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Contents

The constitution of the state in the context of its functions

Dmytro Bielov, Myroslava Hromovchuk

Summary

The scientific publication is devoted to highlighting the peculiarities of the legal nature of the constitution. The authors consider the structure and content of the constitution of the state in the context of its functions. The specificity of the content of the newest constitutions in the history of world constitutionalism is considered. The correlation between the constitution and the state policy is established. Modern approaches to understanding the nature of the constitution are considered. The legal nature of the Constitution of Ukraine is determined.

Key words: legal content, constitution, basic law, legal status, legal nature, nature of the constitution.

Constitutionalism as a politico-legal category and doctrinal learning appears after the emergence and establishment of the constitution of the state in the modern sense of this term. It is inseparable and directly derived from the constitution of the state. Although not always the fact of the existence of a constitution automatically means the emergence of a particular model of constitutionalism. However, without the appearance (availability) of the constitution itself (in the broad sense of this notion), there is no need to talk about constitutionalism. The substantive basis, the very essence of constitutionalism, according to V. Shapoval, is expressed by the formula: "constitutional-legal norm + practice of its implementation"[1]. Therefore, a bit strange, in our opinion, when in certain writings, including monographs, there are such statements as "ancient", "medieval", "totalitarian" or "Soviet constitutionalism", since at that time the constitution as such (in the modern understanding of this concept) simply did not exist. However, it was precisely in previous times that, in fact, the foundations of the future phenomenon – constitutionalism were laid[2].

The Constitution of Ukraine is a part of the national legal system, its core, acts as "coordinator of the system of legislation"[3]. But, as Yu. Tykhomyrov notes, despite the fact that the Constitution, as if is in the middle of the legal array, its influence is not limited to the link "act-act". All elements of the legal system, in turn, also affect the constitution[4].

On the one hand, the Constitution is a kind of construction, on which practically all legislation is being built[5]. It is the Constitution that defines the nature of the current legislation, the process of law-making – determines, which basic acts are adopted by various bodies, their names, legal force, the process and procedure for the adoption of laws[6]. The development of legislation is possible only within the parameters enshrined in the Constitution, which serves as an important condition for ensuring its unity, internal coherence[7]. As S. Shevchuk notes, the constitutional norms are formulated in the form of an open text, and, consequently, constitute "empty vessels", which must be filled with a specific content[8]. Therefore, the adoption of a new constitution in the state, as a rule, causes significant changes and updates to current legislation. Ukraine is no exception. Although, as V. Opryshko notes, "the current legislation does not yet fit into the legal framework defined by the Constitution of Ukraine"[9].

However, the notion of a constitution cannot be disclosed to the full extent without clarifying the question about not only its legal but also socio-political nature.

According to M. Savchyn, the supremacy of the constitution must be supported by certain institutional and procedural guarantees. Only in their totality, they determine the nature of the constitution. Institutional and procedural guarantees define certain criteria for the quality of legislation, administrative and judicial practice. Thus, the nature of the constitution and constitutional order are conditioned by the prob-

[1] В.М. Шаповал, Конституційне право зарубіжних країн: Підручник, АртЕк, Вища шк., Київ 1997, p. 135.

[2] П.Б. Стецюк, Основи теорії конституції та конституціоналізму. Частина перша: Посібник для студентів, Астролябія, Львів 2004, p. 98.

[3] И.М. Степанов, Конституция и политика, Изд-во Наука, Москва 1984, p. 40.

[4] Ю.А.Тихомиров, И.В. Котелевская, Правовые акты. Учебно-практическое и справочное пособие, Юринформцентр, Москва 1999, p. 15.

[5] О.В. Оніщенко, Конституція України як основне джерело конституційного права України, Вид.: Консум, Київ 2005, p. 211.

[6] Е.И. Козлова, О.Е. Кутафин, Конституционное право России, Юристъ, Москва 2003, p. 87.

[7] В.О. Лучин, Конституция Российской Федерации. Проблемы реализации, Юнити-Дана, Москва 2002, p. 79.

[8] С. Шевчук, Основи конституційної юриспруденції: Навч. посібник, Консум, Харків 2002, p. 7.

