis is the concept system of the *International Covenant on Civil and Political Rights* (UN),[5] the *European Convention on Human Rights*[6] and the requirement system of the *European Union law*. One other aspect

strict accordance with well-established and clearly defined laws and procedures. In a second context, the term means rule under law. No branch of government is above the law, and no public official may act arbitrarily or unilaterally outside the law. In a third context, the term means rule according to a higher law. No written law may be enforced by the government unless it conforms with certain unwritten, universal principles of fairness, morality, and justice that transcend human legal systems.' http://legal-dictionary.thefreedictionary.com/Rule+of+Law%2c+the (28.05.2017.).

4 Sári János: *Alapjogok. Alkotmánytan II*. Osiris Kiadó, Budapest, 2004. 108-115. p.

5 International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 Part I. Article 2. (3) (a)-(c) http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (27.03.2017.).

6 Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950 Article 6 Right to a fair trial, Article 13 Right to an effective remedy http://www.echr.coe.int/Documents/Convention_ENG.

should be pointed regarding the international requirements, the *Recommendation of the Committee of Ministers to member states on good administration*.[7] It has become the Code of Good Administration, its requirements shall be respected by all the Member States.

These international and European legal principles and values effect on Hungarian Fundamental Law as well, because it serves as constitutional framework for the administrative procedure law also.[8] The individual fundamental right protection, the subjective legal protection is in the core of the beforementioned Conventions. All the same, the Hungarian administrative procedure law is based on subjective protection of rights as well, as described in the next part of the study. Nevertheless, the protection of legal system and institutions is also significant. Unquestionable fact that legal approximation tendencies could be determined in the legislation of procedural law, at least in terms of principles and core values.[9]

It shall be highlighted that the priority of objective and subjective legal protection has changing nature by state to state. In the Anglo-Saxon legal order and in France the subjective right protection, the remedy of individual injuries considered primarily, but in Germany the legality of the public administration interests regarded primarily protected.[10]

A subjective approach of legal protection could be applicable interpreting the right to a legal remedy, which are in close connection. The other side of the right protection is the objective function, because it has an institution-protection purpose, as well. The subject of latter objective legal protection is not the right protection of individuals, but the protection of institutions, the legal order, public interests. The main goal is the supervision – and as result of it – annulment or alteration of unlawful decisions. As stated by *István Bibó*, the one-sided, client approach of administrative legality shall be replaced with more general, more in-depth approach, that the administrative legality considered as an interest of not only the individual, but the community.[11]

The principle of rule of law requires the objective legal protection, as well. The PA is under the law, the legitimacy of PA shall be ensured by judicial review of decisions. This type of objective legal protection requires right to bring action to court for those people, groups, and communities, who suffer any kind of injury. In this case proving the injury of interest is sufficient. Referring the opinion of *László Trócsányi*, the objective legal protection system provides significantly greater protection than a subjective system.[12]

Right to a remedy is including the enforcement option, and the substantive review of the decisions. Regarding the nature of right to a remedy it should be emphasised, that is narrower than the right to bring an action to court. The right to a remedy is an individual fundamental right, which can be applicable against an unlawful decision, it means the substantive review, in a special procedure. The right to remedy is not an absolute right,

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[7] CM/Rec(2007)7 Adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies. https://rm.coe.int/16805d5bb1 (25.06.2017.).

[8] Fundamental Law of Hungary (25 April 2011).

[9] See legal approximation process of administrative judiciary in F. Rozsnyai Krisztina: *Közigazgatási bíráskodás Prokrusztész-ágyban*. ELTE Eötvös Kiadó Budapest, 2010. 42-60.p.

[10] *Összehasonlító és európai uniós közigazgatási jog. Közigazgatási jog IV*. (ed. Gerencsér Balázs Sz.) Pázmány Press Budapest, 2015. 83-87. p.

[11] Bibó István: *Válogatott tanulmányok. Első kötet 1935-1944* Budapest, Magvető Könyvkiadó, 1986. 279. p.

[12] Trócsányi László: *Milyen közigazgatási bíráskodást?* Közgazdasági és Jogi Könyvkiadó Budapest, 1992. 110. p.

because it can be exercised only in a way specified by provisions of law. The most important responsibility of the administrative jurisdiction to ensure the protection of fundamental rights for citizen and organizations, it is the form of subjective right protection. PA shall make mandatory decisions concerned their rights and obligations only in that case if the court can supervise the legality of them.[13]

The legal protection rules shall be consistent with the principle of the division of power also, as indicated *András Patyi* in accordance with the administrative jurisdiction. In his view, empowerment of the judiciary with review of the decisions of administrative organizations ensures prevailing of law.[14] However, it should be added, that the right to remedy and the supervision of administrative acts before the courts should prevail conjointly and effect on each other. The Hungarian right protection in the administrative process has rather subjective tendency.[15]

II. Regulation on objective and subjective legal protection of Hungarian Fundamental Law in view of Constitutional Court

Examination of legal nature of objective and subjective legal protection requires the constitutional provisions' examination, as well. Rules on right protection, right to remedy and stability of institutions and public interest shall be in accordance with constitutional provisions. Basic ruling on administrative proceeding and administrative jurisdiction are determined by the Constitution, consistently. It should be pointed out, that the definition of rule of law including subordination of public administration to law, therefore the public administration organizations shall act and decide on matters in the organizational framework defined by law, in a procedural order regulated by law and within the limits of substantive law.[16]

Two main provisions of Hungarian Fundamental Law should be mentioned, in accordance with legal protection system. On one hand, the right to remedy, is included to the Article XXVIII.[17] It provides that everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.

On the other hand, provisions on administrative judicial system, the Article 25 (2) b), it means that courts shall decide on the lawfulness of administrative decisions.[18] Competence of judiciary for the review of administrative acts flows directly from this provision. In line

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[13] Rozsnyai 2010, 12-13. p.

[14] Patyi András – Köblös Adél: *A közigazgatási bíráskodás alkotmányos alapjai. Constitutional Background of the Judicial Review of Administrative Act*s. Pro Publico Bono – Magyar Közigazgatás, 2016/3, 13. p.

[15] Rozsnyai 2010, 13-14. p.

[16] Constitutional Court Decision 56/1991. (XI.8.) ABH 1991 454. 456. p.

[17] Fundamental Law of Hungary (25 April 2011) Article XXVIII. (1) In the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[18] Fundamental Law of Hungary (25 April) Article 25. '(2) The courts shall adjudicate:

…

b) the legality of administrative decisions.'

with this statement, the preamble of Code on Judicial Review of Administrative Acts goes on to say, that it serves the implementation of the abovementioned provision. However, this provision does not have fundamental right content, this also follows from placement within the Fundamental Law, because it is regulated in Chapter on the State, on the contrary, the right to remedy is ruled in Chapter on Freedom and Responsibilities.

Cited two provisions are in special relationship during the application. As *András Patyi* stated in accordance with the provisions of former Constitution of Hungary, they are in 'with or without you' connection.[19] His statement was supported by a lot of decision of Constitutional Court, thus concluded, that the content of the judicial review has much wider scope but the right to remedy. The main question is whether judicial review of administrative decision satisfies the right to remedy. However, within this context, the exclusion of judicial review must comply with the requirement of limitation of fundamental rights, there is a separate question to examine the constitutional case of exclusion of right to remedy.

The General Prosecution of Hungary is the guardian of public interest, this organization exercises function in the field of public administration as well. General Prosecution's function according to the assertion of public interest claim of still has remained in administrative procedure. Prospectively this organisation is responsible for protection of public interest, primarily, hence it has a vital role in the field of objective legal protection as well. The prosecutor's intervention serves as a measure of *ex officio* administrative review procedure, it arises if the public prosecutor intervenes in a case covered by administrative procedure Act for the purpose of overcoming an infringement.

The Fundamental Law contains provisions on right to remedy and the legal supervision of administrative decisions, therefore the practice of the Constitutional Court shall be examined both from the interpretation of right to remedy and the legal supervision of the decisions of public administrative authorities by courts aspects.

Several decisions of the Constitutional Court affected the conceptual scope and progress of administrative case that is the material scope of PA procedure.[20]

According to the permanent practice of the Constitutional Court, the right to remedy is a fundamental constitutional individual right of which immanent part is to submit appeals to other organizations or a higher level in the framework of the same organization. Prevailing the effective enforcement of the right to a remedy means, that it is necessary to redress any kind of violation. In accordance with this statement, Constitutional Court pointed out, that the right to bring the case to the court shall not be limited constitutionally.[21]

In addition, the effective remedy shall ensure the possibility of alteration or cancellation of the challenged decision.[22] The right to remedy ensure the redress possibilities in case of decisions of state authorities, but does not cover non-governmental matters, such as employer, owner, or other decisions.[23]

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[19] Patyi András: *Közigazgatás – Alkotmány – Bíráskodás*. Universitas-Győr Nonprofit Kft. Győr, 2011. 121. p. The connection between provisions on right to remedy and judicial review was examined. [Article 50. (2) and 57. (5)]. See also Patyi–Köblös 2016, 24. p.

[20] *Hungarian Public Administration and Administrative Law* (Patyi András – Rixer Ádám eds.) Schenk Verlag GmbH, Passau, 2014. 212. p.

[21] Constitutional Court Decision 46/2003. (X.16.) ABH 2003, 502. p.

[22] Constitutional Court Decision 5/1992. (I.30.) ABH 1992, 27, 31. p.

[23] Constitutional Court Decision 22/1995. (III.31.) ABH 1995, 110. p.

The recourse organ shall be in decision-making situation. The formal and due to the legal regulation desperate remedies are inadequate. The one-level remedy is sufficient, as well. The Constitution entrusts legislation to determine how many degrees of remedies may prevail.

III. Objective and subjective legal measures in administrative procedural rules

Next part of the study focuses on the currently available legal procedural measures and then analyses the new regulation's instruments. Prevailing of legal protection instruments is undoubtedly affecting substantially by the requirement of effective legal remedy. This fundamental right to an effective legal remedy, as a constitutional principle, is determined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (done at Rome, 4 November 1950) Article 13 provides, that '*[e]veryone whose rights and freedoms … are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'* The Convention does not contain any provision on the administrative and judiciary legal protection system of Member States and does not determine the instances of the legal remedy. The only fundamental requirement of the Convention is prevailing of effective legal remedy. Effective legal protection requires the judicial review must cover the formal and procedural aspects of the administrative decision and its merits, and must cover also the findings of the administrative decision and the assessments made by the authority in the discretionary powers.

As a preliminary remark, it should be emphasised that the Code on new regulation of administrative procedure, with regard its structure, is rather simplified, provides a broad scope for the sectoral regulation. The Code has maintained both of basic types former legal remedy system, but not all the tools, on one hand are based on request of client and on the other hand the ex officio procedures. This latter type of legal remedy ensures consistency with the regulation on administrative judicial review. Adoption of Code on Judicial Review of Administrative Acts constitutes a conceptual change in the field of administrative judiciary. The new regulation on Public Administration Procedures and Code on Judicial Review of Administrative Acts will come into force 1 January 2018.

The general outline of remedies and review instruments are presented in the following comparative table.

	Act CXL of 2004	Act CL of 2016
Redress procedures upon request	Appeal procedures Judicial review Reopening procedure Proceedings opened based on a resolution of the CC	Judicial review Appeal procedures
Review procedures ex officio	Amendment or withdrawal of decisions Oversight proceeding Prosecutor's intervention	Amendment or withdrawal of decisions Oversight proceeding Prosecutor's intervention

1. Changing of redress and review procedures of administrative procedural law (Own editing)

At first sight, as compared the possibilities of legal supervision, can be concluded, that the instruments of redress procedure available upon request are reduced, but the *ex officio* administrative review procedures are unaltered. It is noteworthy to point out, that the general rules on administrative procedure are guarantee elements of the administrative legality. From this point of view prevailing, applying and complying administrative procedure provisions shall be of the most significant right protection measures, as *Krisztina F. Rozsnyai* stated, these formulas serves as 'in advance remedy possibilities' in the administrative process, because the legal structures shall operate constitutionally only in that case if procedure provisions are prevailing.[24] The instruments of legal protection have to be consistent with each other and have to be able to ensure protection of fundamental rights and legal interests, and constitutional principles as well, in its entire.

III.1. Remedies and review procedures of the Act CXL of 2004 on the General Rules of Administrative Procedures and Services

The Act of 2004 on General Rules of Administrative Procedures and Services ensured a wide-range of legal remedy instruments. The Act distinguishes the remedies upon request of the client and the other interested parties, furthermore the *ex officio* decision review procedures. These redress procedures are the following: (1) appeal procedures, (2) judicial review, (3) reopening procedure and (4) proceedings opened based on a resolution of Constitutional Court. The *ex officio* procedures are (1) procedures by the authority on its own motion, (2) the oversight proceedings and (3) third form is upon the public prosecutor's intervention, this latter form can lead to amendment or withdrawal of decisions or an oversight proceeding, in the absence of such legal remedy form, to a judicial review initiated by the public prosecutor.

Forms of the upon request procedures, based on protection of subjective right. The appeal procedure[25] is defined by the Act of 2004 as a general remedy. The authority entitled for the review of decision, it can supervise the decision from substantive and procedural aspects, so, it is a full review procedure. The second form, the judicial review[26] is an exceptional opportunity of decision's revision, in the current system. The appeal procedure, the reopening procedure and proceedings opened based on a resolution of Constitutional Court procedures are upon request of client, internal procedures. The purpose of these processes to ensure the closure of the administrative matters, the final decision and to guarantee the remedy in the framework of public administrative bodies, in quicker and more efficient procedures.

The judiciary supervision is an extraordinary remedy, an instrument of external control, based upon the division of power. On the theoretical and constitutional background of judiciary review has been referred before, in the I-II part of the study. The procedure rules of the judiciary review are regulated as an individual chapter in Civil Procedure Code, it posed quite a few problems of its own. Only the most important problems would be highlighted: (1) the dual purpose of litigation, harmonization of subjective and objective legal protection; (2) the principle of equality of arms cannot be enforced in administrative

[24] Rozsnyai 2010, 160. p.

[25] Act CXL of 2004 on General Rules of Administrative Procedures and Services. Section 98-102., 104-107.

[26] Act CXL of 2004 on General Rules of Administrative Procedures and Services. Section 109.

litigation; (3) the principle that the parties delimit the subject matter of the proceedings may conflict with the principle of officiality; (4) proceeding of taking evidences and the burden of proof have unique features in civil and administrative litigation.[27]

The reopening procedure[28] is one of the oldest legal remedy instrument, in 1901 was introduced by the Act on simplification of administrative procedure.[29] The purpose of the reopening procedure is the correction of the facts of the case. The Administrative Procedure Act determines strict conditions and deadline for submitting the application. This procedure considered as an extraordinary procedure, because of the (1) person entitled to submit the application; (2) must affect the substance of the matter; (3) can be submitted against only a final decision; (4) where any rights acquired in good faith may be prejudiced, it shall have no bearing on the decision adopted in the reopened proceedings.

Proceedings opened based on a resolution of Constitutional Court[30] is based on the constitutional complaint. It can be applied only against the decision approved by the authority the settlement between the clients according to the substance of matter. The condition for initiating the procedure is that Constitutional Court annuls the legislation or statutory provision the approval of the settlement between the parties was adopted.

In practical terms, the last two upon request procedures, the reopening procedure and proceedings opened based on a resolution of Constitutional Court have not stimulated significant effect in the legal remedy system, do not apply, the number of cases is very limited.

The second part of remedy tools are the *ex officio* review procedures of the public administrative acts. The aim of these ex officio procedures primarily is the protection of public interest. These measures involve the alteration or the withdrawal of decisions by the authority that has adopted the decision in its own motion, and furthermore the oversight proceedings. The oversight proceedings are responsibility of the supervisory authority in contrast with the alteration or withdrawal of decisions. Finally, the function of public prosecutor is worth to mention among these tools, because if the public prosecutor realizes that the public administrative authority committed an infringement of the merits of the case, entitled to turn to the supervisory authority to eliminate the infringement.

The right of alteration or withdrawal of the administrative decision[31] entitled to both the first and second instance authorities, to ensure the legality of decisions is responsibility of the authority, because of the constitutional principle of legality. If the authority has revealed the fact of the infringement, the situation shall be corrected. The correction is of limited duration, this possibility can be exercised within a year from the delivering of the decision.

The supervisory authority performs not only the supervisory but control-command tasks. This control-command function shall be operated constantly to ensure the legality of administrative decisions and decision-making processes. The supervisory organ shall have powers to examine ex officio the proceeding of the competent authority, and its decision.[32]

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[27] Küpper 2014, 19-24. p.

[28] Act CXL of 2004 on General Rules of Administrative Procedures and Services. Section 112.

[29] Act XX of 1901 on Simplification of the Administrative Procedure.

[30] Act CXL of 2004 on General Rules of Administrative Procedures and Services. Section 113.

[31] Act CXL of 2004 on General Rules of Administrative Procedures and Services. Section 114.

[32] Act CXL of 2004 on General Rules of Administrative Procedures and Services. Section 115.

The oversight proceeding[33] involves two different, clearly distinct procedures. One of them generally guarantees the abolition of omissions, and the other is the real legal remedy tool. In this latter form the supervisory organ may alter the decision, may annul it or in very limited circumstances may annul and order to conduct a new procedure.

Beyond the principle of legal certainty, the legality of administrative decisions another principle should be emphasised: protection of acquired and exercised rights in good faith. This latter right is only based on a legally binding, means final decision. Therefore, the Act explicitly provides those supervisory forms, when the authority may disregard the principle of protection of acquired and exercised rights in good faith.

III.2. Legal protection tools of new procedural regulation

The explicit purpose of the new legislation was the renewal of the remedy system, beyond the modernization, simplification and making more comprehensible to the public the administrative procedure rules. The proposed objectives include to create and develop the system of modern administrative judiciary.

The primary form in remedy system of the administrative procedure has essentially exchanged, the judiciary administrative review, the administrative litigation will therefore be priority.[34] The appeal form,[35] as an internal legal remedy, shall be applied only in that case, when the provisions of administrative procedure allow, or the sectoral rules extend the scope of appeal. This fundamental principle prevails only with exceptions, these exceptions are considered as most of administrative decisions, however the appeal form will be maintained as a primary form, when the administrative decision-maker is the organ of local government (except the body of representatives) or the leader of district office. It should be mentioned, that these organs constitute the local and lower level of public administration, where most of the decisions in individual cases are taken. The possibilities of redress procedure measures upon request will be reduced, basically two forms of remedies upon request of the client prevail in the future, as well. New system abolishes the appeal as an internal remedy instrument, it could lead to reduction the instances of remedies.

The reopening procedure and the proceedings opened based on a resolution of the Constitutional Court shall be cancelled. This latter form is close connection with the constitutional complaint, it is ruled in its entire in the Act on Hungarian Constitutional Court.[36] The legislator did not consider necessary to justify the cancellation of reopening procedure, merely assumed that this legal remedy tool has not lived up to expectations.

The *ex officio* review procedures of the public administrative acts have remained in terms of content unchanged. These legal measures widely cover the aim of protection of legal order and public interests. This finding is not affected by the fact that the administrative litigation has become the primarily tool of recourses.

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[33] Act CXL of 2004 on General Rules of Administrative Procedures and Services. Section 115.

[34] Act CL of 2016 on Public Administration Procedures. Section 113.

[35] Act CL of 2016 on Public Administration Procedures. Section 116-119.

[36] Act CLI of 2011 on Hungarian Constitutional Court. Section 26-31.

III.3. Administrative litigation

The new regulation of independent administrative judiciary has been established with the Act I of 2017. The detailed rules of administrative litigation are in the scope of a new Code on administrative litigation and non-contentious proceedings.

Adoption of Code of Civil Procedure[37] has given a real opportunity for the establishment of administrative judiciary rules. As is also confirmed in the preamble to the Act, recognized the independence of the administrative judiciary and ensured the quick, effective, competent settlement of administrative affaires. The main purpose of New Code is the establishment of effective judicial remedy system.

Highlighting only the innovations of new ruling are as follows, solely about study. (1) One of the most significant changes is the extension of the scope of administrative litigation through a general definition of administrative case. This clause provides a flexible framework for achieving complete legal protection. (2) Important innovation of the Act is the differentiated competences of courts. It is necessary to divide the first instance powers between the administrative courts, pursuance the difficulty, complexity and frequency of cases. (3) Decided to reinstate the primacy of the proceedings in the Chamber of Judges. (4) Instead the annul of the administrative acts the alteration of acts has priority. (5) The legal remedy system has been modified, as it was mentioned above. (6) The Code contains the rules of non-contentious proceedings also.

IV. Consequences

According to the legislative justification the remedy system of new regulation consists of three basic elements: the administrative procedure, the first instance judicial procedure and the second instance judicial procedure.[38] The priority of the judicial remedy better responds to European tendencies and in compliance with the rule of law. The new regulation emphasises the final settlement of administrative cases, therefore the principle of res judicata has relevance. The aim of the new system to ensure impartiality during the remedy system, and leaves no scope for appearance of other interests and unfairness. The judicial procedure generally is open to the public, and the principle of openness and transparency therefore be better achieved. Counter-arguments might also be made against the primacy of judicial review of administrative acts. For example, may be referred the limited accessibility to the legal remedy, the lack of administrative expertise of judges, legal remedy takes longer than the administrative supervisory. The client shall appeal to the court to protect his or her rights primarily, I think that using of legal protection tools could be more complicated. The pros and cons can be continued further. Therefore, the legislator recognised that most administrative acts are taken at local and territorial level and ensured the inner legal remedy tool, the appeal form in these cases. The exception that the client can submit appeals against

[37] Act CXXX of 2016 Code of Civil Procedure (will enter into force on 1 January 2018).

[38] Részletes jelentés az általános közigazgatási rendtartás koncepciójának előkészítéséről. 32.p. http://www.kormany.hu/download/c/c8/50000/20150514%20Jelent%C3%A9s%20az%20%C3%A1ltal%C3%A1nos%20k%C3%B6zigazgat%C3%A1si%20rendtart%C3%A1s%20koncepci%C3%B3j%C3%A1r%C3%B3l.pdf (10/04/2017.).

the decisions of city clerks or notaries and district offices to another public administrative organ, may relieve the consequences of these challenges. Reduction of subjective, upon request remedy forms, namely the reopening procedure, and the instance of legal remedy might be considered problems of the new administrative procedural regulation.

The new remedy system is in silence on the alternative dispute resolution and other preventive procedures, which can serve the avoidance of litigation and the facilitating of agreement. Preparatory work in sectoral legislation must be speeded up to ensure possibilities of alternative solutions.

Key issue will be the preparing for the application of new administrative procedure rules for practitioners. The training courses, varied forms of trainings that promote learning of law enforcement are appreciated. The preparation of judges should be a matter of priority, the decision on legality in public administration acts requires a special view, a specific expertise.

Particular attention shall be paid to sectoral law rules, hence the radical streamline of general rules demand knowledge of detailed sectoral procedural rules.

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CONSTITUTIONAL COMPLAINTS AGAINST THE ADMINISTRATIVE AND LABOUR COURTS' DECISIONS FROM 2012[1]

I. Introduction

In this paper, my aim is to examine the constitutional complaints submitted against the Administrative and Labour Courts' decisions. To understand the legal framework of these decisions, first we have to look at the changes in the Hungarian constitutional system after the Fundamental Law of Hungary entered into force in 2012. The main changes in the functions of the Constitutional Court have to be examined as well as the new three-prong system of the constitutional complaints. After having laid out this framework, can one really study the types of constitutional complaints submitted against the Administrative and Labour Courts' decisions, especially the ones that are constitutionally significant.

The Fundamental Law of Hungary entered into force the 1st January 2012. Significant changes were introduced to the legal system in relation with several institutions.[2] New institutions and new procedures emerged as old ones disappeared. For instance, the system of the ombudsmen was transformed to the Commissioner for Fundamental Rights[3] as

[1] This research was supported by the project nr. EFOP-3.6.2- 16-2017- 00007, titled Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

[2] Gárdos-Orosz Fruzsina - Szente Zoltán (szerk.): *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon*, Nemzeti Közszolgálati és Tankönyv Kiadó Zrt., Budapest, 2014. 245-282. p. And a series of publications decided to examine these changes, in particular the Constitutional Changes series by the Hungarian Academy of Sciences Institute for Legal Studies, to mention some of these papers, by the way of illustration: Bócz Endre: *Sarkalatos átalakulások 2010-2014 – az ügyészség* 1-11. p.; MTA Law Working Papers 2014/07 Hungarian Academy of Sciences Budapest ISSN 2064-4515 http://jog.tk.mta.hu/mtalwp (15.05.2017.); Darák Péter: *Sarkalatos átalakulások A bíróságokra vonatkozó szabályozás átalakulása* 2010-2014 1-3. p MTA Law Working Papers 2014/39, Hungarian Academy of Sciences Budapest, http://jog.tk.mta.hu/mtalwp (15.05.2017.); Ganczer Mónika: *Sarkalatos átalakulások: az állampolgársági jog átalakulása* 1-16. p. MTA Law Working Papers 2014/63 Hungarian Academy of Sciences Budapest ISSN 2064-4515 http://jog.tk.mta.hu/mtalwp (15.05.2017.); Pap András László: *Sarkalatos átalakulások – a nemzetiségekre vonatkozó szabályozás* 1-16. p., MTA Law Working Papers 2014/52 Hungarian Academy of Sciences Budapest http://jog.tk.mta.hu/mtalwp (15.05.2017.);

[3] Such as: Takács Albert: *Az ombudsman eszméje és megvalósulásának formái*, Pro Publico Bono 2015/2, 39-61. p. 47-54. p.

well as the legal position of the local governments changed.[4] The Constitutional Court of Hungary (hereinafter: the CC) was one of the affected institutions.

II. The Main Changes in the Functions of the Constitutional Court after 2012

The Fundamental Law of Hungary defined the functions of the CC, and the Act CLI of 2011 on the Constitutional Court laid down the details.[5] The changes affected the judges, the institution itself and the jurisdiction of the CC.[6] Several researchers decided to form an opinion related to the new system.[7]

The main changes in the functions of the CC could be listed as following.

II.1. The review power of the CC on the amendment of the constitution

The question of unconstitutional constitutional amendments[8] could have been examined before the fourth amendment of the Fundamental Law of Hungary, although it was clear until the 45/2012 (XII. 29.) The examination of the constitutional amendments is not

Some opinions have firm criticism against the new system, especially: Majtényi László: *A független ombudsman intézményeket helyre kell állítani, az alapvető jogok biztosától pedig továbbra is elvárható a jogállami jogvédelem* 9-7. p. MTA Law Working Papers 2014/47., Hungarian Academy of Sciences http://jog.tk.mta.hu/mtalwp (2017. 05. 15.); Jóri András: *Az adatvédelmi és adatnyilvánossági szabályozás átalakítása* 7-9 p., MTA Law Working Papers 2014/34 Hungarian Academy of Sciences Budapest http://jog.tk.mta.hu/mtalwp (15.05.2017.)

4 Pálné Kovács Ilona: *Az önkormányzati rendszer és a területi közigazgatás átalakulása 2010-2013*., 1-4. p., MTA Law Working Papers 2014/02 Hungarian Academy of Sciences Budapest ISSN 2064-4515 http://jog.tk.mta.hu/mtalwp (15.05.2017.); Balázs István: *Az önkormányzatokra vonatkozó szabályozás átalakulása,* MTA Law Working Papers 2014/03 1-4. p. http://jog.tk.mta.hu/uploads/files/mtalwp/2014_03_Balazs_Istvan.pdf (15.05.2017.); Siket Judit: *A helyi, területi önkormányzatok közigazgatási autonómiája Magyarországon. Történeti és nemzetközi kitekintéssel, figyelemmel a Helyi Önkormányzatok Európai Chartájára*. PhD értekezés, 2017. 95. p.; Horváth M. Tamás: *Helyi sarok Sarkalatos átalakulások – A kétharmados törvények változásai 2010–2014: Az önkormányzatokra vonatkozó szabályozás átalakulása,* 1-10. p., MTA Law Working Papers 2014/04 Hungarian Academy of Sciences Budapest, http://jog.tk.mta.hu/mtalwp (2017. 05. 15.); Szente Zoltán: *Sarkalatos átalakulások – Az önkormányzati rendszer* 1-4 p., MTA Law Working Papers 2014/29 Hungarian Academy of Sciences Budapest ISSN 2064-4515 http://jog.tk.mta.hu/mtalwp (15.05.2017.)

5 The whole Act CLI of 2011 on the Constitutional Court is available on the following website in English: http://hunconcourt.hu/rules/act-on-the-cc (2017. 06. 05.)

6 Szakály Zsuzsa: *Az alkotmányjogi panasz elmúlt öt éve.* in: Jogvédelmi kaleidoszkóp, A jogvédelem elmúlt öt éve (2009-2014) Magyarországon, szerk: Pongó Tamás - Szakály Zsuzsa, Lectiones Juridicae 12, Pólay Elemér Alapítvány, 2015, 59-60. p.

7 Especially: Tilk Péter: *Az Alkotmánybíróság az Alaptörvényben*, in: Közjogi Szemle, 2011/2, 5-14. p.; Spuller Gábor: *A Magyar Alkotmánybíróság – a törvényhozás második kamarájából az európai alkotmányos rendszer (europäischerVerfassungsverbund) bírósága?* Alkotmánybírósági Szemle, 2014/1. 99-104. p.; Paczolay Péter: *Megváltozott hangsúlyok az Alkotmánybíróság hatásköreiben*, Alkotmánybírósági Szemle 2012/1, 67-69. p.; Chronowski Nóra: *Az alkotmánybíráskodás sarkalatos átalakítása*, MTA Law Working Papers 2014/08, 7-12. p. http://jog.tk.mta.hu/uploads/files/mtalwp/2014_08_Chronowski.pdf (15.05.2017.)

8 Roznai, Yaniv: *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, Oxford University Press, 2017 5-10; Roznai, Yaniv: *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea* 61(3) American Journal of Comparative Law (AJCL), 2016, 713-719. p.; Barak, Aharon: *Unconstitutional Constitutional Amendments*, Israel Law Review, Vol. 44. 2011. 332-338.p.

part of the jurisdiction of the CC.[9] Since 2013 that decision established the possibility for the examination, although the Fourth Amendment of the Fundamental Law precluded this opportunity. However, the question is still preferred in academic discourse.[10] While previously the actual possibilities for an unconstitutional constitutional amendment were minimal and without example, almost every author agreed on the absurdity of the annulment of a constitutional amendment. After the events which raised the question[11] the picture became more ambiguous. As *Tímea Drinóczi* examined, the events made the scholars think differently in some ways.[12] The scope of the examination that can be conducted by the CC is limited, and the changes in judicial appointments made after 2012 clarified the opinions of the new judges meaning that they will not turn to an activist action like what one can find in some decisions of the Constitutional Court of Turkey[13] or the Supreme Court of India.[14]

II.2. The judges

Before the Fundamental Law, the CC had 11 members who were elected for nine years.[15] At the moment, the CC has fifteen judges, each elected for twelve years.[16] The judges elected the president among themselves until 2012, since then the Members of the National Assembly elect the President of the CC.[17] The *possible forms of operation have changed as well. Before 2012, only plenary sessions were the form of activity for the CC. After*

The well-known examples of court case-law can be found in the practice of the Indian Supreme Court and the Turkish Constitutional Court.

9 Constitutional Court Decision 1260/B/1997 ABH 1998, 816. p.

10 Chronowski Nóra - Drinóczi Tímea - Zeller Judit: *Túl az Alkotmányon…* Közjogi Szemle, 2010/4., 7-9. p.; Drinóczi Tímea: *Gondolatok az Alkotmánybíróság 61/2011. (VII. 12.) AB határozatával kapcsolatban*. JURA 2012/1, 38-39. p.; Zsugyó Virág: *Az Alkotmánybíróság határozata az alkotmánymódosítások alkotmányossági felülvizsgálatáról Fogalmilag kizárt-e az alkotmányellenes alkotmánymódosítás?* Jogesetek Magyarázata 2011 hallgatói különszám, 59-62. p.; Kocsis Miklós: *Az Alkotmánybíróság határozata az alkotmányellenes alkotmánymódosítások ügyében*. Jogesetek Magyarázata, 2011/3, 9-16. p; Szente Zoltán: *Az „alkotmányellenes alkotmánymódosítás" és az alkotmánymódosítások bírósági felülvizsgálatának dogmatikai problémái a magyar alkotmányjogban*, Közjogi Szemle, 2014/3. 3-11. p., Csink Lóránt - Fröhlich Johanna: *Egy alkotmány margójára - Alkotmányelméleti és értelmezési kérdések az Alaptörvényről*, Gondolat Kiadó Kft., 201259-62. p; Drinóczi Tímea: *Többszintű alkotmányosság működésben – alkotmányos párbeszéd Magyarországon,* MTA Doktori Dolgozat, 2016. 234-288. p.; Bragyova András – Gárdos-Orosz Fruzsina: *Vannak-e megváltoztathatatlan normák az Alaptörvényben?,* Állam- és Jogtudomány, 2016/3, 56-62. p.

11 The regular amendments of the constitution which were created to nullify the decisions of the Court related to questions of importance.

12 Drinóczi 2016, 236-237.

13 Roznai, Yaniv – Yolcu, Serkan: *An Unconstitutional Constitutional Amendment - The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision,* 10(1) International Journal of Constitutional Law (I-Con), 2012, 182-189. p.

14 Roznai, 2017 42-46. p.

15 Act XX of 1949 on the Constitution of Hungary Article 32. (4).

16 Fundamental Law of Hungary 25 April 2011 Article 24. (8).

17 Fundamental Law of Hungary 25 April 2011 Article 24. (8).

2012, beside the plenary sessions, panels of five and a single judge can also decide on a limited number of issues.[18]

II.3. The new functions of the CC

A*s there were many modifications in this respect, the following is just a list of some of the new powers given to the CC: Examination of the Decision of the Parliament Concerning the Acknowledgment of Organisation Performing Religious Activity, Opinion on the Dissolution of a Local Representative Body Operating Contrary to the Fundamental Law, Examination of Local Government Decrees, Normative Decisions and Orders, and Decisions on the Uniform Application of the Law. The CC's functions have changed in several ways; entirely new functions can be found as well as old ones with minor changes related to the experience of the two decades of the functioning of the CC.*

II.4. Restrictions

"As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may […] review the Acts on the central budget, […] for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights."[19] The size of state debts can affect the jurisdiction of the CC in exception with some different sort of rights. When these declarations became part of the constitution, the debate surrounding unconstitutional constitutional amendments peaked again in relation with the possible restrictions imposed on the CC. While the results could have been different, the CC decided to go along with the original interpretation and not examining the amendments of the constitution.[20] However, the possibility is still available to the CC to broaden the scope of examination as the CC itself did in the beginning of the 90's.[21]

III. The Constitutional Complaint

The constitutional complaint was one of the procedures of the CC from 1990, however, it was rarely used until 2012. In the system of the Constitution (before the Fundamental Law), the most important form of the procedure was the *actio popularis*, i.e. general ex post control of constitutionality of legal norms.[22] Constitutional complaints between 1990-

[18] Act CLI of 2011 on the Constitutional Court Article 47. (1).

[19] Fundamental Law of Hungary 25 April 2011 Article 37.

[20] Drinóczi 2016, 235-236. p.

[21] Sólyom László: *Az alkotmánybíráskodás kezdetei Magyarországon*, Osiris Kiadó, Budapest, 2001. 445-462. p.

[22] Gárdos-Orosz Fruzsina: *The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint,* Acta Juridica Hungarica 53, No 4, 2012, 303-307. p.;

2011 were almost insignificant, unfortunately, only a few important decisions arose from this type of the procedure.[23]

The new Constitutional Court Act created two new procedures. Before 2012, it was only possible to file a complaint against the application of a legal norm contrary to the constitution as part of a judicial proceeding (now academically called: 'old' constitutional complaint). One of the new types is academically referred to as 'real' constitutional complaint, possible to be submitted against judicial decisions in violation of the Fundamental Law, while the other one is called a 'direct' constitutional complaint against the application of a legal provision contrary to the Fundamental Law, or when such legal newly adopted provision becomes effective causing a violation of fundamental rights contained in the Fundamental Law, without a judicial decision.[24]

These three types of constitutional complaints became very popular, and due to the elimination of the *actio popularis* rule under the new Constitutional Court Act, the constitutional complaint has become the most favoured type of procedure in the practice of the CC.[25]

Year	Arrived	Decided
2009	91	20
2010	144	29
2011	51	4
2012	728	752
2013	199	27
2014	333	311
2015	286	288
2016	388	284

1. All Types of Constitutional Complaints arrived and decided (2009-2016). Source: statistics on the website of the Court. http://www.alkotmanybirosag.hu/dokumentumok/statisztika/2017 (05.06.2017.)

The constitutional complaints submitted in a year and the constitutional complaints decided in the same year have connection in between the numbers. As one can see, the most complaints were submitted in 2012, because the elimination of *actio popularis* allowed the petitioners to submit their petitions for *a posteriori* (*ex post*) control of constitutionality in the form of constitutional complaints if they were affected by the challenged legal norm.[26] After the more than seven hundred cases of 2012, there was a downturn in 2013 only with 199 cases. Nonetheless, after 2014 the numbers increased again.

The decisions on the constitutional complaints demonstrate the same pattern: great increase in 2012, because of the wave of the several former *actio popularis* motions

[23] Jánosi-case: Constitutional Court Decision 57/1991 (XI. 8.) ABH 1991, 279. p.; *Az alkotmányjogi panasz kézikönyve*, (Bitskey Botond – Török Bernát szerk.), HVGOrac Kiadó, Budapest, 2015, 36-46. p.

[24] Act CLI of 2011 on the Constitutional Court Articles 26-27.

[25] From the statistics on the website of the Court. http://www.alkotmanybirosag.hu/dokumentumok/statisztika/2017 (06.05.2017.)

[26] Gárdos-Orosz 2012, 307. p.

resubmitted in the new form of the constitutional complaint, then a downturn and a stabilisation.

Generally, if a complaint is admissible, one of the panels will decide on this, with the exception of cases when different circumstances result in the decision of the plenary session.[27] The new rules on the constitutional complaints created serious discussions in academic discourse. Different opinions were formed as an increasing number of decisions were submitted.[28]

IV. Real Constitutional Complaints against the Administrative and Labour Courts' Decisions

Within the above context, following the introduction, I chose the 'real' constitutional complaints as the topic of my detailed analysis. From 2012, a total of 119 such complaints were submitted against the Administrative and Labour Courts' decisions according to the database of the CC.[29] I decided to examine these as they paint a more colourful picture, and the question of direct constitutional complaints in the practice of the CC was examined as well as the old constitutional complaints.[30]

A total of sixteen 'real' complaints were lodged in labour law issues on a variety of topics from old-age pension to termination without notice. If petitioners find a legal hiatus in the administrative court decision they wanted to question, the possibility of submitting a review in the Administrative and Labour Court is open to them. If the petitioner finds this decision unlawful, then the possibility of submitting a real constitutional complaint becomes available. The scope of the real constitutional complaints that have been filed is quite broad as Table 2 shows below.