[9] В.Ф. Опришко, Конституція України – основа системи національного законодавства, Видавничий Дім «Юридична книга», Київ 2000, p. 118.

lem of statics and the dynamics of constitutional matter. The definition of the nature of the constitution is also influenced by the social environment since real constitutional relationships are determined by a certain type of society, civilization in general. The nature of the constitution is influenced by the legal tradition, which is based on the paradigm of constitutionalism, constitutional consciousness and culture, national traditions of government, the system of social values. A diversity of approaches to defining the nature of the constitution determines how these components are combined in the process of drafting the constitution and building a constitutional order[10].

The Constitution fulfils the function of legitimizing public order. Therefore, in the form of constitutional principles, democratic access to positions is determined through democratic elections and the fundamental principles of separation of powers, as well as the limitation of power, which are carried out mainly through legal guarantees of human rights and freedoms[11]. From the institutional point of view, the constitution is embodied in ensuring the consolidation of democracy, representation of the people through free and periodic elections, parliamentary regime, and judicial constitutional control.

In the normative sense, the constitution includes both the provisions that contain specific regulations, as well as the provisions that determine the general legal principles of intervention in private life. Accordingly, the constitution has both a vertical and a horizontal structure. The vertical structure of the constitution relates to its own requirements, horizontal one defines a set of principles of law (provisions-principles), which operates both in the sphere of public and private law. Thus, the constitution in the normative sense extends to the sphere of public and private law[12].

In its content, the constitution expresses: a) a public consensus on social values provided by legal protection; b) ways of implementing democratic procedures and control of the people over the public authority; c) legitimation of public authority; d) limits of interference of public authority in the private autonomy of a person; e) legal mechanism of international cooperation of the state. Thus, the constitution in its content is a certain type of social order that is based on the definition of the legitimate framework of government in order to ensure the public good (balance of public and private interests).

In the formally-legal sense, the constitution is understood as the Basic Law, which has a constitutive character and has the rule of law. One should agree with M. Savchyn that, as a normative legal act, the Constitution of Ukraine has the following properties[13]:

a) constitutive nature – the constitution is an act of the constituent power; hence the constitution cannot be considered as a result of the legislative process of the parliament, which is actually established by the constitution and bound by its requirements. The Constitution, therefore, sets the foundations for the organization of society and the state, defines the foundations of the legal status of a person, the content and directions of activities of state authorities and local self-government, foundations of activities of institutes of the political system, and principles of the democratic system in the country.

Since people in a democratic state are recognized as the bearer of sovereignty and the only source of power, only they possess its highest manifestation – the constituent power. The content of the latter is the right to adopt a constitution and, with the help of it, to create the foundations of a social and state system that chooses one or another people for themselves. Only the constituent government can change, in the most radical way, foundations of the structure of society and the state. The whole history of the constitutional development of both our country and foreign countries serves as a confirmation. Using constitutions, fundamental changes in the entire social system obtained the legitimacy.

It is the recognition of the constitutive nature of the constitution that the special order of its adoption, its supremacy, its role in the entire legal system of the state, the non-contradiction of the constitution for all the powers established by it, including for the legislative, are based.

In the foreign science of constitutional law, the concept, according to which the difference between the constituent power and the authority is established, is quite broadly presented. And in Germany, it received a direct expression in the constitution itself. In its preamble, it is said: "[…] the German people, by virtue of their constituent power, have created the Basic Law".

The constitutive nature of the constitution is manifested also in the fact that its prescriptions act as the first principles are primary. This means that there are no legal restrictions to establish the provisions of the constitution. There can be no such legal provision that could not be included in the constitution on the grounds that it does not correspond to any legal act of the given state. Yes, laws in Ukraine cannot contradict the Constitution. Of course, from this does not follow the conclusion that the content of the constitutional provisions is arbitrarily determined that any provision may be included in the constitution;

[10] М.В. Савчин, Конституціоналізм і природа конституції: Монографія, Поліграфцентр «Ліра», Ужгород 2009, p. 256.

[11] Р. Циппеліус, Філософія права, Тандем, Київ 2000, pp. 204–205.