The majority of the complaints are in relation with the gaming machines. In Hungary, the operation of gaming machines is forbidden without a special licence.[31] After this law

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[27] Act CLI of 2011 on the Constitutional Court Article 49. (6) Issues on the agenda of the panel shall be submitted for decision-making to the plenary session, if

a) in the matter examined on the merits by the panel the Act must be annulled, or

b) the conditions specified in Section 50 (2) f) are met, and

ba) the majority of the members of the panel initiates it,

bb) the President orders it, or

bc) five Members of the Constitutional Court who are not members of the given panel initiate it.

50 (2) f) in all cases where a decision of the plenary session is required by the social or constitutional importance or complexity of the case, by upholding the unity of constitutional jurisprudence or by other important reason.

[28] Vissy Beatrix: *Megkötözött szabad kezek*, Fundamentum 2014/1-2, 81-84. p.; Tilk Péter: *Az új típusú alkotmányjogi panasz előzményei és az eljárási renddel kapcsolatos egyes szabályozási elvárások*, Alkotmánybírósági Szemle 2011/2, 85-90. p.; Naszladi Georgina: *Veszélyben az alkotmányjogi panasz jogorvoslati jellege*, Fundamentum 2013/1. 81-83. p.

[29] The website showed this statistic 20 April 2017.

[30] Tilk Péter: *Az alkotmányjogi panasz, mint a bíróságok és az Alkotmánybíróság eljárásának kapcsolódási pontja*, Bírák Lapja, 2002/12. 59-61. p; Halmai Gábor: *Az alkotmányjogi panasz – jelen és jövendő?,* Bírák Lapja, 1994/3-4. 45-48. p., Köblös Adél: *A "régi" típusú alkotmányjogi panasz az új Abtv.-ben*, Alkotmánybírósági Szemle, 2012/1. 83-88. p.

[31] Act XXXIV of 1991 on the Gaming Operation Article 12. (2)

entered into force, several enterprises tried to operate only with online gambling, and when the National Tax and Custom Administration decided against their petitions in accordance with the law,[32] they tried to find remedy by submitting a constitutional complaint. It happened in thirty cases. The arguments of the petitions vary, e.g., in the Decision 3028/2016 (II. 23.), the CC pointed out that the petitioner argued that the lack of a forensic expert resulted in the wrong decision, because important questions of the information technology were neglected.[33]

The next group of nine decisions can be categorized under the keyword of 'review of administrative decisions'. These are general cases, where no other important point was emphasised such as significant human rights or the right to the fair trial -, but the petitioner argued at the core of the complaint against the decision-making itself.

Complaints submitted in tax law questions form the next group (ten cases). Several complaints were lodged against decisions in connection with land (agricultural land) –forests, constructions, line easement, etc.-. In some cases, the main point of the complaint was an important human right, such as the right to assembly or equal treatment. Finally, there is the category of 'other complaints', the cases not fitting into other categories: fines, cases concerning judicial enforcement officers, campaign contributions, etc.

V. Main objects of the complaints

Main Objects of the Complaints	Number of Complaints
Gaming machines	30
Labour law	16
Tax law	10
Review of administrative decisions	9
Procedural law	8
Right to assembly	7
Construction cases	6
Equal treatment	4
Competition law	4
Forest cases	3
Protection of property	3
Land use	2
Fine	2
Others[33]	15

2. Main objects of the complaints. Source: statistics on the website of the Court. http://www.alkotmanybirosag.hu/dokumentumok/statisztika/2017 (05.06.2017.)

[32] Act XXXIV of 1991 on the Gaming Operation Article 26. (1)

[33] Constitutional Court Decision 3028/2016 (II. 23.) ABH 2016, 874, [7]

[34] Cases of the „others" category: refugee, public procurement, expropriation, media cases, judicial enforcement officials, mine cases, land registry, line easement, campaign contribution, custody, gambling, family doctor business licence, membership contributions, traffic offence, carrier cases

V. Some Cases

I chose some cases to describe few of the more interesting problems mentioned in the complaints and to show that even a complaint against a decision of the public administration could result in an important decision of the plenary session of the CC and could even lead to the rectification of unconstitutionality caused by legislative omission.[35]

V.1. Freedom of Assembly

Several cases were examined by the CC in relation with the freedom of assembly mainly because of the Act III of 1989 on the freedom of assembly. This act was a great achievement in 1989 (at the time of the transition),[36] yet several problems arose since then in the practice built on its regulation.[37] For instance, according to the act, the planned assembly has to be announced three days in advance, which cannot be applied to spontaneous assemblies, in line with the recommendations of the OSCE as well.[38] The precise rules of the process were not specified so the authorities had to decide without proper constitutional guidelines, one can find many different decisions in judicial practice.[39] According to *Barnabás Hajas*, it would be enough if some of the provisions would be amended or supplemented, then the Act could be adequate.[40]

If someone intends to organise an assembly, it must be announced to the police.[41] The police will decide if the planned event can comply with the conditions of the law. There are some conditions in the Act which can result in the prohibition of the assembly beforehand,[42] and some conditions which can result in the prohibition during the assembly, leading to its dissolution.[43] The decision of the police can be petitioned to be reviewed in the Administrative and Labour Court.[44]

The CC then can examine the decision of the Administrative and Labour Court in case a real constitutional complaint is filed by the person or organization affected by the judicial decision and "a) their rights enshrined in the Fundamental Law were violated, and b) the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available."[45]

[35] Constitutional Court Decision 13/2016 (VII. 5.) ABH 2016. 253. p.

[36] Badó Katalin: *A gyülekezési jog értelmezése az Alkotmánybíróság döntéseinek tükrében,* Rendészet és emberi jogok – 2011/2. 4. p.

[37] Hajas Barnabás: *Megjegyzések a gyülekezési jog gyakorlatának irányváltásaihoz,* Iustum Aequum Salutare, XII. 2016. 4. 45. p.

[38] 'It is therefore important that the law does not stifle spontaneous demonstrations by unnecessarily restrictive provisions, including those concerning the requirement of prior notice.' OSCE.

[39] Hajas 2016, 44-45. p.

[40] Hajas Barnabás: *A gyülekezési jog egyes aktuális elméleti és gyakorlati kérdései*, Doktori értekezés, 2012., 245-248. p.

[41] Act III of 1989 on the Freedom of Assembly Article 6.

[42] Act III of 1989 on the Freedom of Assembly Article 8.

[43] Act III of 1989 on the Freedom of Assembly Article 14.

[44] Act III of 1989 on the Freedom of Assembly Article 9.

[45] Act CLI of 2011 on the Constitutional Court Article 27. (1)

In the examined case, Decision 13/2016 (VII. 5.), the petitioners organised an assembly in more than ten places during a day and three of them were prohibited by the police. They initiated a review of the police administrative decisions in the Administrative and Labour Court.

One of the venues was in front of the Curia of Hungary, which could be prohibited, because the Act allows the prohibition if the operation of the parliament or the courts is under direct and serious threat. The CC examined this condition in Decision 30/2015 (X. 15.) and stated that this condition is necessary, but not automatic.[46]

The other two prohibited venues were in residential areas, and they said that it would disturb the right to privacy of the owner of the house and the neighbours.[47] The CC recognised the dilemmas created by the regulation of the Act again, and decided to take action. The CC declared legislative omission that results in violating the Fundamental Law, and called upon the Parliament to comply with its duties to remedy this situation until the end of 2016. The collision of two human rights (assembly and privacy) resulted in a constitutional conflict of the rights, and the CC decided to refer the question to the law-maker, who has the power to act in this situation and it became the responsibility of the Parliament to adopt a new and proper act on the freedom of assembly until the end of 2016.[48]

Due to the priority adoption of more extensive procedural laws in the field of administrative, civil and criminal procedure laws, the new bill still has not been submitted to Parliament, but codification is under way in the Ministry of Justice and it is hoped that the legislator will be able to fulfil the obligation imposed by the CC.

V.2. The Role of the Court

Several petitioners tried to seek legal remedy against the unfavourable decisions of the Administrative and Labour Courts. The CC drew a line in the sand and decided that there would not be a 'super-court', a court of fourth instance for the petitioners.[49] A *per se* erroneous decision of a court is not enough and the constitutional aspects of the challenged judicial decisions would need to be examined, in case the complaints meet formal and material conditions (admissibility criteria).[50]

The alternative material conditions are:

- if the merits of the judicial decision are significantly affected by a conflict with the Fundamental Law;
- or the case raises constitutional law issues of fundamental importance.[51]

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[46] Constitutional Court Decision 30/2015 (X. 15.) ABH 2015, 774, [43]

[47] Constitutional Court Decision 13/2016 (VII. 5.) ABH 2016, 253, [4]

[48] Constitutional Court Decision 13/2016 (VII. 5.) ABH 2016, 253, [56]

[49] Constitutional Court Decision 3325/2012. (XI. 12.) ABH 2012, 1808, [14]

[50] Deli Gergely: *A formai és tartalmi követelmények vizsgálata a befogadás visszautasítása során*, Forum. Acta Jur. et Pol., 2015/2, 38. p.; Sulyok Tamás – Szakály Zsuzsa: A*z alkotmányjogi panasz jogorvoslati jellegének bővülése,* in: Számadás az Alaptörvényről, Tanulmányok a Szegedi Tudományegyetem Állam- és Jogtudományi Kar oktatóinak tollából, Balogh Elemér (szerk.), Magyar Közlöny Lap- és Könyvkiadó, 2016, 362-366. p.;

[51] Karsai Dániel: *A bírói döntést érdemben befolyásoló alaptörvény-ellenesség és az alapvető alkotmányjogi jelentőségű kérdés az Alkotmánybíróság gyakorlatában,* Forum. Acta Jur. et Pol., 2015/2, 71-72. p.;

In Decision 3077/2016 (IV. 18.), the petitioner tried to establish the complaint on the fact that he was not informed properly about the difference between an appeal and a supplement by the public authorities but the CC did not find this argumentation sufficient to admit the complaint.[52]

The principle of legal certainty was cited by several petitioners,[53] but the CC stated several times that the principle of legal certainty itself is not enough for a successful constitutional complaint, only under special circumstances, e.g. in the case of the retroactive effect of legislation or the absence of the time for preparations to apply a piece of legislation.[54]

V.3. The Principle of Equal Treatment

The principle of equal treatment was used in the reasoning of four constitutional complaints which are examined hereunder. One of them is remarkable as in this case the petitioner was a company which managed a lounge. The establishment introduced a discount favouring women (ladies' night). One of the male guests decided to lodge a complaint because of the perceived lack of equal treatment in the company policy introducing the gender-based reduction. The practice applied by the establishment was indeed found to be discriminatory at first instance by the Equal Treatment Authority.[55] The owner of the establishment then decided to lodge a review against the decision of the Equal Treatment Authority in the Administrative and Labour Court. The Administrative and Labour Court confirmed the Authority's decision.[56] The owner then decided to submit a constitutional complaint against the court's decision and he alleged that the decision was discriminative, violated the right to property, the right to human dignity and the freedom of enterprise. He argued that he just wanted to compensate the lower working wages of women with the advantages in his bar and prevent discrimination with the measures he introduced.[57]

In his decision on this complaint, the CC examined the freedom of enterprise, the rights of the legal persons and the possible restrictions of the freedom of property and found against petitioner, which means that based on the facts of the case, it is constitutionally discriminative to create discounts for female costumers based on their gender. In this case the CC declared significant principles regarding the rights of the legal persons and the possibility of gender-based discrimination against men.

Another case related to the principle of equal treatment was filed and examined in relation to the rights of the child. In a bathing area, the presence of the children under the age of sixteen was forbidden in a designated area of the facility that offered these services (quiet wellness). The mother of a four-year-old child decided to turn to the Equal Treatment Authority, and after the refusal of her complaint, to the Administrative and Labour Court. Following the refusal of her case by the Administrative and Labour Court, she filed a constitutional complaint to the CC. The CC also found no proper argumentation

[52] Constitutional Court Decision 3077/2016 (IV. 18.) ABH 2016, 1243, [38-39]

[53] Such as in the case of Decision 3124/2015. (VII. 9.) ABH 2015, 2139, in relation with competition law.

[54] Constitutional Court Decision 3062/2012. (VII. 26.) ABH 2012, 604, [86-91]

[55] Decision of the Equal Treatment Authority EBH/545/13/2013.

[56] Budapest-Capital Administrative and Labour Court Decision 21.K.30.042/2014/15.

[57] Constitutional Court Decision 3001/2016. (I. 15.) ABH 2016, 647, [17]

is support of the material conditions that we mentioned above, and upheld the arguments of the Authority and the Administrative and Labour Court. They both alleged that the use of a designated area of a bathing facility is not a basic human right, and the practice of the facility therefore was not discriminative.[58]

VI. Conclusion

To summarize, we can conclude that the CC decided on several real constitutional complaints against the decisions of the Administrative and Labour Courts after 2012. The more than a hundred cases are extremely divergent, as we could have seen from the analysis as well.

The new possibility of filing these complaints was (and still is) quite popular among the petitioners, however, their initial success rate was quite low. This is not surprising, though, if we examine the statistics of other European constitutional courts, like that of the Federal Constitutional Court of Germany. The German court's jurisprudence has always been an example for the Constitutional Court of Hungary from the beginning as well as in the formulation of the new method of assessing the admissibility of the new types of constitutional complaints.[59]

The divergence of the possible processes of the public administration can be found in the cases as well. The judicial review of public administration decisions is one of the cornerstones of the rule of law in a democratic society. The new possibility, that the decisions of the regular courts, even the decisions of the Administrative and Labour Courts can be examined by the CC created a new step in the system in 2012. Several cases were only attempts to find a fourth instance for their case, but these were declined. The CC decided against becoming a 'super-court', and committed to the principle of only examining the constitutional aspects of complaints. As the CC stated in its Decision 3325/2012 (XI. 12.), "Neither the abstract definition of the rule of law, neither the basic right of the fair trail, neither the prohibition of discrimination could create a basis for the Constitutional Court to enter in the role of a "Super-Court" which is above the court system and act as an ordinary forum of legal remedy."[60]

However, one error of public administration can be enough to find serious constitutional violations. As we could have seen, the CC has declared legislative omission in violation of the Fundamental Law in the case of the freedom of assembly.

The possible ways of the development of the examination of the constitutional complaints are depending on several factors, particularly on future petitioners, future petitions and the future decisions of public administration these will be based on. The new Act I of 2017 on the Code of Administrative Procedure will fundamentally change the system of reviewing

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[58] Constitutional Court Decision 3185/2014. (VI. 27.), ABH 2014, 2171.

[59] Naszladi Georgina: *A német alkotmányjogi panasz hatása a hazai szabályozásra és az alkotmánybírósági gyakorlatra*, JURA 2014/1. 236-240. p; Zakariás Kinga: *Az alkotmányjogi panasz objektív és szubjektív funkciója,* Forum. Acta Jur. et Pol., 2015/2. 153-154. p.; Vissy 2012, 205-209. p.; Csehi Zoltán: *Kérdések és felvetések a német típusú alkotmányjogi pnasz magyarországi bevezetése kapcsán,* Alkotmánybírósági Szemle 2011/1. 103-108. p.

[60] Constitutional Court Decision 3325/2012. (XI. 12.) 1 ABH 2012, 808, [14]

the decisions of public administration,[61] and it could affect the practice of the CC in terms of constitutional complaints against the decisions of the Administrative and Labour Courts, but it is still early to state any more than this.

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[61] Balázs István: *A közigazgatási hatósági eljárás és jogvédelmi rendszer új szabályozásához,* A Jogtudományi Intézet blogoldala http://jog.tk.mta.hu/blog/2017/03/kozigazgatasi-hatosagi-eljaras-uj-szabalyozasa (15.05.2017.); Rozsnyai Krisztina: *Koncepcionális változások a közigazgatási perrendtartásban,* https://jogaszvilag.hu/rovatok/szakma/koncepcionalis-valtozasok-a-kozigazgatasi-perrendtartasban (15.05.2017.)

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HUNGARIAN PETTY OFFENCE LAW - AN AREA OF LAW BETWEEN CRIMINAL AND ADMINISTRATIVE LAW

I. Introduction

"In our legal system, it is the petty offence law that is intended to ensure protection against acts that, compared to criminal offences, have lower dangerousness to society. The regulation of the petty offence law needs to ensure protection against behaviours that endanger the basic values to a lesser extent and against behaviours that endanger values that are "still" determined to be protected by the law. […] Petty offence law has a special place in our legal system as it affects the everyday life of citizens and influences their legal awareness and law-abiding attitude."[1]

The Act on Petty Offences, Petty Offence Procedure and the Petty Offence Registry System (in the following: Act on Petty Offences) came into force on the 15th of April 2012. According to *Marianna Nagy* there were neither theoretical, nor practical reasons for a new Act on Petty Offences, not to mention that the new regulation has shifted our petty offence law towards criminal law which means that petty offences no longer belong to the realm of administrative penalty law, but they are part of a latent law of misdemeanours.[2]

But from where did petty offences start? What are those elements that lead petty offence law closer to criminal law than to administrative law? It is a fact, also identified by the Hungarian Constitutional Court, that it is connected to both administrative and criminal law. What are these connections? What kind of attitude do dogmatism of the administrative and the criminal law have towards petty offences?

The aim of this paper is to answer these questions and to give an overall picture of the character of the Hungarian petty offence law. According to these goals this study is divided into three main sections. The first part is about petty offences in general: how did they come into being, what were the milestones in their history, how does the Hungarian Constitutional Court interpret the character of them and how are they regulated currently? In the second section of the paper the connections of the petty offence law to the administrative law will

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[1] Details from the concept on the Act on Petty Offences, 2010 2014. kormany.hu/download/6/18/40000/Koncepció.doc (02.06.2017).

[2] Nagy Marianna: *Quo vadis Domine? Elmélkedések a szabálysértések helyéről a 2012. évi szabálysértési törvény kapcsán*. Jogtudományi Közlöny 2012/5. 217. p.

be considered and the third part of the essay attempts to show the elements of the criminal law in the Hungarian petty offence law.

However, it is necessary to clarify here why the term petty offence is used in this paper as there would be some other possibilities, as well. Terms like misdemeanour, infringement, infraction, and petty offence all seem to be an appropriate translation of the affected legal institution.

The original Hungarian term is *szabálysértés*. As it will be presented in the next section of this paper this legal institution exists only from the 1950s. Before that, as part of the trichotomy, there were felonies (*bűntett*), misdemeanours (*vétség*) and infractions (*kihágás*). The term *szabálysértés* is often translated as misdemeanour which is incorrect as misdemeanours are one type of the criminal offences.

Infringement is also an improper expression: on the one hand, it is rather used in the Anglo-Saxon legal system for smaller offences, on the other hand in the European Union it is a term for a special proceeding of the European Commission.

In my opinion, the term petty offence expresses the special character of the affected legal institution mentioned above in the most specific way and presented in the following.

II. Special character of petty offences

Petty offence is an activity or passive negligence that is potentially dangerous to society and that is punishable under this Act. An 'act dangerous to society' means any activity or passive negligence which prejudices or presents a risk, lower than in case of criminal offences, to the fundamental constitutional, economic or social structure of Hungary provided for in the Fundamental Law, as well as the person or rights of others.[3]

Petty offences are according to the Hungarian Constitutional Court Janus-faced, which means that generally they are classified into two types: situations of the petty criminal law (*bagatell büntetőjog tényállásai*) and situations against public administration (*közigazgatás-ellenes tényállások*).

In the following, it is going to be clarified how this concept and classification came into being.

II.1. Historical background with special regard to conceptual approaches

A special milestone in the development of the Hungarian criminal law is the Act Nr. V. of 1878 on Felonies and Misdemeanours (in the following: Act on Felonies and Misdemeanours) and in connection with that the Act Nr. XL. of 1879 on Infractions (in the following: Act on Infractions). According to this regulation the trichotomy was instituted and on the basis of their weight offences were divided into felonies, misdemeanours and infractions. Infractions became the mildest category of crimes.[4]

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[3] Section 1 of the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System.

[4] Nagy Ferenc: *A magyar büntetőjog általános része*. HVG-ORAC Lap- és Könyvkiadó Kft, Budapest, 2010. 37. p.

As for the connection of the two Acts it shall be mentioned that without different provisions the rules of the Act on Felonies and Misdemeanours were applicable, as well as there were general concepts, like perpetrator – accomplice, attempt, intent, or negligence.

According to Art. 1. of the Act on Infractions infraction is any act declared as an infraction by an act, minister's, or municipality's decree. Most of the infractions were judged by public administration authorities.[5] The Act on Infraction ordered to sanction infractions with confinement or fine. If the perpetrator didn't pay the fine it was possible to substitute it by the appropriate term of confinement.

The general provisions of the Act on Infractions are very similar to the Act on Petty Offences. That is why the statement of *Ferenc Finkey* about the Act on Infractions is quite actual today as well: „the Act on Infractions has fallen between two stools because of the discords between criminal and administrative law."[6]

Several changes occurred in the 1950s. First, the Act Nr. II of 1950 on the General Part of the Criminal Code abolished the category of misdemeanours and instituted dichotomy. The regulation concerning crimes must have been applied basically for infractions as well. Felony was an act that is potentially harmful to society and that is punishable under this Act.[7] Infraction is an activity or passive negligence declared as an infraction by the law, a provision of the police or the entitled authority, that is harmful to society.[8] The common specific of felonies and infractions was the harmfulness to society which was defined the following way: an 'act dangerous to society' means any activity or passive negligence which prejudices or presents a risk to the constitutional, economic or social structure of the Hungarian People's Republic, as well as the citizens or their rights.

Infractions were judged by the so called executive committees (*végrehajtó-bizottságok*) and by the police. However, in 1953 the decision-making right of the police was terminated and the authority was divided between the executive committees and the district courts (*járásbíróságok*). Irregularities (*szabálytalanságok*) as a new category differing from the infractions were introduced.

In 1955 dichotomy was abolished together with the category of infractions and a new, independent legal institution was created: the petty offences.

Petty offences were regulated in the Act Nr. I of 1968 on the Petty Offences and in the Government Decree Nr. 17 of 1968 (it contained the different situations). According to the Art. 1 of the Act an activity or a negligence may be declared as petty offence by act, government decree or local government decree. The definition of petty offences cannot be found in the Act, though according to the preamble the Act, shall be applied to acts that are against the law and have a lower dangerousness to society.

The proceeding authorities were part of the public administration: in general, the so-called councils (*tanácsok*) (after the change of the regime: the notaries) and the police had the decision-making right in case of petty offence situations.

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[5] Árva Zsuzsanna: *A közigazgatás szervezeti változásai a szabálysértési jog fórumrendszere tükrében*. Debreceni Jogi Műhely, 2014/1-2. http://www.debrecenijogimuhely.hu/archivum/1_2_2014/a_kozigazgatas_szervezeti_valtozasai_a_szabalysertesi_jog_forumrendszere_tukreben/ (04.06.2017)

[6] Domokos Andrea: *Finkey Ferencről*.
http://www.ugyeszek.hu/finkey+ferenc-dij/finkey+ferencrol/finkey+ferencrol.html#domokos (04.06.2017).

[7] Article 1 of the Act Nr. II of 1950 on the General Part of the Criminal Code.

[8] Article 72 Act Nr. II of 1950 on the General Part of the Criminal Code.

In the 1990s some constitutional qualms occurred in connection with the fact that court protection was not guaranteed (with one exception) against the decisions of the petty offence authorities. This was the basis of the Resolution Nr. 63/1997. (XII. 12.) of the Hungarian Constitutional Court and throughout that the starting point of a new act on petty offences.

As for the decision of the Hungarian Constitutional Court, the panel laid down that petty offence law is a Janus-faced area of law, as a part of the situations are against administrative law, while the other part of them are criminal acts and of course in both cases the right to court protection must be ensured.

The legislator, accomplishing the expectations of the Constitutional Court, passed the Act Nr. LXIX of 1999 on Petty Offences and its executive decree. With the new regulation, the Hungarian petty offence law was obviously determined to become the so called administrative penalty law. It follows most of all from the definition of petty offences according to the Preamble of the Act: petty offences mean any conduct that violate or endanger generally accepted standards of social coexistence (dangerousness to society), lower than in case of criminal offences, hinder or interfere with the functioning of public administration or violate the legislation on the exercise of a specific activity or profession.

A conduct may have been identified as a petty offence by act, government or local government decree and many authorities had decision-making right: notaries, police, and other special administrative bodies. Local courts also got scope in case of petty offences that might be sanctioned with confinement, as well as they decided remedies and conducted the non-paid fine into confinement.

In 2010 a significant legislative process began, by that petty offence law was affected, too. Because of that the Hungarian Parliament repealed the Act. Nr. LXIX of 1999 on Petty offence. Also, the Government Decree Nr. 218 of 1999 on the petty offences and all the local government decrees on petty offences were rescinded.[9]

On the 23rd of 2011 the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System had been launched. What the main characteristics of the new applicable law are, will be examined in the next section of the paper.

II.2. Applicable law

The *Act on Petty Offences, Petty Offence Procedure, and Petty Offence Confinement* (in the following: Act on Petty Offences) entered into force on the 15th of April 2012.

Most of the experts did not see any theoretical or practical reason for a new regulation. According to some researchers the development and simplification of this area of law had been undermined.[10] According to *Marianna Nagy* the only reason for the new regulation could have been the aim of restricting the legal sanctions in the interest of more effective legal compliance of the citizens.[11]

One of the most important changes is that the administrative-law-like situations were „disconnected" from petty offence law, which is also expressed in the Preamble: the aim

[9] Belcsák Róbert Ferenc: *Lassú evezőcsapásokkal a kihágási büntetőjog felé, avagy gondolatok az új szabálysértési törvényhez*. Iustum – Aequum – Salutare 2013/1. 164. p.

[10] Belcsák 2013, 164. p.

[11] Nagy 2012, 218. p.

of the act is to handle conducts that do violate or endanger the generally accepted rules of social cohabitation, but which do not have the same risk or danger as criminal offenses. Essentially, this means that the legislator looks at petty offences as petty or small crimes. This kind of attitude shifts our petty offence law towards criminal law.[12]

As mentioned above, petty offence is an activity or passive negligence that is potentially dangerous to society and that is punishable under this Act. An 'act dangerous to society' means any activity or passive negligence which prejudices or presents a risk, lower than in case of criminal offences, to the fundamental constitutional, economic or social structure of Hungary provided for in the Fundamental Law, as well as the person or rights of others.[13] The basic element of petty offences is the law dangerousness to society.

The criminal law like character of petty offence law is expressed most of all through the sanctions and their execution in the Act on Petty Offences. The sanction system is dual which means that there are penalties and measures. Penalties are the petty offence confinement, the petty offence fine and – as a new penalty – the community service work; measures are the driving ban, the exclusionary order, the confiscation, as well as the warning. Petty offence confinement may be imposed only by court.

Another important provision of the Act is connected to the proceeding authorities about which an ostensible simplification may be observed. The general petty offence authority is the district office of the government office (*a fővárosi és megyei kormányhivatal járási* (*kerületi*) *hivatala*) (instead of the notary of the local governments). Petty offences, that may be sanctioned with confinement, are judged by district courts (*járásbíróságok*). There are petty offences in connections with that the police, as well as the National Tax and Customs Administration of Hungary are the proceeding authorities.[14] In fact the reduction of the number of proceeding authorities does not realize as there are plenty of authorities besides the above mentioned that has the right to confine a fixed penalty fine.[15]

According to *Marianna Nagy*, the Hungarian petty offence law cannot be described as administrative penalty law anymore, it is getting even more the law of infractions with the latent elements of infractions in its regulation. The new Act on Petty Offences confirms the elements of criminal law and criminal procedural law. However, there is still a strong connection to administrative law and that is the proceeding authorities, that are part of the public administration.[16]

Also, *Marianna Nagy* said that the Janus-faced character should not be questioned anymore and it should be accepted, that there are both elements of administrative and criminal law in its material and procedural law.[17] These different elements will be presented in the following two parts of the essay.

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[12] Belcsák 2013, 164. p.

[13] Article 1 of the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System.

[14] Article 1, Section 38 of the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System.

[15] Article 1, Section 38 of the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System.

[16] Nagy 2012, 218. p.

[17] Nagy 2012, 219. p.

III. Petty offence law and administrative law

The relation between petty offence law and administrative law will be examined from two viewpoints. Firstly, how the dogmatism of administrative law handle petty offences and secondly, what are the main elements of administrative law in the petty offence procedures.

III.1. Petty offences from the view of administrative law

Petty offences are in connection with the punitive and sanctioning power of public administration, which was written up by *James Goldschmidt* (theory of administrative penalty law). From the view of statutory law, it means norms that set the terms of using punitive sanctions by administrative bodies. From the view of procedural law the administrative punitive power means the sanctioning 'jurisdiction' of the public administration. The expansion of the administrative punitive power has two main reasons. On the one hand, it aims the relief of criminal jurisdiction through decriminalization. On the other hand, it may be originated in the recognition that administrative sanctioning may be faster, simpler and sometimes more efficient than the judicial proceeding.[18]

The punitive and sanctioning power of public administration appears in the form of administrative sanction (*közigazgatási jogi szankció*). The administrative sanction is a disadvantageous legal act of the entitled administrative authorities in a regulated process that reacts to an unlawful conduct and may be enforced.[19]

Administrative sanctions may be grouped by several aspects. According to the administrative activity there are magisterial sanctions (*hatósági szankciók*), sanctions based on public service legal relationship and sanctions based on supervision power. Based on their aim, there are reparative, repressive, interdicting and correctional sanctions. Depending on the legal act that has been violated sanctions may be classified into material and procedural sanctions (*anyagi és eljárásjogi szankciók*). In case of a subjective sanction it must be examined if the offender handled with intent or with negligence unlike objective sanctions. [20]

Petty offences are also part of the system of administrative sanctions. The reason for that is that most of the petty offence situations got into the administrative law through decriminalization [situations of the petty criminal law (*bagatell büntetőjog tényállásai*)], while the other part of them (as subjective sanctions) is the most significant element of the liability for the violation against administrative law [situations against public administration (*közigazgatás-ellenes tényállások*)].[21]

As beyond these, there are also situations that have the characteristics of both branches of law, the legislator had to decide between two theoretical solutions when reregulating the law of petty offence. According to the first theory, only situations against administrative

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[18] Cserép Attila – Fábián Adrián – Rózsás Eszter: *Kommentár a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről szóló 2012. évi II. törvényhez*. Wolters Kluwer Kft., Budapest, 2012. 2. p.

[19] Fazekas Marianna – Ficzere Lajos: *Magyar Közigazgatási Jog Általános Rész*. Osiris Kiadó, Budapest, 2005. 548. p.

[20] Fazekas – Ficzere 2005, 549. p.

[21] Fazekas – Ficzere 2005, 553. p.

law should be part of the petty offence law, while the smaller criminal law like situations should be recriminalized. The other theory is based on the recognition of the duality of this field of law.[22] As for the Act on Petty Offences, the legislator followed another solution and shifted petty offence law towards criminal law.

However, there are still some connections to the administrative law and that these are the proceeding authorities and their decisions.

III.2. Connection to administrative law

Petty offence procedure can be described as a special administrative procedure, as administrative bodies establish different obligations for natural or legal persons under public authority activity. This means an administrative legal relationship between the administrative body and the so-called client. Is petty offence legal relationship an administrative legal relationship as well?

This question was answered by *László Sólyom*, former judge of the Constitutional Court, who attached concurring opinion to the Resolution Nr. 63/1997 (XII. 12.). According to him, it is a wrong view to take an equal sign between petty offence legal relationship and administrative legal relationship and throughout it is also incorrect to qualify the decisions of petty offence authorities as administrative decisions. First, the provisions of the Act Nr. IV of 1957 on the General Rules of Administrative Proceedings – as well as the provisions of the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services – must not be applied for the petty offence procedures.[23] Except for the proceeding authorities, that are organs of the public administration in both cases, there is nothing common in the two kinds of legal relationships. The main differing attribute of petty offence proceedings is that the proceeding authority may impose a penalty that is a repressive sanction (see above).[24]

As for the system of proceeding authorities, as a connection to the public administration, they have been varying since the Act on Infractions, though there were always authorities of public administration that may have proceeded in case of infractions or petty offences. Besides them, courts had a decision-making right from time to time. As mentioned above, in 1955 the scope got completely in the sphere of public administration and that was the case until 1999, when courts got back their decision-making right, but only in situations that may be sanctioned with petty offence confinement.

According to the Article 38, Section 1 of the Act on Petty Offences the general proceeding authority is the so-called district office of the government office (*a fővárosi és megyei kormányhivatal járási* (*kerületi*) *hivatala*), that is part of the central public administration and is under the supervision of the government. Before that the general proceeding authority was the notary (*jegyző*) of the autonomous local government. As we can see it, the decision-making right had been moved from the local organ of public administration to the central organ of public administration.

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[22] Fazekas – Ficzere 2005, 553. p.

[23] Szilvásy György Péter: *Rendvédelem és közigazgatási eljárások*, in: Szigeti Péter (szerk.): Jogvédelem – rendvédelem tanulmányok. RTF Alkotmányjogi és Közigazgatási Jogi Tanszék, Budapest, 2007. 132. p.

[24] Constitutional Court Decision 63/1997. (XII. 12.) ABH 1997, 365, 367-368. p.

What was the reason for this change? According to *Marianna Nagy*, it was the new perception about the state, that needs a strong and centralized public administration system for the enforcement of the tasks of public administration. In that the punitive power of public administration has an important role. And so, we are back to our starting point i. e. sanctions of public administration and petty offences as part of the system of public administrative sanctioning.[25]

However, there are also some questions (that will not be answered here lack of time and place) remaining: does and if yes how does this change – moving the decision-making right from local authorities to central public organs – affects the right of perpetrator to independent and neutral decision? Can the system of public administration operate this kind of petty offence law that is getting closer and closer to criminal law?[26]

IV. Petty offence law and criminal law

The main theoretical question of petty offence law has not changed since the Act on Infraction: what kind of relationship does petty offence law have with administrative law and criminal law? The main connection points of petty offence law to administrative law have already been presented, in the following part of my essay I would like to make an attempt to summarise the relationship between petty offence law and criminal law. Firstly, I mention how criminal law dogmatism near petty offences, secondly, I name specific elements that stem from criminal law that shift petty offence law quite far from the administrative law.

IV.1. Petty offences in the dogmatism of criminal law

The dogmatism of criminal law proceeds from the question if criminal law has such components that belong solely to it. There are three main aspects in connection with this question. According to the first aspect, this component is the crime, while according to the other it is the penalty. A third theory is that both crime and penalty are inevitable components of criminal law. It follows that the lack of crime and penalty, as well as the lack of crime or penalty can lead to another branch of law in the field of public law and inter alia that may also be petty offence law. So first of all, the relationship between petty offence law and criminal law has to be examined. [27]

According to a formal approach, the difference between petty offence lawlessness and criminal lawlessness is the compulsory valuation of the legislator: if a conduct may be sanctioned with fine or confinement, then we speak about a petty offence, if the sanctions are criminal law penalties than that is a crime. The material approach may be divided into two viewpoints. According to the first perspective, petty offences differ from crimes essentially in the way and seriousness of the offense against the legal interests (qualitative difference). According to the other one in connection with the unlawfulness there is only

[25] Nagy 2012, 218. p.

[26] Belcsák 2013, 172. p.

[27] Nagy Ferenc 2010, 21-22. p.

a gradual difference (quantitative difference), which means that these conducts are also harmful to society but in a lesser way than crimes, so the sanctions are milder as well.[28]

As mentioned above, petty offences do not have a homogeneous nature, which means that there is criminal law like situations and situations that violate the provisions of public administration. As for the criminal law like situations they also violate legal interests just like crimes and sometimes it is hard to differentiate between crimes and petty offences but there are some viewpoints: the extent of damage, financial disadvantage or smaller value of the thing may result in a petty offence. More and stronger *criteria* may lead to a crime, for example in case of a libel or a breach of the peace. Another viewpoint may be the sanctioning system, as it is different from the sanctioning system of criminal law[29], though but as we will see it petty offence confinement is very close to it.

IV.2. Elements of the criminal law in the Hungarian petty offence law

Petty offence procedure can be seen as a 'petty criminal procedure'. Firstly, general prevention and repression are specific to petty offences as they are also conducts dangerous to society. Secondly, the Act on Petty Offences uses several legal institutions and definitions of the criminal material and procedural law.[30] As petty offences and crimes differ from each other only in the seriousness and dangerousness of the offense against the legal interests, but the way of the offense and sometimes its form are the same, there are several definitions and rules of criminal law in petty offence law.[31]

First, instead of these definitions I would like to mention the strictest sanction of the petty offence proceeding and that is the so called petty offence confinement. Except for a short period in the 1990s, petty offence confinement was always one of the sanctions in the petty offence proceedings though the imposing authority may have varied (courts, organs of public administration). As this is kind of a deprivation of liberty that is the specificity of criminal law, it makes petty offence law really like criminal law.

On the one hand, most experts of the petty offence law think that confinement, that may be imposed only for certain types of petty offences, is a too strict sanction for a petty offence. If petty offences are dangerous to society in a lesser way than crimes then why is confinement needed? Article 21 of the Act on Petty Offences states that the sanction must be proportional with the unlawful conduct. Does the possibility of imposing a confinement meet this requirement?[32]

On the other hand, petty offence confinement has the characteristic of *ultima ratio*. If the perpetrator does not pay the imposed fine or does not accomplish the community service work (*közérdekű munka*), the fine or the community service work may be transformed by the court into confinement. It is possible not only by the certain types of petty offences but in case of all petty offences.[33] To sum up these thoughts about petty offence confinement,

[28] Nagy Ferenc 2010, 23. p.

[29] Nagy Ferenc 2010, 24. p.

[30] Szilvásy 2007., 132. p.

[31] Nagy Ferenc 2010, 23. p.

[32] Belcsák 2013, 173. p.

[33] Belcsák 2013, 172. p.

the question of *László Papp* shall be accepted, i. e. "Then why is petty offence, that may be sanctioned with confinement, petty offence and not crime?"[34]

In the following, I would like to mention definitions that originate from criminal law but are also used in the Act on Petty Offences. It is most of all the elements of the liability that are part of the criminal law liability, as well.