[12] М.В. Савчин, Конституціоналізм, p. 256.

[13] Ibidem, p. 259.

b) the main law – the constitution is the core of the legal system, laws and regulations are developed and adopted on its basis, it lays the program, the general direction of law-making work in the state, consolidates the system of sources of national law;

c) the highest legal force – any other normative act can distort the content of the constitution, it creates such an order when justice and law should not diverge. The Constitution of Ukraine has the highest position among rules and regulations, which should not contradict it, but conform to its basic principles and spirit.

In its Decision № 2-в/99 on 02.06.1999, the Constitutional Court interpreted the principle of the supreme legal force of the constitution in the following way: "One of the most important conditions for the definiteness of relations between a citizen and a state, the guarantee of the principle of inviolability of human rights and freedoms enshrined in Article 21 of the Constitution of Ukraine is the stability of the Constitution, which, in addition to other factors, is largely determined by the legal content of the Basic Law. The presence in the Constitution of Ukraine of too detailed provisions, which place is in the current legislation, will give rise to the need for frequent changes to it, which will negatively affect the stability of the Basic Law";

d) the horizontal effect – the constitution equally is the basis for the rules of public and private law; such a normative influence of the constitution on the legal system of the country is realized through the specification of constitutional principles and human rights and freedoms at the level of current legislation and constitutional jurisprudence;

e) the supremacy of the Constitution regarding international treaties submitted to the parliament for the ratification procedure; this provision also applies to international treaties, duly ratified by the Parliament;

f) direct action of constitutional norms means the duty of state authorities and local self-government bodies, their officials to apply directly provisions of the Constitution in the presence of gaps in law or in the event of a conflict between constitutional provisions and provisions of law; if it is impossible to eliminate such a contradiction during the course of law enforcement, then such a conflict is finally resolved by the Constitutional Court of Ukraine;

g) special procedure for adoption – the constitution in the modern sense of this concept is an act that is usually adopted by the people or on behalf of the people. Characteristically, the emergence in the XVII century of the very idea of the need for such an act as a constitution was associated precisely with this feature.

The demand imposed by the bourgeoisie to restrict the rights of the king and feudal lords to protect their liberties could only be secured through the adoption of an act of supreme authority that embodies the will of the entire nation, of all the people. Thus in an unrealizable in practice "People's Agreement" project of Cromwell in 1653, the condition for signing it by all the people was provided. The same requirement was put forward later by J. Russo. He believed that the constitution requires the consent of all citizens. It should be the result of a unanimous decision, signed by all citizens, and opponents of the constitution should be considered foreigners among citizens.

This essential feature of the constitution is still recognized as dominant in constitutional theory and practice. It is no coincidence that the constitutions of most democratic states of the world begin with the words: "We, the people […] accept (proclaim, establish, etc.) this constitution".

In Soviet constitutions, this formula was first restored in the Constitution of the USSR in 1977, the Constitution of the RSFSR in 1978. Thus, in the preamble to the Constitution of 1978, it was written: "The people of the Russian Soviet Federative Socialist Republic ... accept and proclaim this Constitution"[14].

The idea of the people's involvement in the adoption of the constitution could not be ignored even under a totalitarian regime. Then it was expressed in a nationwide discussion of the draft Constitution of the USSR in 1936, which was held for six months with the widest scope and designed to "sanctify" the Basic Law by the will of the people. The Soviet Union Constitution of 1977 was also subject to a nationwide discussion[15].

Consequently, the main and still unresolved issue is the ambiguity of what is proposed to adopt: a new Constitution, a new version of the current Constitution, amendments and additions to the current Constitution. Although paradoxical, but in Presidential speeches, these terms are used repeatedly as synonyms. However, legally they are completely different concepts. This terminological confusion carries a great danger of loss of landmarks and prevents a clear statement of the problem in a purely legal area.

Thus, we believe that the constitutional process is too politicized today. In our opinion, the acutest political struggle is underway for adopting a form of constitution that is convenient for one of the parties. But in fact – for power – everyone wants a maximum of power. Including through their Constitution en-

[14] Конституция (Основной Закон) РРФСР 1978 года, Известия ЦИК Союза ССР и ВЦИК 1978, № 121, 8 июня.