Petty offense liability may be established, if the conduct of the perpetrator is committed intentionally or – if negligence also carries a punishment – with negligence. If it is expressly prescribed by the act establishing the petty offence, any person who carries out an act with the intent to commit a petty offence, but without finishing it, shall be punishable for attempt. Perpetrator does not only mean the parties to a crime, but also the abettor and the aider.[35]

The principle of the so called *nulla poena sine lege* is regulated in the Act on Petty offences, as well as the grounds for total or partial exemption from responsibility should be examined during the petty offence proceeding, as well.[36]

As for the petty offence proceeding, the Act on Petty Offences orders to apply the principals of the criminal proceeding: these are the principles of the presumption of innocence, the *ex officio* proceeding, the burden of proof and the right to defence.[37]

The proceeding itself is also much more similar to the criminal procedure than to the administrative procedures as it begins with accusation and in case of petty offences, that may be sanctioned with confinement, there is also the possibility of the so called preparatory procedure. An important difference is though that in most of the cases the roles do not differ, as it is the authority that should explore, decide the case and execute the decision.[38]

V. Conclusions

Since petty offences came into being it had always been a question what kind of connection do they have with administrative law and criminal law. This is a question that is getting increasingly important if we examine the new regulation on petty offences that is embodied in the Act Nr. II of 2012 *on Petty Offences, Petty Offence Procedure, and Petty Offence Registry System*.

First, there were the so-called infractions: they were the mildest form of criminal acts in the system of trichotomy. In the 1960s appeared the petty offences defined as sanctions of public administration. With the theory of administrative penalty law petty offences became the device of the punitive power of public administration. Defining the current regulation would be quite a hard task.

Though it was not the aim of this paper but the presentation of the so many times mentioned special character of petty offence law. Petty offences are according to the

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[34] Belcsák 2013, 174. p.

[35] Article 2, Section 1-3 of the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System.

[36] Article 2, Section 6-7 of the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System.

[37] Article 31-32, 34 of the Act Nr. II of 2012 on Petty Offences, Petty Offence Procedure and Petty Offence Registry System.

[38] Belcsák 2013, 176. p.

Hungarian Constitutional Court Janus-faced, which means that generally they are classified into two types of situations: situations of the petty criminal law and situations against public administration. Another characteristic of petty offence law that there are both elements of administrative and criminal law in its material and procedural law.

From the aspect of administrative law, petty offences are part of the public administration sanctioning system. They are magisterial, material, repressive, subjective sanctions. As for the dogmatism of criminal law the lack of one of components of criminal law, i. e. crime and penalty, as well as the lack of crime or penalty can lead to another branch of law in the field of public law and *inter alia* that may also be petty offence law. So, the relationship and the distinguishing factors between petty offence law and criminal law is examined.

The evaluation of petty offences belongs to the realm of public administration, because the general proceeding authorities are the so-called district offices. Such instruments and definitions shall be used that originate from criminal law and that are quite strange compared to the traditional magisterial law application. Will they remain in the sphere of administrative law or will we be the witnesses of a new re-discrimination process?

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PANEL III – INTERNATIONAL AND EU LAW INFLUENCE ON PUBLIC ADMINISTRATION

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RIGHT TO GOOD ADMINISTRATION IN THE CONTEXT OF THIRD COUNTRY NATIONALS

Introduction

In 1992 the Maastricht Treaty introduced the *Concept of Citizenship of the Union*, marking a significant shift away from the EU's origins as a purely economic union. The consequent strengthening of the rights of EU citizens, however, has carried the potential to widen the gap between the treatment of EU citizens and the millions of third country nationals currently resident in the EU. [1]

By granting EU citizenship European Union created a common identity for Member States nationals, but the European citizenship granted union citizenship rights only for EU nationals.

For non-nationals, who arrived from third countries (non-EU states) and stayed in one of the EU Member States the regulation about the union citizenship didn't provided union rights. Meanwhile, third country nationals (TCNs) remain explicitly outside the scope of European citizenship.

The TCN status largely determined by the law and regulations of the Member States of residence. As a result of this, TCNs in one Member State may live under a very different national legal regime-and hence have different prospects for obtaining national and thence European citizenship.[2]

So, although the EU comes closer to achieving the *common identity* which has so long been aimed for, the rights of the TCNs can be said to be ignored and possibly discriminated against in comparison to the EU nationals.[3]

Because the greatest obstacles to integration arise from differences among MS naturalization regimes and immigration rules, the EU decided to harmonise the status of the TCNs after the Tampere Programme.[4]

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[1] Doukas, Irenie: *Non-discrimination on grounds of nationality: the position of third country nationals within the EU*, 4 Cambridge Student Law Review, 2008., 1. p.

[2] Becker, a. michael: *Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals*, Yale Human Rights &Development Law Journal, Vol.7., 138. p.

[3] Becker 2014, 12. p.

[4] Gyeney, Laura: *Legal Migration to the European Union with special regard to the right to respect family life*, Summary of Doctoral Thesis, Budapest, 2011.

The basis for policy development in the sphere of integration was elaborated by the 1999 Tampere European Council. The conclusions of the Tampere Council – in the context of setting out the political guidelines for the EC immigration – pointed towards an inclusive policy based on equal treatment and a secure legal status, particularly in the case of long-term residents. The Council requested the creation of a uniform set of rules through which *fair treatment* of all TCNs residing legally in the EU Member States should be ensured.[5]

This fair and equal treatment paradigm of integration envisaged[6] that a *vigorous integration policy* should aim at granting legally resident TCNs rights and obligations comparable to those of EU citizens.[7]

I. The Rights of the Third Country Nationals in the EU

EU developed a patchwork of TCN provisions provided different rights regarding residency, free movement, family reunifications, students and researchers in form of EU Directives.

Community acquis on legal migration includes the Directive 2003/86/EC on the right to family reunification[8], Directive 2003/109/EC on the status of long term residents[9], Directive 2004/114/EC on the conditions of admission of students, pupils, unremunerated trainees and volunteers[10], Directive 2005/71/EC on a specific procedure for admitting third country national researchers,[11] Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment.[12]

Directive 2003/109 EC is the most significant developments in the regulation of the position of third country nationals. A long-term resident is defined as third-country national who is in has long-term resident status and has met the conditions on the acquisition in question, conditions on the duration, and order and public security.

The Directive creates not only a common European long-term residence status (*European Denizenship*) but granted a conditional right to free movement within the EU.[13]

It establishes the rights and conditions for granting and withdrawing long-term resident status of third-country nationals who meet several conditions. Persons with this status are

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5 Tampere European Council – Presidency Conclusions – 15 and 16 October 1999 at paragraph 18.

6 Carrera, Sergio: *Benchmarking Integration in the EU: Analyzing the Debate and Moving it Forward, Bertelsmann Foundation*, 2008, 8. p.

7 Murphy, Cliodhna: *Immigration, integration and citizenship in European Union Law: the position of third country nationals*, 8 Hibernian Law Journal 155, 2008-2009. 158. p.

8 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003 P. 0012 – 0018.

9 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Official Journal L 016, 23/01/2004 P. 0044 – 0053.

10 Council Directive 2004/114/EC of 13December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

11 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

12 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17–29.

13 Tutilescu, Amelia: *Considerations on the legal status of third-country nationals who are long-term residents in the EU*, Journal of Law and Administrative Sciences, No.3/2015, 199. p.

entitled to equal treatment as nationals in a range of areas such as employment, education, social security, tax advantages and freedom of association.[14]

Besides the necessary criteria to be met for obtaining long-term resident status in the territory of a Member State, the Directive provides travel conditions in another Member State and rules that must be fulfilled to obtain long-term resident status in that State.[15]

Other important step in the regulation of TCN is the Directive 2003/86/EC on the right to family reunification. The purpose of this Directive is to determine the conditions under which non-EU nationals residing lawfully on the territory of EU countries may exercise the right to family reunification.[16] "Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion".[17]

It commonly codifies the right to family reunion, defines who can apply for family reunification, sets out the conditions for admission, gives a certain level of protection against expulsion and provides family members with certain rights of access to the labour market, education, and equal treatment.

In these legal instruments relating to entry and residence conditions for third-country nationals some of the rights and guarantees provided by these are similar to those conferred by European citizenship. The conditions of entry and residence of third-country nationals (migration law) have therefore unquestionably become a matter of concern at European level and are being addressed by the EU legislator. These relevant instruments often contain a list of minimum rights to which the third-country national is entitled in the host state.

The Court show also willingness to interpret to concept of union citizenship to third country nationals too. In several cases interpreted the rights of the TCN's analogously to union citizens' rights. With these steps, the Court could in the same time clarify the rights of the TCN's and with the help of the non-discrimination principle developed and make more comparable the treatment of the EU citizens and TCN's.

But these international instruments leave a margin of appreciation to States when they treat TCN nationals. Directives constitute a restriction of Member States discretion in this regard, but there are number of fields, in which the Member States' discretion remains untouched.[18]

States often see *foreigners* as a potential threat to the security of their country and to their national identity. This is why we see a strong reluctance to cooperate in order to create common standards in this area, as shown by the difficulty to agree on the Schengen Agreements. Furthermore, national politicians do not want to be seen as *opening up the floodgates* to immigration, as this can have huge political costs for them. Thus, a more restrained approach is shown on their part.[19]

So, the fundamental rights could have relevant effect in the *Area of freedom, security and justice*. Immigration law is at the core of this Area, covering questions that by nature have a

[14] Tutilescu 2015, 202. p.

[15] Tutilescu 2015, 202. p.

[16] Cliodhna 2008, 158. p.

[17] Directive on Family Reunification, Preamble, para. 4.

[18] Cliodhna 2008, 168. p.

[19] Doukas 20008-2009, 7. p.

potential impact on fundamental rights: the very essence of immigration law is to regulate entry and status, and therefore, to establish lines of differentiation between individuals.

The Charter is therefore destined to play the role of minimum floor for the enactment of the rights of foreigners under the common immigration policy, and the breadth of the endeavour to regulate the status of TCN is likely to engage many Charter rights.

II. The Charter of Fundamental Rights

The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Proclaimed in 2000. The Charter has become legally binding on the EU and primary union law with the entry into force of the Treaty of Lisbon, in December 2009.

The provisions of this Charter are addressed to the EU institutions, bodies, offices and agencies and to the Member States only when they are implementing Union law.[20]

Generally, it doesn't contain obligation for Member States but the national authorities must respect such rights only when they act within the scope or field of Union law.[21]

The Charter of the Fundamental Rights regulating not only the rights of union citizens also contributed to the legal status of TCNs. Article 45 (2) states that freedom of movement and residence rights *may be granted*, in accordance with the Treaty (TFEU) to TCNs legally resident in the territory of the Member States.

This provision in the Charter *Every person has the right* or *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State* means that the number of rights enshrined in Art. 20. TEU are already enjoyed by subjects of the Union without any requirement of having a member states nationality, such as the right to petition the European Parliament and European Ombudsman could extended.

The Art.41 states:

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
   (a) he right of every person to be heard,
   (b) he right of every person to have access to his or her file,
   (c) he obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties."[22]

[20] Article 51(1) of the Charter of Fundamental Rights.

[21] Case C-400/10 PPUJMcB [20111 ECR 1-0000, paragraphs 51 and 52.

[22] Article 41 of the Charter of Fundamental Rights.

III. Right to Good Administration

The right to good administration is one of the fundamental rights of the citizens of the EU, guaranteed with Article 41 of the Charter of Fundamental Rights of the EU.

The right to good administration is an umbrella provision comprising various administrative rules and meant to protect all persons from administration errors. For example, the right to have affairs handled impartially, acting within a reasonable time, right to be heard, right to access to his or her file, the obligation of the administration to give reasons for its decisions, right to make good any damage, right to communicate to the institutions of the EU to any of the languages of the Treaties.[23]

This right, as defined in the Charter, applies only to cases where an institution, body of agency of the EU is involved.[24] So the scope of this right, as defined in Article 41 of the EU Charter, is limited to situations in which persons are dealing with the institutions and bodies of the European Union. This means that national authorities must respect such rights when they act within the scope or field of Union law.

Therefore, the beneficiary of the right is any person, and the correlative obligation belongs to the institutions, bodies, offices and agencies of the European Union.

This obligation belongs to the administrations of the Member States only to the extent but to which the European law is applied.

The TCN's procedural problems mostly occurred before the national bodies in family reunification process or residence permit process.

National measures related to admission conditions and admission procedures of TCN' family members, students, researchers, and highly qualified workers and to the admission procedure of workers, are now with the help of the Directives of the EU likely to fall within the category of measures implementing EU law and, therefore, to be covered by the Charter. But the wording of Article 41 of the Charter of Fundamental Rights contains no mention of obligations on the Member States.

IV. Applicable right in the national procedure, too?

Administrative rules play an important role in the implementation of law, including law regarding the protection of the various fundamental rights. As such, administrative law is an important factor in the protection of rights. The right to be heard and the duty to collect sufficient information may, for instance, be important for the realization of the various rights protected by national legislations and constitutions. These rules may therefore function as means to an end, the end being the attainment of the substantive right in question in a given case. This is also true for the implementation of the substantive law of the European Union.

This is an important question, as its answer may determine the outcome as regards the applicability of the right to good administration in situations in which Member States

[23] Kristjánsdóttir, Margrét Vala: *Good administration as a Fundamental Right*, Icelandic Review of Politics and Administration Vol. 9, Issue 1 2013, 240. p.

[24] The limitation in Article 41 is, on the other hand, addressed in the Court's judgement of 21. December 2011 in Case C-482/10 Cicala (Teresa Cicala v. Regione Siciliana [2011] Judgement 21 December 2011), where the Court states that 'according to its wording Article 41 of the Charter is addressed not to the Member States but solely to the EU institutions and bodies.' (Judgement 21 December 201, para 28).

implement EU law. EU fundamental rights may be invoked only when the contested measures come within the scope of application of EU law through measures enacted by EU institutions, implementing acts or other national acts falling within the field of application of EU law.[25]

The existence and proper functioning of a procedural framework is a precondition for the effective implementation of EU law.[26]

The right to a reasoned decision may, for instance, be regarded as a tool for enforcing a Union right such as the right of free movement of workers.[27] It may in other words be a *gateway* to this fundamental right of EU law.[28]

Since the EU Directives in the field of TCN's contain procedural rules and these procedural rules have to implements into the national legislation and process regulation, national measures related to admission conditions and admission procedures of TCN's fall within the category of measures implementing EU law. So, covered by the Charter. As a consequence of this the Member States must comply with rights in the Charter in connection of procedural regulation, such as right to good administration using national measure and process in relation of TCN's.

This is confirmed, for example, in joined cases C-147/06 and C-148/06[29] concerning procedures for the award of public work contracts.[30] In this case, *Advocate General Colomer* addressed the question whether the right to good administration imposed obligations on Member States on these grounds (i.e. as a Treaty rule).[31]

The Advocate General pointed out that all the Member States provided for the right to be heard in their legal systems and that it was a part of the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights.[32]

So, it could be argued that their very reliance on EU secondary legislation brings the situation of third-country nationals within the scope of Union law, thereby triggering the application good administration right.

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[25] Case 36/75 Rutili [1975] ECR 1219, para.26; Case 222/84 Johnston [1986] ECR 1651, paras.17-19; and Case 222/86 Heylens and Others [1987] ECR 4097, paras.14-15; Case 5/88 Wachauf [1989] ECR 2609, para.22; Case C-2/92 Bostock [1994] ECR 1-955, para. 16.

[26] Kristjánsdóttir 2013, 238. p.

[27] Case 222/86 Unectef v. Georges Haylens and others [1987] ECR 04097, para. 15.

[28] Kristjánsdóttir 2013, 238. p.

[29] SECAP SpA and Santorso Soc. Coop. Arl v. Comune di Torino [2008] ECR I-03565.

[30] The case included the question whether a tenderer suspected of submitting an abnormally low tender had a right to state his point of view and supply relevant explanations before being excluded from the award of a contract.

[31] Kristjánsdóttir 2013, 249. p.

[32] SECAP SpA and Santorso Soc. Coop. Arl v. Comune di Torino [2008] ECR I-03565., Opinion of AG Colomer, para 50.

V. Right to good administration as a general principle of EU law

In the Åkerberg case the Court supports a broad interpretation of Article 51(1).[33] In the case the Court stated that the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.[34] If national legislation falls within the scope of EU law, that legislation must be compatible with the fundamental rights guaranteed, including those guaranteed in the Charter of Fundamental Rights.[35] This implies an obligation on Member States to respect EU fundamental rights when implementing EU law,[36] as well as a duty on national courts to ascertain whether a certain EU legal act or implementing measure has infringed rights of a fundamental nature that must be respected in the EU legal order.[37]

The inclusion of the right to good administration in the Charter of Fundamental Rights constitutes a formal recognition of this right as a fundamental right. Fundamental rights constitute general principles of Union law, that are binding not only on the EU institutions but also on the Member States when their actions fall within the scope of Union law.[38]

In case concerning the Common European Asylum System[39] the Court provided a question regarding the applicability of the right to be heard to citizens of Member States.

In his opinion of 26 April 2012, *Advocate General Bot* claims that this right must, as a general principle of EU law, be applicable in any procedure which may culminate in a decision of an administrative or judicial nature adversely affecting a person's interest. This requirement not only applies to the EU institutions by virtue of Article 41(2)(a) but also, because it constitutes a general principle of EU law, it applies to the authorities of the Member States when they adopt decisions falling within the scope of EU law, even when the applicable legislation does not expressly provide for such a procedural requirement.[40]

As a consequence, a national authority is obliged to ensure, when it adopts a decision falling within the scope of EU law, observance of the right of the person concerned to good administration, which constitutes a general principle of EU law.[41]

This right must, as a general principle of EU law, be applicable in any procedure which (…) affecting a person's interest. This requirement not only applies to the EU institutions by virtue of Article 41 (2)(a) but also, because it constitutes a general principle of EU law, it applies to the authorities of the Member States when they adopt decisions falling within the scope of EU law.[42]

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[33] This provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

[34] C-617/10 Åklageren v. Hans Åkerberg Fransson, Judgement of 26 February 2013, para.18.

[35] C-617/10 Åkerberg case, paras.19-21.

[36] C-117/06 Mollendorfand Mollendorf-Niehuus [2007] ECR 1-836.

[37] T-55/08 UEFA [2011] ECR I-0000, para. 179.

[38] 5/88 Wachauf [1989] ECR 2609; C-260/89 ERT [1991] ECR 1-2925.

[39] C-277/11, Minister of Justice, Equality and Law Reform [2012] ECR I 00000. Judgement 22 November 2012.

[40] C-277/11, Opinion of AG Bot, paras. 31-32.

[41] C-277/11, Opinion of AG Bot, paras. 31-32.

[42] C-277/11, Opinion of AG Bot, paras. 31-32.

So, the Court did, however, lay down a minimum standard regarding the concept of integration which may be employed in determining the nature of the integration conditions[43], holding that:

„The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the Directive."[44]

Legally binding integration measures are ultimately only constrained by a minimalist obligation to respect fundamental rights and the general principles of Community law.

VI. Principle of Non-Discrimination in relation to good administration

A further potentially crucial tool for third-county nationals to rely upon vis a vis the Member States is the principle of non-discrimination.

The Charter and the Treaties prohibits discrimination on the ground of nationality.

The principle of non-discrimination on grounds of nationality is created for the establishment of a free market. The key provision in this context was Article 39 EC, which provides for the free movement of workers, requiring the abolition of any discrimination on grounds of nationality as regards employment, remuneration and other conditions of work and employment.

The Treaties contain general legislation in relation of non-discrimination principle now. So, Article 18 TFEU (Article 12 EC) prohibits any discrimination on grounds of nationality, but only within the scope of application of the Treaty. The secondary legislation, most notably Directive 2000/43/EC[45] and Directive 2000/78/EC[46] explicitly excludes from its scope nationality discrimination, conditions relating to the entry and residence and third-country nationals as well as any treatment arising.

It is notable that in the Lisbon Treaty, Articles 18 and 19 TFEU are listed under the heading *non-discrimination and citizenship of the Union*, so it seems that the TCN are excluded from the applicability these provisions.

Nevertheless, there are a number of situations where TCNs can be given very similar rights to those of Member State nationals under the EC Treaty with the help of the three main Directives.

There are extremely similar conditions of entry and exit, rights of residence and rights to take up employment in the Member States. Although there is difference in treatment in the area of free movement.[47]

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[43] Cliodhna 2008, 168. p.

[44] C-540/03 European Parliament v Council [2006] ECR 1-5769., para.70.

[45] Council Directive 2000/43/EC of 29. June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22, Article 3(2).

[46] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, Article 3(2).

[47] Doukas 20008-2009, 9. p.

Tampere Council pointed towards an inclusive policy based on equal treatment and a secure legal status too, particularly in the case of long-term residents. The Council requested the creation of a uniform set of rules through which *fair treatment* of all TCNs residing legally in the EU Member States should be ensured.[48]

In its recent case law, the Court also seems to have developed an alternative to the full extension of Union citizenship to TCNs. Contrary to earlier case law, it has started to interpret the rights and concepts applicable to TCNs in analogy with the case law governing the situation of Union citizens.[49] The case law developed in interpreting Union citizens' rights thus serves as guidance in interpreting provisions governing the situation of TCNs.[50]

In the recent situation, we could conclude that the Article 19 TFEU undoubtedly applies to third-country nationals. But Article 18 TFEU, which prohibits any discrimination on grounds of nationality in view of academic researchers apply only to EU nationals, but the wording of the provision does not explicitly exclude its application to third-country nationals.[51]Article 21(2) of the Charter is affected by the same degree of legal uncertainty regarding its application to third-country nationals as Article 18 TFEU.

It could be inferred from the case law of the Court that third-country nationals may rely on the principle of non-discrimination on grounds of nationality as a general principle of EU law. So, where a situation falls within the scope of EU law it would be difficult to justify excluding a specific group of persons from the personal scope of such a general principle.[52]

Consequently, although the prohibition of nationality discrimination is laid down in Article 18 TFEU, it is a general principle which is also applicable in cases where Article 18 cannot be relied upon. The general principle of non-discrimination on grounds of nationality must therefore be applicable not only to EU citizens but also to third-country nationals.

Only the equal treatment principle and the correlated prohibition of discrimination on grounds of nationality are suitable to satisfactorily govern the status of foreigners, particularly with regard to entitlement and enjoyment of EU fundamental rights.[53]

The prohibition of discrimination as a general principle and/or fundamental right may also be supported by its incorporation in the Charter of Fundamental Rights. The legally binding force of the Charter and its application to all matters covered by Union law equally implies a possible application of the principle to cases of third-country nationals.

The extension of the equal treatment principle – even if only for the purposes of entitlement and enjoyment of fundamental rights –, would have as one of its most important implications the enlargement of the scope of application of the Charter. [54] Such an

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[48] Cliodhna 2008, 158. p.

[49] In the CEZ case the CJEU clarified that even in a case where Article 18 TFEU is not applicable, the general principle of non-discrimination on grounds of nationality can be invoked. According to the Court, Article 18 TFEU, which prohibits any discrimination on grounds of nationality, is merely a specific expression of the general principle of equality-Case C-115/08 CEZ [2009] ECR 1-10265., paras. 88-91.

[50] Wiesbrock, Anja: *Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?,* European Journal of Migration and Law 14 2012, 67. p.

[51] Hublet, Chloé: *The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?*, 15 European Law Journal 2009., 757. p.

[52] Wiesbrock 2012, 82. p.

[53] Brouwer, Evelien – De vrie, Karin: *Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach*, 139-140. p.

[54] Brouwer-de Vrie, 144. p.

interpretation would allow TCNs to rely on this provision where they are treated differently on account of their nationality in any area falling within the scope of the EU treaties.

But the allowing third-country nationals to rely on a right to non-discrimination at the Union level would open the door to a large number of claims, not only concerning the distinction made between different categories of third-country nationals in national immigration law implementing Union legislation, but also regarding the distinction made between Union citizens and third-country nationals. Were third-country nationals to be covered by the principle of non-discrimination on grounds of nationality, which is one of the core rights of Union citizenship, this would diminish the dividing line between third-country nationals and Union citizens significantly, as well as undermining the validity of making such a distinction.[55]

Conclusion

The Charter of Fundamental Rights of the EU is binding, with a legal value similar to that of the Treaties. It applies both to European citizens and to third-country nationals. Title V is dedicated to *citizens' rights*, but its Article 41 (right to good administration) and Article 45(2) (freedom of movement and of residence) also include nationals of third countries.

Hopefully, taken together, Union citizenship and the Charter can have profound effects in terms of extending the personal scope of European citizenship status.

It must also be noted that in the Tampere European Council of October 1999 one of the conclusions reached in relation to EU Justice and Home affairs policy was that the EU "must ensure fair treatment of third country nationals", and should create rules that „should aim at granting them rights and obligations comparable to those of EU citizens".[56]

Although the rights are not equal, the position of the TCNs is comparable to that of the EU nationals, especially in light of the ECJ's expansive approach to interpretation.[57]

One of the greatest challenges is to guarantee access to effective remedy for third-country nationals whose fundamental rights and freedoms have been subjected to exemptions and violations by Member States and their authorities in relation to European law. One of the Charter's crucial features is Chapter VI on justice, which includes the right to effective justice and remedy if fundamental and citizenship rights are violated. The discretion and autonomy of national administrations over European citizenship-related matters have been transformed as a result of EU integration and now fall within the scope of EU law.[58]

As a result of this we could conclude that the Charter restricts Member States' discretionary power regarding matters relating to security of residence, family reunification, expulsion, and acquisition and loss of nationality. However, the provisions of Article 41 of the Charter represent a valuable source of inspiration for the national legislator because they manage to bring together, under the same right, various other procedural or material rights.[59]

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[55] Wiesbrock 2012, 81. p.

[56] Tampere European Council, Presidency conclusions, 15 and 16 October 1999., para.18.

[57] Doukas 2008, 10. p.

[58] Opinion of the European Economic and Social Committee on A more inclusive citizenship open to immigrants, 2014/C 67/04., para.5.4.

[59] http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA(2015)519224_EN.pdf.

It has been pointed out that the right to good administration may in the future be enhanced through its codification in secondary legislation and the interpretation of this principle as a legally enforceable guarantee for the individual, which is its objective.[60] Although these aspirations may not yet be achieved, the references made in the case-law to the subjective right stated in Article 41 may just be an important step in the development towards a common administrative order within the EU.

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[60] Kristjánsdóttir 2013, 253. p.

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CONSULAR PROTECTION POLICY OF THE EU IN THE VIEW OF GOOD ADMINISTRATION[1]

EU citizens are entitled to a good administration. It is a fundamental right stipulated in Article 41 of the Charter of Fundamental Rights of the European Union (EU Charter) and it is guaranteed not only to EU citizens but *every person* in their cases proceeded by the institutions, bodies, offices, and agencies of the European Union (EU) and the national administrative authorities serving as the local hands of the EU as most of the EU policies are executed by them. In addition, there is an increasing number of EU policies which require not only a simple law application but the cooperation and collaboration of either the administrative organs at EU level with the authorities of Member States or the competent national authorities or in extreme cases, all of them are involved in one single case. All the phases of such procedures shall also correspond to the fundamental requirements, although, there is no complete and binding universal procedural legislation for them and neither domestic rules expand on the phase when direct and indirect level of European administration interact with each other,[2] nor the EU has definitive administrative procedural rules for them. Only the requirement of a good administration stand as a general background for such procedures[3] and it is important to explore its outstanding relevance in

[1] „Supported by the ÚNKP-16-4-III. New National Excellence Program of the Ministry of Human Capacities".

[2] Schwarze, Jürgen: *Judicial Review of European Administrative Procedure*. Law and Contemporary Problems, Vol. 68. 2004. 86. p. The European Parliament adopted a resolution with the aim of guaranteeing the right to good administration and ensuring an open, efficient, and independent EU civil service on 15 January 2013. It was based on a legislative initiative report prepared by the Legal Affairs Committee (*Berlinguer Report*) presenting detailed recommendations to the Commission on a *Law of Administrative Procedure of the EU*. On 4th October 2016, the Commission indicated that it remained unconvinced that the benefits of codifying administrative law would outweigh the costs. Instead, the Commission proposed that concrete problems should be analysed as they arise and met with specific actions. To highlight the necessity of comprehensive and cross-cutting administrative procedure, the European Parliament adopted a related resolution for an open, efficient and independent European Union administration in June 2016 (*Hautala Report*) and asked the Commission to examine a suggested proposal for a regulation and to present to Parliament a legislative proposal to be included in its work programme for the year 2017. See: European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration 2016/2610(RSP). Legislative Train Schedule Union on Democratic Change. Law of Administrative Procedure of the EU http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-eu-administrative-procedure (20.04.2017.)

[3] „European administrative law evolved from non-written general principles common to the constitutional (administrative) traditions of the Member States to core principles of the European administrative law which

the field of consular cooperation for consular protection; what is means and how is shapes and shadows the substantive and procedural aspects of this area despite the EU's intention of excluding any harmonisation of the administrative laws and regulations of the Member States [4] although it acknowledges that the effective implementation of EU law is a common interest and the key for that lies in the administrative capacity of Member States.

I. Consular protection policy of the EU and its specificities as an administrative law area

Consular authorities are the external hands of public administration for their nationals on the territory of other States within this latter's consent. Therefore, consular service is based on bilateral consular treaties thus foreign policy of States determines and affects this legal field. For such services the EU does not have competence[5] but to give a sense of being one big European nation where certain rights are available for every citizen of the Member States, it invented the concept of EU citizenship to create a relationship similar that exists between the State and its nationals.[6] The rights include the availability of help and protection abroad, on the territory of third States.[7] This concept exists since 1992 when it was introduced by the Treaty of Maastricht but being strictly attached to

include proportionality, legal certainty, protection of fundamental rights, non-discrimination, fair administrative procedure and efficient judicial review. All of them are standards of a modern administrative law common to those of the Member States." CĂRĂUȘAN, MIHAELA V.: *Towards an Administrative Procedure of the European Union: Issues and Prospects*. Acta Universitatis Danubius, 8(2) 2016. 80. p.; BAST, JÜRGEN: *Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings under EU Law*. German Law Journal, 11(9) 1008-1010. p.

4 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012. p. 47–390. [TFEU] Article 197 al 3. TORMA, ANDRÁS: *The Public Administration of the European Union and the Member States, in Terms of the Lisbon Treaty*. Curentul Juridic, Vol. 46, 2011. 28. p.

5 WESSEL, RAMSES A. – VOOREN, BART VAN: *The EEAS' Diplomatic Dreams and the Reality of European and International Law*. Paper presented at the UACES Conference Exchanging Ideas on Europe 2012, Old Borders – New Frontiers, 3-5 September 2012, Passau, Germany. https://www.academia.edu/2993985/The_EEAS_Diplomatic_Dreams_and_the_Reality_of_European_and_International_Law (20.04.2017.) p. 10-13.

6 TFEU Article 20. *1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. EU citizenship is destined to be the fundamental status of nationals of the Member States. C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 Sepptember 2001, ECR I-6193, para. 31.

7 International law recognizes the practice of protecting other States' nationals along with own citizens. The consular protection policy of the EU is based on this thesis. Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 UNTS 261. [VCCR] Article 7-8. Cf. *Co-creating European Union Citizenship. Policy review*. Directorate-General for Research and Innovation, Socio-economic Sciences and Humanities 2013. 24. p.

the foreign policy area, basically, the EU's consular policy used to be under the scope of the intergovernmental regime of the former second pillar which was the widest area for national sovereignty and the least power for EU.

The EU's consular policy is limited to the competences conferred upon by its Member States.[8] Therefore, it referred only to a certain equal treatment clause of in case of death, serious accident or serious illness, arrest, or detention, falling victim of violent crime, loss or theft of identity documents, and situations requiring repatriation or relief especially in armed conflicts, and in case of natural disasters.[9]

Besides, a decision calling the attention to provide consular protection to EU citizens in certain situations, the common form of emergency travel document was created, but as for details only soft law guidance was established and the field was left for further practical arrangements of the Member States which has never happened. The inter-governmental regime was therefore not effective.[10] The major change arrived by the Treaty of Lisbon, when the right to consular protection in Third States was reaffirmed as a fundamental right by the EU Charter along with the right to good administration together with other procedural rights which are enforceable by citizens[11] but the new rules of consular protection in the form of directive adopted in 2015 and to enter into force in 2018 still do not go into details and although it lay down the cooperation and coordination measures for consular authorities and involves new players in the procedure of consular protection, leaves procedural questions and negotiations with the host Third States for Member States which sound reasonable as the directive itself declares that it neither affects consular relations between Member States and Third States, nor it Member States' competence to determine the scope of the protection to be provided to their own nationals. Under these circumstances, it needs to be

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[8] Wouters, Jan – Duquet, Sanderijn – Meuwissen, Katrien: *The European Union and Consular Law*. Leuven Centre for Global Governance Studies Working Paper No. 107. 2013. 3. p.; Geyer, Florian: *The External Dimension of EU Citizenship. Arguing for Effective Protection of Citizens Abroad*. CEPS, No. 136. July 2007. 5. p.

[9] Council Directive 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC. OJ L 106, 24.4.2015. [Consular Directive] Article 9. Article 23(1) TFEU appears to use the adjectives 'diplomatic' and 'consular' as synonyms, although diplomatic protection and consular protection are two completely different legal concepts. Given the fact that consular function can also be practiced by both diplomatic and consular agents, and considering the content of secondary sources it is obvious that Article 23 TFEU refers only to consular protection. Schiffner, Imola: *A diplomáciai védelem gyakorlásának eszközei, avagy a fogalom-meghatározás és az elhatárolás problémái*. Acta Jur. et Pol., LXXII (18), 2009. 535-543. p.; Vigni, Patricia: *The Protection of EU Citizens: The Perspective of International Law*, in: Larik, Joris – Moraru, Madalena (eds): Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty. EUI Working Papers, Law 2011/10, 100. p. Battini, Stefano: *The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection*, in: Chiti, Edoardo –Mattarella, Bernardo Giorgio (eds.): Global Administrative Law and EU Administrative Law. Springer-Verlag, Berlin – Heidelberg, 2011. 177-178. p.; Becánics, Adrienn: *Konzuli védelem és segítségnyújtás az Európai Unió perspektívájából*, in: Karlovitz, János Tibor (ed.): Fejlődő jogrendszer és gazdasági környezet a változó társadalomban. http://www.irisro.org/tarstud2015aprilis/index.html (18.04.2017.) 2014. 25-26. p. Diplomatic protection is still considered an exclusive prerogative of the State of nationality which does not have any duty to exercise such protection vis-à-vis its nationals. Cf. Vigny 2010, 17.p. and C- 293/95 *Odigitria AAE v Council of the European Union and Commission of the European Communities*, ECJ, 28 November 1996, ECR II-02025. point 43-45.

[10] Cf. Bickerton, Christopher J.: *European Union Foreign Policy. From Effectiveness to Functionality*. Palgrave Macmillan, London, 2011. 24. p.

[11] Hoffmann, Herwig C.: *Administrative Law and Policy of the European Union*. OUP, Oxford, 2011. 203. p.

explored what is required by the EU under the term 'good administration' and then how the procedure of consular protection looks like and whether it conforms with the previously mentioned requirements.

II. Good administration

At first sight, *good administration* refers to a collection of fundamental procedural rights expressed in art. 41. of the EU Charter: impartial, fair handling of case in time, right to be heard, to access to documents, to get reason for decisions, right to compensation in case of maladministration, right to use of any official language of the EU. Although in a wider context it is a complex requirement system vis-á-vis administration. Accordingly, good administration in European administrative law refers to both a general principle (comprising legal and not-legal rules for a properly functioning democratic administration) and a fundamental right of EU citizens, a subjective right of fundamental nature in procedures of administrative authorities applying EU law.[12] As a general principle, it refers to the functioning of the EU is based on the rule of law,[13] therefore good administration means that the institutions, bodies, offices, and agencies of the EU in carrying out their missions, shall have the support of an *open, efficient and independent European administration*. Thus, good administration '*must be ensured by the quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible*'.[14] In fact, the principle itself does not confer rights upon individuals except where it constitutes the expression of specific rights[15] based on the caselaw and it must be noted that the rights in Article 41 of the EU Charter, are granted to 'every' person, which broadens the scope of protection to the non-citizens of the EU in comparison with those rights which are only guaranteed to citizens of the EU.[16] Hereby it is necessary to call the attention to the fact that the right to consular protection in third states shall be ensured to non-citizen family members too, so they have substantive and procedural rights which might be a problem in case of disapproval of the Third State.[17]

As a substantive right, it encompasses more that is expressed by Article 41, it is expanded on other procedural rights of the EU Charter whose scope is not limited to administrative

[12] There is no exhaustive list of rights covered by the notion 'good administration'. Hofmann Herwig – Türk, Alexander: *Legal Challenges in EU administrative Law by the Move to an Integrated Administration*. in: Hofmann Herwig – Türk, Alexander (eds.): Legal Challenges in EU Administrative Law: Towards an Integrated Administration. Edward Elgar, Northampton, 2009. 350-351. p.

[13] Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, p. 13–390. [TEU] Article 2. The rule of law has no official definition; regarding its meaning see: Pech, laurent: *The Rule of Law as a Constitutional Principle of the European Union*. Jean Monnet Working Paper 04/09. 53-57. p.

[14] Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. Council of Europe, 20 June 2007 at the 999bis meeting of the Ministers' Deputies, 3-4. p.

[15] C-352/98 *P Bergaderm and Goupil v Commission*, 4 July 2000, ECR I-5291, para. 42.; T-196/99, *Area Cova and others v Commission*, 6 December 2001, ECR II - 3602 para. 43.; T-193/04, *Hans-Martin Tillack v Commission*, 4 October 2006, 2006 ECR II-03995. para 117.

[16] Koprić, Ivan [et al.]: *Good Administration as a Ticket to the European Administrative Space*. Zbornik PFZ, 61 (5) 1529. p. Mendes, Joana: *Good Administration in EU Law and the European Code of Good Behaviour*. EUI Working Paper, Law, 2009/9. 3. p.

[17] Consular Directive Aricle 5. cf. Article 1 (2).

procedures.[18] However, the administrative authorities of Member States who already function according to democratic principles and the rule of law, as it was a pre-condition of accession, so, if Member States share the same democratic background,[19] then the question is whether it has any relevance to Member State administration if the same principles and procedural rights are repeated with a scope of domestic authorities too?[20] The answer is affirmative because there is an increasing number of segments of administrative procedures which are not covered by definitive rules of neither EU law nor domestic law of Member States and it challenges the whole prestigious concept of good administration in such cases when the authorities shall cooperate and collaborate and the right to good administration is an enforceable right of constitutional status.[21] Consular protection of EU citizens and their accompanying family members in Third States has become one of these procedures. The major question is therefore if an administrative procedure able to function in a proper way without detailed procedural rules if it is only based on principles[22] and the influence of fundamental substantive and procedural rights.[23] Is that enough for an *open, efficient and transparent* European administration?

III. Procedural aspects of consular protection

The consular protection policy of the EU and so the consular directive put an emphasis on cooperation and coordination of consular authorities but without settling any procedural details and leaving it for the field of further negotiations of Member States as the treaties

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[18] See, Schiffner Imola: *A gondos ügyintézés elvének érvényesülése az Európai Unió gyakorlatában*. In: Papp Tekla (ed.) A jó állam aspektusai, perspektívái: Az önkormányzatok változó gazdasági, jogi környezete. Szeged: Pólay Elemér Alapítvány, 2013. 5-7. p. In a wider sense, good administration as its aspects stems from the principle of rule of law, it incorporates several procedural rights which are normative for all types of procedures, not only administrative issues but no exhaustive list exists of those aspects. *Good Administration from the European Ombudsman's Perspective*. Speyer, Germany, 16 April 2008. https://www.ombudsman.europa.eu/en/activities/speech.faces/de/5436/html.bookmark (19.04.2017.); Good Administration through a Better System of Administrative Procedures. SIGMA, October 2012. http://www.sigmaweb.org/publications/Comments_LawAdminProceduresKosovo_JN_Oct2012_Eng%20%20.pdf (19.04.2017.) Galetta, Diana-Urania [et. al]: *The General Principles of EU Administrative Procedural Law. In-depth Analysis for the JURI Committee*. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, PE 519.224. 2015. 7. p.

[19] Cf. TEU Article 6 (3).

[20] Cf. EU Charter Article 51. al 1.

[21] Kristjánsdóttir, Margrét Vala: *Good Administration as a Fundamental Right*. Icelandic Review of Politics and Administration, 9(1) 242. p.; Siucińsk, Robert: *Convergence of Law – Examples from European Administrative Procedure*. Conference Paper, 25–26 April 2013, Vilnius. http://www12007.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Siucinski.pdf (20.04.2017.) 305. p.

[22] Principles are not supposed to be the legal basis for making a decisions to solve a case. See, von Bogdandy, Armin: *Founding Principles of EU Law. A Theoretical and Doctrinal Sketch*. Revus, 2012/12. 43. p.; Principles serves for gap filling and interpretation. Lenaerts, Koen - Gutiérrez-Fons, José A.: *The Constitutional Allocation of Powers and General Principles of EU Law*. Common Market Law Review, Vol. 42, 2010. 1630. p.

[23] The EU provisions must be „*sufficiently precise and unconditional' to give rise to enforceable individual rights*" C- 8/81 *Ursula Becker v Finanzamt Munster-Innenstadt*, 19 January 1982, ECR 53, para 25.; Moorhead, Timothy: *European Union Law as International Law*. European Journal of Legal Studies, 5 (2012) 1. 136. p.

and the directive are *pacta tertiis* for the Third States.[24] But as EU expanded its legislation to a field which is so differently legislated by Member States: being a domestic issue, the substantive, and the procedural rules of providing consular protection varies from state to state and the obligation refers only to the equal treatment[25] of nationals and non-national EU citizens together with their accompanying family members in certain qualified situations[26] happened in Third States. Moreover, it created an obligation for authorities to cooperate but left for further negotiation of Member States to share the burden of tasks as actually, if there are more available consular authorities, the citizen can choose any of them to proceed. As the material rules of consular protection is not harmonised, the unrepresented citizen would probably choose the most convenient option. As for the definition of being 'unrepresented', it is to be noted that every citizen holding the nationality of a Member State which is not represented in a Third State. For the purposes of the Consular Directive, a Member State is not represented in a Third State if it has no embassy or consulate established there on a permanent basis, or if it has no embassy, consulate, or honorary consul there which is effectively able to provide consular protection in each case.[27] It makes the choice of vary more flexible for the EU citizen but also more complicated for legal application. Considering the non-EU citizen family members, their right to consular protection is derivate, only accompanying family members are entitled to the protection however, for them, the Consular Directive does not make a condition to be 'unrepresented' so the granting of material and procedural right for family members may also be a pitfall of legal challenges.

In addition, the primary obligation of a consular authority in a Third State if a non-national EU citizen ask for consular protection is to contact the competent authority of nationality to give it an opportunity to provide for the consular help itself.[28] The consular authority of the Member State in the Third State provides help only if the authority of nationality cannot or do not help. Without previously settled scenario, in crisis situations when the collaboration and cooperation of consular authorities of Member States are complemented by the EU missions and possibly governed by the *European External Action Service*,[29] the

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[24] *Pacta tertiis nec nocent nec prosunt* is a general principle of international law, that is: a treaty binds the parties and only the parties; it does not create obligations for a Third State without its expressed consent. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331. Article 34.

[25] On generalising the principle of non-discrimination ratione personae and its limits see: Wollenschläger, Ferdinand: *The Europeanization of Citizenship. National and Union Citizenships as Complementary Affiliations in a Multi-Level Polity*. Paper presented at the EUSA Tenth Biennial International Conference Montreal, Canada, May 17-May 19, 2007. http://aei.pitt.edu/8025/1/wollenschlager-f-03h.pdf (20.04.2017.) 8-12. p.

[26] Consular Directive Article 7. The consular protection referred to in Article 2 may include assistance, inter alia, in the following situations: (a) arrest or detention; (b) being a victim of crime; (c) a serious accident or serious illness; (d) death; (e) relief and repatriation in case of an emergency; (f) a need for emergency travel documents as provided for in Decision 96/409/CFSP. cf. 95/553/EC Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. OJ L 314, 28/12/1995 73 - 76, Article 5 (1).

[27] Consular Directive Article 4-6.

[28] Consular Directive, Article 3.

[29] Consular Directive, Article 13. As background, see: *The Role of The European External Action Service in Consular Protection And Services for EU Citizens*. Directorate-General for External Policies of the Union, Directorate B, Policy department. 2013. 12-15. p.; Raik, Kristi: *Serving the Citizens? Consular Role of the*

coordination of consular protection is not ensured in a *transparent and predictable*[30] way. Most administrative acts for consular protection involve the exercise of discretionary powers by administrative authorities which is a legitimate feature of administrative law,[31] but it must have clear legal boundaries and be subject to several constitutional and administrative law standards, such as objectivity and consistency in application.[32] Where States that does not even regulate consular protection as a right with all the necessary legal guarantees of this legal institution shall do it without a delay, therefore substantive administrative law changes are required despite that it is a domestic competence.[33] Being an acknowledged fundamental right with direct effect, according to EU rules, the necessary guarantee system[34] shall also be established not only for simple cases before a consular authority but to those phases of the procedure when EU level organs are also involved to ensure its enforcement. *Ubi ius, ibi remedium* where there is a right there is a remedy.[35] This cooperative mechanism of consular authorities, due to the lack of delimitation of tasks and therefore responsibilities in the view of citizens is not transparent, clear, or predictable.[36] It is not always obvious to find the forum and the applicable procedural rules even in a simple case before a consular authority of nationality, for example the *Hungarian Act on consular protection* (HCPA) makes a difference between authority procedures of consular protection and the assistance which is also performed by the consular authority but is not qualified by official matters of an administrative nature as they are not administrative actions manifested in individual decisions.[37] For the former category, it makes a clear that it falls under the sphere of act

EEAS Grows in Small Steps. European Policy Centre, 30 April 2013. http://www.epc.eu/documents/uploads/pub_3488_consular_role_of_the_eeas.pdf (20.04.2017.) 2. p.

[30] Eliantonio, Mariolina: *Information Exchange in European Administrative Law. A Threat to Effective Judicial Protection?* Maastrict Journal, 23(3) 2016. 533. p. About legal certainty and legitimate expectations, especially clarity and precision, see: Hofmann, Herwig C. – Rowe, Gerard C. – Türk, Alexander H.: *Administrative Law and Policy of the European Union*. OUP, Oxford, 2011. 172-182. p.

[31] Juli Ponce: *Good Administration and Administrative Procedures*. Indiana Journal of Global Legal Studies, 12(2) 2005. 553-554. p.

[32] See in detail: European Principles for Public Administration. SIGMA Papers No. 27. 1999. 8-14. p.

[33] Cf. Kochenov, Dimitry: *EU Citizenship and Federalism. The Role of Rights*. Cambridge University Press, Cambridge, 2017. 595. p.

[34] Baubôck, Rainer – Paskalev, Vesco: *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*. Georgetown Immigration Law Journal, Vol. 30, 2015. 92. p.

[35] "*The principle that rights must have remedies is ancient and venerable*." Thomas, Tracy A.: *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*. San Diego Law Review, 64, 2004. 4-5. p.; Cf. Cărăuşan 2016, 87. p.; Buijze, Anoeska: *The Principle of Transparency in EU Law*. Uitgeverij BOXPress, Utrecht, 2013. 249-251. p.

[36] The cooperation mechanism should be based on legally binding sources to make the procedure predictable and transparent with clearly defined tasks and competences, aspects of responsibility, applicable law and finally: supervision and legal remedy. EU Charter, 2007, Article 47.; Model Rules. Welcome to ReNEUAL – the Research Network on EU Administrative Law. http://www.reneual.eu/ (31.04.2017.) VI-3.; Varga, ZS. András: *Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról*. Magyar Jog, 2014/10. 547. p., Hofmann, Herwig C.H. – Mihaescu, Bucura C: *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*. European Constitutional Law Review, 2013/9. p. 73-101. Milecka, Kamila: *The Right to Good Administration in the Light of Article 41 of the Charter of Fundamental Rights of the European Union*. Contemporary Legal & Economic Issues, 2011/3. 43-60. p.

[37] Act XLVI of 2001 on consular protection [HCPA], Article 1 (1).

on *General Rules of Administrative Proceedings and Services*[38] and provides of the legal remedy forum,[39] but for the latter, the Act does not give any provision. It is more complicated if an honorary consul is in the procedure as for example according to Hungarian rules, it is not even an authority, and only analogy can help to define procedural rules for his/her activity and not definitive and transparent legal rules. Referring to the administrative nature of the legal relationship between the citizen and the consular authority, legal logic help to deduce the solution that it also falls under the scope of the act on general rules of administrative proceedings.[40] However, in case when further authorities appear as actors in the procedure of consular protection the delimitation of competences, therefore their responsibility for breaches of law vis-á-vis each other and mainly against the individuals protected by the several fundamental rights of the EU Charter.

IV. Consequences of good administration on consular protection

Summing up, the EU, by using its power to regulate cooperation of authorities and declaring consular protection in Third States as a fundamental right[41] and settle the frames of it by a directive is not yet in conformity with neither the principle nor the fundamental right of good administration. In fact, the doctrine of procedural autonomy allows Member States to decide upon the implementation of EU law. Accordingly, Member States may lay down the rules governing their actions, therefore administrative procedural law is a domestic competence. However, this procedural autonomy has implicit limitations: first, when the implementation refers to a provision with direct effect, and when the application of a general principles of EU law require so. Article 51 al 2 of the EU Charter states that it does not establish any new power or task for the EU or modify powers and tasks defined by the Treaties and it has to be noted that the general obligation implementing the EU law in a good faith and in a consistent manner and also the roots of fundamental rights already existing in the constitutional traditions of Member States, the actions taken for the proper implementation and enforceability of rights expressed in the EU Charter cannot be considered as direct expansion of competences of the EU. Given the fact that the right to consular protection in Third States is a fundamental right with direct effect,[42] so as the right to good administration and the principle of good administration is a general principle of EU law, the procedural autonomy no longer exists in this field and the effective implementation of the above-mentioned provisions (duty of consistent interpretation or 'indirect effect').[43]

Since the reforms of the Lisbon Treaty, the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, is empowered to adopt

[38] Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

[39] HCPA, Article 19 (7).

[40] Csatlós Erzsébet: *Az általános konzuli hatósági együttműködések elméleti kérdései*. Eljárásjogi Szemle, 2017/1. 36-37. p.

[41] Kochenov 2017, 596-597. p.

[42] Poptcheva, Eva-Maria Alexandrova: *Consular Protection Abroad: A Union Citizenship Fundamental Right?* Doktoral Thesis, Universidad Autonóma de Barcelona, Barcelona. 2012. 157. p.

[43] See, Chalmers, Damian – Tomkins, Adam: *European Union Public Law. Text And Materials*. Cambridge University Press, Cambridge, 2007. 381-394. p.; Klamert, Marcus: *The Principle of Loyalty in EU Law*. OUP, Oxford, 2014. 125-138.

directives establishing the coordination and cooperation measures necessary to facilitate consular protection[44] and it did so when it adopted the directive on consular protection but the EU should also consider using its supportive legislative power on administrative cooperation by means of regulations in accordance with the ordinary legislative procedure to improve administrative capacity to implement EU law and to facilitate the exchange of information.[45]

Systematically, the EU expanded its ruling in that area where it has no further competences however, but the enforcement of fundamental rights and the conformation to the rule of law including principles of good administration would require a common executive regulation for which in fact the Commission has competence. Although in the past two decades, no real practice of this kind of consular protection has evolved, the need for consular protection is not a theoretical question as in recent years its importance has just being increasing.[46] However, the directive of 2015 will enter into force on 1 May 2018 thus Member States still have time to act but given the fact that since 1994 there have been no step forward further international negotiations to settle the problem of *pacta tertiis* or any kind of arrangements for the burden share, in the forthcoming year, no progress is predicted. It would not solve the problem of *pacta tertiis*, currently the EU seems to have no competency for that, but at least would make a proper, transparent, clear, and predictable procedural background for the interrelation of authorities when provide for ensuring citizen's rights.

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95/553/EC Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. OJ L 314, 28/12/1995 73 – 76. p.

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[44] TFEU Article 23 al. 2.

[45] TFEU Article 197. al. 2.

[46] In 2015, more than 160 cases were reported when a consular authority provided help for non-national EU citizens. See numbers and charts in: Consular Affairs Working Party Report of April 16 2016. Consular Cooperation Initiatives - Final report. Presented by the CCI Core Team to the EU Working Party for Consular Affairs COCON – 8. CFSP/PESC 345, 29 April 2016 Brussels; See also, Schiffner, Imola: A*z uniós polgárok védelme harmadik államokban – a statisztikák fényében*. In: Katona Tamás (ed.): Ünnepi e-könyv Herczeg. János professzor 70. születésnapjára. Szegedi Tudományegyetem, Állam-és Jogtudományi Kar, Szeged, 2011. 509. p.

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C- 293/95 *Odigitria AAE v Council of the European Union and Commission of the European Communities*, ECJ, 28 November 1996, ECR II-02025.

C- 8/81 *Ursula Becker v Finanzamt Munster-Innenstadt*, 19 January 1982, ECR 53.

C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 Sepptember 2001, ECR I-6193.

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THE PUBLIC ADMINISTRATION OF KOSOVO EUROPEANIZATION CONSEQUENCES: THE PAST AND THE PRESENT

Undergoing a myriad of regime changes, occupied by different empires and states throughout the history, Kosovo has never had a particular administrative experience. With the creation of the *Socialist Federative Republic of Yugoslavia*, where Kosovo gained its self-ruling autonomy status granted by the Constitution of 1974, the native Albanian majority were able to join the province administration structures. Nonetheless, with the breakup of Yugoslavia, and the forced supremacy of the autonomy imposed by *Slobodan Milosevic* with the new 1989 Constitution, all Albanian employees in the administration were forcibly dismissed from their work places. The war in 1999 was succeeded with the launch of the *United Nations Mission in Kosovo (UNMIK)*, the largest civilian mission at that time, with the task of building a new self-governing administration for the country. That was largely aided by the European Union and its programs of aid.

17 years after the war, the public administration in Kosovo is still regarded as unprofessional, partisan, politically dependent and corrupt. Where did the UN or EU fail?

In this paper, I will try to give an insight to the shifts of administrative powers in Kosovo since 1974, how did the administration developments occur in times of a communist Federation, the abolishment of these powers with the new Constitution imposed illegally by Slobodan Milosevic and the endeavors of UN to build up the first modern public administration in post war democratic Kosovo.

Further I will analyze the consequences of the sudden shift from a communist inherited practice to an EU standards public administration, as imposed by the Union itself as a pre-accession condition.

This, in itself has been identified as a major problem, taking into consideration the difficulties of implementation of such standards because of the legacy from the communist practice to a modern EU standard based administration.

I will prove that the reform as imposed by the EU especially, analyzing it through the prism of the Europeanization theory, has not yielded satisfactory results, as to the approach that was used.

I. Developments of the Public Administration from 1974-1989

Kosovo throughout its history has been under constant foreign rule, and had never a fully-fledged public administration to govern. The mere responsibilities in governing the administration were extended to the Autonomous Province of Kosovo with the *Constitution of the Federative Socialistic Republic of Yugoslavia (SFRJ)* sponsored and adopted by *Josip Broz Tito* as its president.

The Constitution of 1974, has put Kosovo on the equal terms with all the other constitutive Republics, thus giving the province autonomous regulatory powers to self-govern.[1]

This marked an era of rapid development on the province both culturally, politically, and sociologically. The Constitution of 1974 has allowed for Kosovo to even have its own Province Constitution[2] that has been based on the provisions as well as freedoms and liberties as prescribed in the SFRJ Constitutional arrangements.

These provisions gave power to Kosovo to decide on its territorial integrity, stating that without the consent of the Province its borders cannot be changed, for the consent must be given by the Provinces Assembly.[3]

The provision can be interpreted as a clear administrative, political, and judicial power of the Kosovo's institutions for self-governance[4] and vast control over its territory, thus it represents the highest constitutional arrangement for Kosovo being equivalent to the other Republics, and deciding on the matters on its own, until the Declaration of Independence in 2008.

Below I will briefly describe the organizational arrangement of Kosovo until the supremacy of the its autonomy began by the increased nationalist sentiment of *Slobodan Milosevic* in the Communist Party of Yugoslavia, in 1989, where Kosovo was stripped off from its self-governing powers and its autonomy abolished.

Kosovo between the periods of time 1974–1989 has had autonomy over the three crucial governing branches, the executive, the legislative and the judicial one.

The Constitution of the Kosovo Autonomous Province of 1974 has stipulated all the elements of self-rule and was equal to the other Constitutions of the Republics. It was the higher legislative act of Kosovo that governed the role of Provinces Assembly, the Council of Kosovo, the Kosovo Presidency, the Kosovo Executive Council, as well as other mechanisms such as the Constitutional Court, the Supreme Court, the Public Prosecutor, placing the Assembly as the highest organ of power in the sense of duties and responsibilities of the Province.[5]

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[1] Ustav SFRJ iz 1974 (The Constitution of SFRJ from 1974). http://mojustav.rs/wp-content/uploads/2013/04/Ustav-SFRJ-iz-1974.pdf (24.05.2017.)

[2] Kushtetuta e Krahines Socialiste Autonome te Kosoves, adopted on 27 February 1974 by the Province Parliament. Ref.number: KK Nr. 010-08. Accessed at the Kosovo archives Official Gazette of the Socialist Autonomous Province of Kosovo. Nr. 4 published on 27 February 1974.

[3] The Constitution of SFRJ from 1974. Art. 5, par. 3.

[4] Soós, Edit: *New modes of governance*. In: Robert Wiszniowski – Kamil Glinka (ed.): New public governance in the Visegrád Group (V4). Torun: Wydawnictwo Adam Marszalek, 2015. 44. p.

[5] Saliu, Kurtesh. *Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovë në Jugosllavinë socialiste*. Enti i Teksteve, Prishtinë, 1984. 79. p.

As per the administrative arrangements, the Province Assembly has had the veto power over the Constitutional amendments of the SFRJ Constitution and the Constitution of the Socialist Republic of Serbia, whereas the internal powers have envisaged adoption of provincial laws, budget, institutional arrangements, and any other administrative function as prescribed in the relevant legal documents.[6]

However, the Province of Kosovo just like Vojvodina which had the same equivalent status, did not have its own flag, coat of arms or anthem, like the other six constitutive Republics did.

The Constitution of SFRJ, article 2, did stipulate that the two Provinces are a constitutive part of the SFRJ, nonetheless within the auspice of the Socialist Republic of Serbia. This has subsequently caused series of actions that led to the 1999 bloodshed, with more than 13 thousand civilians killed and more than 800.000. displaced according to the UNHCR official figures.

The breakup of Yugoslavia started with the 1989 changes of the Constitution. The *Badinter Arbitration Committee*, during the 90's was convened by the European Community (EC) in order to address questions of secession for the Republics of Slovenia, Croatia, Bosnia and Herzegovina and Macedonia. Facing what was seen as inexorable dissolution of the SFRJ, the aforementioned Republics demanded recognition by the EC as sovereign states, whereas the *Badinter Committee* acknowledged their right for secession in delivering 4 opinions by 14th of January 1991[7], but did not mention Kosovo, where the tensions were rising high. On March 23, 1989, the provincial assembly, a body that was established under the 1974 Constitution, met under siege of armored cars and tanks, where the changes of the Constitution were voted, restricting severely Kosovo's powers, and enabling Serbia to take over the control of the Police, Courts and Civil Defense, matters of social and educational policy, power to issue administrative instructions as well as ultimately use of the language.[8] It is important to mention that the meeting took place without the presence of the Albanian members of the Assembly. Both of these actions led to the escalation and the uprising of the Kosovo Albanians in response to the oppression exercised by the Milosevic regime, resulting in bloodshed, ethnic cleansing, atrocities and humanitarian catastrophe.

As it can be concluded from above, the fundaments of the Kosovo modern administration were laid out in 1974 Constitution. The majority Albanian population had self-governing rule over its inhabited territory, and exercised the administrative powers as the legislation in power provided. However, the breakup of Yugoslavia, and the forcible topple of the autonomy by Milosevic, that ultimately led to a violent conflict and the NATO intervention in Kosovo, put a break to the administrative memory of the Kosovo bureaucrats. The subsequent installation of the United Mission in Kosovo and the consequent actions after, will be an uncontested empiric argument about the failure of the international community to properly address the challenges of building a new and professional administration, which will be discussed in the following chapters.

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6 Saliu, 1984, 80. p.

7 Pellet, Allain: *The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples*. Eur J Int Law. Vol. 3(1). 1992. 178-185. p.

8 Malcolm, Noel. *Kosovo: A short history*. Macmillan, London. 1998. 343. p.

II. The UN-efficiency – they gave us freedom but no future

Responding to human rights violations and ethnic cleansing of the Albanian population in Kosovo, a US led and NATO backed up air strike campaign, named Operation Allied Forces was launched directed on the military and strategic targets of the Republic of Serbia which brought to the surrender of Serbia[9] and ultimately on 9th of June, the subsequent agreement requested and confirmed the withdrawal of all armed and police forces of Serbia from Kosovo and the installation of the United Nation led Mission in Kosovo as well as the NATO controlled *Kosovo Protection Force* (*KFOR*).[10]

The liberation of Kosovo was succeeded with the Resolution 1244 of the United Nation Security Council (UNSC 1244), which did stipulate an installation of an international civilian UN mission (UNMIK) that will conduct tasks such as, organization and supervision of the provisional self-government institutions as well as the transition of powers to those institutions while mediating a political process which is aimed at determining a final status solution for Kosovo, taking into consideration the *Rambouillet accords*.[11]

Intervening into post conflict countries, since the end of the Cold War, has been an ambitious project for the international community which has strived to fundamentally reshape the societal landscape by building new state institutions, helping on the economic development and revival, as well as the support for other pillars of the state building architecture.

In Kosovo, this started with the adoption of the *Constitutional Framework of the Republic of Kosovo*, a quasi-constitution, which foresaw developing meaningful self-government pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive, and judicial fields through the participation of the people of Kosovo in free and fair elections.[12]

The war and the killing during the 1998 and 1999 were succeeded by another extraordinary, not least difficult, experience for the Kosovars: a partisan regime that took the powers vested in them for granted. A work of many international organizations, with excessive amount of money, a continuous process of digging for a spark of hope with all the perils embedded in lawless and anarchic "free Kosovo".

Since the abolition of the Autonomy, and especially during the war in 1999, there practically was no administration in Kosovo. The limited number of Kosovo Serbs that retained their offices especially in the Ministry of Internal Affairs and Secret Services, fled the country upon the arrival of NATO forces and the UN administrators. The latter, being inexperienced and too bureaucratic from its top, i.e. the Security Council and the General Assembly, did not have the sufficient capacities to address all the needs in the post-conflict society.

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[9] Ker-Lindsay, James: *Kosovo: The Path to Contested Statehood in the Balkans*. I. B. Tauris & Co Ltd. London, 2009. 14-17. p.

[10] Military Technical Agreement between the International Security Force (KFOR) and the Governments of Federal Republic of Yugoslavia and the Republic of Serbia'. 9 June 1999. http://www.nato.int/kosovo/docu/a990609a.htm (22.05.2017.)

[11] UNSC Resolution 1244 – https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement (24.05.2017.)

[12] "Constitutional Framework for Provisional Self-Government in Kosovo" – signed on March 15, 2001. http://www.assembly-kosova.org/common/doc, s/FrameworkPocket_ENG_Dec2002.pdf (24.05.2017.)

Kosovo's civil service just prior to the 2008 declaration of independence faced a lot of challenges, such as the extent legacy from the past communist regime in exercise of duties, lack of legislative modernization, working conditions and human resources, corruption, appointments made on the basis of seniority, political convictions and patronage and ultimately inadequate skills.

Nonetheless, UNMIK did establish a form of administration that reactive to the processes ahead was divided in three periods, the first one being immediately after the war where Kosovo actors mainly the leaders of the Kosovo Liberation Army that formed the *Democratic Party of Kosovo* (*PDK*) and the *Democratic League of Kosovo* (*LDK*) led by *Ibrahim Rugova* had only consultative role. This followed by the second phase in 2000 where the *Joint Interim Administrative Structure* (*JIAS*) was created by UNMIK where different departments had the civil administration role and the heads of these departments were a Kosovo national and an international administrator. After the adoption of the Constitutional Framework of Kosovo in 2001 the local Provisional Institutions of Self Government (PISG) were created.[13]

This setup lasted until the Declaration of Independence in 2008, albeit gradual transfer of responsibilities did occur, nonetheless UNMIK was still holding the decision-making powers that superseded the authority both of the PISG and the Kosovo Parliament.

Joshi and Mason claim that 48 percent of the 125 civil wars that occurred in seventy-one countries between 1945 and 2005 resurged again[14] in the context of international administration failure which *Skendaj* puts it from the theoretical analysis of the international community involved in state-building exercises in Kosovo and elsewhere.[15]

UNMIK has failed in so many prerogatives. Primarily designed as an interim administration, did not have the qualifications to quickly setup a non-partisan administration, and transfer the powers to the national elected authorities. It lacked an exit strategy while struggling to remain politically correct on both ends, with Serbia and with the Kosovo interlocutors which pushed the status quo of Kosovo all the way to the outbreak of violence in 2004.

Instead of concentrating on the low level of administrative reform and training, UNMIK was designed to rule, rather than transfer the know-how.

A lack of local knowledge about and sensitivity to the local context also explains the difficulties that international organizations face when they attempt to build democracy and state bureaucracies.[16]

Drawing from conclusions from the Mission in Kosovo, it should have been more vigilant 5 years later when it established the Mission in East Timor – where it did fail again.

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[13] Weller, Mark: *Contested statehood: The international administration of the Kosovo's struggle for independence*. Oxford University Press, Oxford, 2009. 301-302. p.

[14] Joshi, Madhav – T. David Mason: *Civil War Settlements, Size of Governing Coalition, and Durability of Peace in Post–Civil War States*. International Interactions, Vol. 37 (4). 2011. 389. p.

[15] Skendaj, Elton: *Creating Kosovo: International Oversight and the Making of Ethical Institutions*. Woodrow Wilson Center Press. 2014. 6. p.

[16] Skendaj 2014, 8. p.

III. European Union takeover of inducing reform – the sticks and carrots

The inconsistency of the UNMIK mission, flawed by its bureaucratic mechanisms and procedures forced it to request that Kosovo being in the middle of the European continent, should be treated as a European problem, thus the EU must take over the responsibilities in the further developments.

Immediately after the coordinated Declaration of Independence, on February 17, 2008 by the Kosovo Parliament, the newest Republic was recognized by the majority of the EU member states, USA, Japan, Norway, Turkey and a number of the rest of the democratic world.

A difficult task hailed upon the EU – to help build a state that has little or no administrative memory, burdened by incapacity and overwhelming corruption, moreover to reflect on the pledge given in the 2003 Thessaloniki Summit that the future of the Western Balkans lies within the Union.[17]

The EU Progress Report in 2008 was very clear and concise in its assessment. The review that started in April 2007, showed serious flaws inherited from the pre-independence period.

Civil servants continue to be vulnerable to political interference, corruption, and nepotism. Overall, despite some progress related to the adoption of an action plan and some legislation, public administration reform still needs to be implemented. Public administration and the coordination capacity of public bodies in Kosovo continue to be weak. Ensuring the delivery of public services to all people in Kosovo and establishing a professional, accountable, accessible, and representative public administration is a key priority in the *European Partnership for Kosovo*.[18]

Having this in mind, the EU has been engaged in Kosovo through multiple mechanisms such as the IPA funds and other mechanisms and projects to be elaborated more below. Other organization such as UNDP have extensively been engaged in Kosovo through their projects for the reform of the Public Administration the latest being The Support to Public Administration Reform project provides high-level policy advice to the Ministry of Public Administration on the process of developing policies and legal instruments which support the implementation of PAR as a technical process worth 1.5 million dollars.[19]

As per the EU, since 1999, the European Agency for Reconstruction, a body established for the purpose of postwar reconstruction by the European Commission, in 1999 did pledge the support of 500-700 million EUR per year per Kosovo in the course of the following three years. Only in 1999, the European Commission allocated 150 million EUR from its annual budget for immediate needs for Kosovo.[20]

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[17] Declaration of the EU after the Eu-Western Balkans Summit. Thessaloniki, 21 June 2003. C/03/163. 10229/03 (Presse 163) http://europa.eu/rapid/press-release_PRES-03-163_en.htm (24.05.2017.)

[18] Commission staff working document. Kosovo (under UNSCR 1244/99) 2008 Progress Report accompanying the communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2008-2009. COM(2008) 674. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/press_corner/key-documents/reports_nov_2008/kosovo_progress_report_en.pdf (23.05.2017.)

[19] Summary of the UNDP project Support to Public Administration Reform. http://www.ks.undp.org/content/kosovo/en/home/operations/projects/democratic_governance/PAR.html (24.05.2017.)

[20] European Agency for Reconstruction set up for Kosovo. Brussels, 23 June 1999. Press release number: IP/99/411. http://europa.eu/rapid/press-release_IP-99-411_en.htm (24.05.2017.)

In total Kosovo has received more than €2.3 billion in EU assistance since 1999, while it initially focused on emergency relief actions and reconstruction, it now concentrates on promoting Kosovo's institutions, sustainable economic development and Kosovo's European future.[21]

Once the Declaration of Independence was read, and Kosovo became the newest state in the world the EU concentrated onto a series of projects and ventured towards a more institutional approach. The clear EU perspective yielded by both EU officials and Kosovo political representatives, had the European Commission engage in drawing different projects within the *Instrument for Pre-Accession* (*IPA*) that will benefit Kosovo in its administrative alignment to the EU Acquis and fulfilment of the *Copenhagen Criteria Plus*[22].

Insofar, the IPA funds dedicated to the fulfilment of the political and economic criteria, the European Standards and the support activities, from 2007 to 2013 reach the figure of 672.3 million EUR, while the projected cost for the 2014-2020 projects is 645.5 million EUR. (*See the tables below*).[23]

Kosovo	2007	2008	2009	2010	2011	2012	2013	Total 2007–2013
Total IPA funds granted to Kosovo	68.3	184.7	106.1	67.3	68.7	70.0	107.2	672.3
Reforms in preparation for EU approximation: Democracy and governance	13	23	18.5	19.8				74.3

1. Instrument for pre-accession (IPA) funds distributed to Kosovo in the 2007-2013 period. Source: European External Action Service. https://eeas.europa.eu/delegations/kosovo/1387/kosovo-and-eu_en#Technical+and+financial+cooperation (24.05.2017)

Kosovo	2014	2015	2016	2017	2018–2020	Total 2014–2020
Reforms in preparation for EU approximation	37.3	34.0	31.0	35.2	99.1	236.6
Democracy and governance	64.4				46.0	110.4
Rule of law and fundamental rights	73.1				53.1	126.2

2. Instrument for pre-accession (IPA) funds distributed and planned for Kosovo in the 2014-2020 period for reform of the Public Administration and the Rule of Law Reform. Source: European Neighborhood Policy and Enlargement. https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/kosovo_en (24.05.2017)

[21] Kosovo and the EU - An overview of relations between the EU and Kosovo. 12.05.2016. https://eeas.europa.eu/delegations/kosovo/1387/kosovo-and-eu_en#Technical+and+financial+cooperation (24.05.2017.)

[22] The "Plus" is added because apart from the Copenhagen Criterions as established by the EU member states as precondition for accession, Kosovo has the additional reform of the public administration and the political dialogue with Belgrade added to it. The European Council Conclusion of 1993 in Copenhagen, referred to as the "Copenhagen Criteria" http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en (24.05.2017.)

[23] Kosovo - financial assistance under IPA. https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/kosovo_en (24.05.2017.)

With all the money poured in project implementation for the modernization of the public administration, the EU regardless has constantly echoed in its progress report the weak and corrupt public administration that needs a thorough reform. In its 2016 report, the first after the signing of the Stabilization and Association Agreement between the EU and the Republic of Kosovo, the Commission has again like in the previous years addressed the need to address the Commission's recommendations in the area of accountability. According to the Report, non-merit-based recruitment continues to adversely affect effectiveness, efficiency, and professional independence of public administration.[24]

Did the EU fail in its role? More than 1.2 billion EUR given for the reform of the public administration in different projects, nonetheless the Progress Reports released by the same EU body that finances these projects identifies serious flaws and lag of reform. All this combined with the lack of political willingness to implement the myriad of laws and regulations especially pertaining to the civil service, exhibits a clear contradiction on the EU's role in Kosovo. They pay for the reform, yet every year no words are spared to criticize its functionality. In a theoretical approach of the Europeanization process, the transformative powers of EU as explained by *Boerzel* are seriously undermined in the cases of limited statehood which is one of the main causes of ineffective implementation of the EU induced reform especially when talking about the public administration.[25]

In the case of Kosovo, a deeper analysis is needed, since it represents a *sui-generis* case of international administration and oversight for more than 13 years, in which the EU for the majority of the time period served as a padron.

IV. Brief overview on the legal framework of Kosovo – but it lacks implementation

On paper, Kosovo has numerous laws, strategies and directives that have been put in place to please the appetite of the EU decision makers. The structure that will be listed below, will show that in paper Kosovo has an up to date and well aligned with EU's interest legislation. The glitch is found in its implementation and the notion of how the administration is perceived by the political forces in the country.

The core of the Public Administration lies in the Law for Civil Service which regulates the status of the civil servants as well as their relations with the administration, being that on a central or local level, different Agencies executive and independent ones.[26] It represents the core of the institutional mechanisms for how the public administration works, including the ethics, disciplinary measures, appointments as well as duties and responsibilities.

Adjunct to the core Law on Civil Service is the Law on the Salaries of Civil Service as well as numerous directives and regulations as sublegal acts that individually regulate a broad range of issues regarding the civil service.

Urged by the need to address the findings of the Progress Reports and the continuous criticism, the Ministry of Public Administration, did adopt two core strategies the Strategy

[24] Kosovo 2016 Report. Brussels, 9.11.2016. SWD(2016) 363 final. Commission staff working document.

[25] Borzel, Tanja A.: *When Europeanization hits limited statehood: the Western Balkans as a test case for the transformative power of Europe*. KFG Working Papers Series, No. 30. 2011. Freie Universitat Berlin.10. p.

[26] Law Nr. 03/L-149 for the Civil Service of the Reupublic of Kosovo, Art. 1., par.2.

for the Reform of Public Administration 2010-2013 and the Strategy for the Modernization of the Public Administration 2015-2020, the latter financed by OECD/SIGMA.

The problem with the Public Administration in Kosovo lies not on paper, but as said on its implementation. The laws and strategies do proclaim the very democratic spirit that the EU instills. Nonetheless, bringing the recommendations in practice requires political willingness, which is rather costly both economically and politically.

V. Conclusion

Nobody has had the illusion that Europeanization is a smooth and calm process. It is costly and needs to have a firm determination on both ends, the national authorities i.e. the Government of Kosovo, and the EU.

The public administration in Kosovo is a large one, and saying "large" is being humble in the characterization. The best possible illustration for the major problems that it faces, is when the General Auditor in the 2011 Report, has found in the Ministry of Justice the absurdity of a position classified as a "senior officer for photocopies".

These cases substantiate by far the claims of *Boerzel* about the impossibility of the full application of reforms by states with limited statehood. Claims that robust reforms towards the Europeanization in this case of the public administration do bare political cost for the Government that is seen as a potential risk of losing public support[27], do reflect the fact that the Administration in Kosovo has been seen as a safe haven for the political parties to comfort their members and relatives, something that not only the EU as a whole but also member states individually have constantly been criticizing the Government for.

However, what was the value added to the 1.2 billion EUR donated by the European Union a portion of which is designed specifically for reforming and modernizing the public administration? The Europeanization in its strict definition as prescribed by *Radaelli* as a set of norms, beliefs and values that are taken on the EU level and implemented on the national level, in the case of Kosovo if we measure it with the "goodness of fit", it can be clearly seen that it steps on hurdles along the way.

Firstly, Kosovo has not had any institutional memory. The only experience it can draw is from the communist period in the SFRJ. Many of the institutional members from that period are either retired or don't have any desire to adopt to the rapid changes of the modern administration. The transfer from the old to the new and modern administration happened in Kosovo rapidly, started with UNMIK and it goes on with the European Union, thus the adaptation period of those who have had any experience in the state bureaucracy proved to be insufficient.

Secondly, Kosovo has more than 91.000 employees in the public sector in 21 Ministries, with over 70 subordinate bodies in the Office of the Prime Minister and 34 other institutions established by the Kosovo Parliament.[28] These institutions have been seen by the Governing political parties as a mechanism to please its constituents, political affiliates and groups

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[27] Borzel, 2011. 9. p.

[28] Reforming Public Administration in Kosovo: a proposal to decrease the number of employees in the public administration. GAP Institute Policy Brief. July 2015. http://www.institutigap.org/documents/99892_

of interest closely linked with the major political parties. This has been echoed by various analysis and think-tanks as well as foreign diplomats accredited in Kosovo.

While the consequence of this particular negative trend can be argued only upon the lack of political will and the high cost of reform, I see it as a legacy from the not so long ago past time.

Immediately after the war mainly the educated youth were attracted to work for one of the hundreds of international organizations operating in Kosovo. They would benefit from a very high salary, at least five times higher than the current average salary in Kosovo, in addition to other benefits. This opened the market for the less competent staff to engage in the public sector established in the form of Departments in times of UNMIK, where salaries and benefit packages were less than attractive – and at that time, no one paid attention to it.

The European Union in its reform induction should take into consideration many prerogatives. Europeanization cannot be seen as "tailored to fit all" model, without careful analysis of the social, historical and political construct of the prospective countries wishing to join the EU, including Kosovo.

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