[15] Ю.П. Еременко, Советская Конституция и законность, Изд-во СГУ, Саратов, 1982, p. 112.

forced in some way. However, the Basic Law should be adopted not from the conjuncture considerations of political expediency, but be a complete legal document, taking into account the achievements of the world jurisprudence, with the strict observance of all the prescribed legal procedures. After all, the constitution should be the main document of the state, at least for a decade.

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Phenomenological juvenile delinquency features in Republic of Macedonia during 2002-2011

Ersin Sulejmani

Summary

Juvenile delinquency, as in many countries in the world, it is also present in Macedonia and it represents a complex social phenomenon, and as such, a thorough scientific and multidisciplinary study is necessary. Historically, juvenile delinquency is as old as mankind it has appeared in society sometimes less and sometimes more, all depending on the social and environmental circumstances of the minors. For revealing and identifying this negative phenomenon in our society, it is important to study phenomenology, respectively its different forms, its dimensions, structure and its dynamics, because only if we have a well educated and healthy youth we can have one stable society contributing for the welfare of their country.

Key words: Juvenile Delinquency, Republic of Macedonia, phenomenology and its representing forms.

1. Introduction

As elsewhere, so in Macedonia, the crime in general, especially juvenile delinquency is considered as one complex social phenomenon that requires one systematic, professional and genuine study, for the purpose of identifying its source of origin, its determining factors, representation forms and many other features. The aim of this research is to help the scientists, researchers, the institutions related to this field and the government of Republic of Macedonia to be more aware in the future about the juvenile delinquency.

Phenomenology plays an important role in juvenile delinquency because as an object of study has its representing forms of crime, its scope, structure and its dynamics. With juvenile delinquency it implied any illegal and anti social behaviors committed by minors between 14 to 18 years old which should be specifically and appropriately dealt with. A crime means (action or no action) liable to be punished by law under the respective legal system.[1]

2. Phenomenological characteristics of juvenile offenders

2.1 The dimensions of delinquency of the minors

Criminality as a negative and dangerous phenomenon in society has been manifested in various forms throughout the human histories. Today, there is no country in the world that is not preoccupied by this negative phenomenon and as such represents a danger to the whole world, and as such, it presents a risk for Macedonia too. In this regard, it is necessary to be studied specially its dimensions and its implications in the society.[2] The term aspect means the spread of the criminal activities in a certain location. With this manuscript, the level of commission of criminal offenses by juveniles is presented statistically in the tables, and it is obvious the presence of this phenomenon in Macedonia during the period between 2002-2011.

From Table 1 it is obvious that the number of felonies of juvenile delinquents is not small and its dynamical rate from 2002 until 2011 has gone through various changes in the number of offenses committed. The data on the above table indicates that 2004, 2006 and 2009 has a risen up compared to the previous years.

2.2 The Structure and the types of felonies by the minors

As part of the phenomenology review, the study of the structure and structural changes and the types of crime in society is also very crucial.[3] In Macedonia, the structure and types of crimes committed by juveniles are different, and the differences between its number, structure and types of crimes committed in Macedonia are noticeable during the period 2002-2011.

Although minors are different from adults due to their age and their psycho physical development still they do not differ at all from the adults from the type of offense committed. Table No. 2 indicates that in most cases of juvenile delinquency in the area covered by this court, most breaches have been against property, in total about 1054, and they are more in 2006 and less in 2011. Then, followed by 847 offenses as life threatening and body , 583 crimes in traffic as part of the public transport, 506 offenses against the

[1] The set of minimum rules of the United Nations regarding the provision of the Juvenile Justice (the Beijing Rules), approved by the General Assembly of the UN, 1985, Article 14.

[2] Halili, R. Criminology, Pristina, 2002, P.113.

[3] Halili, R. Criminology, Pristina, 2002, P.114

Table nr.1

Number of felonies filed in the Republic of Macedonia in the period between 2002-2011

YEAR	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
TOTAL	1266	1278	1488	1262	1500	1229	1355	1519	1244	1163

Table nr.2

The Structure and the types of offenses committed by minors in the country during the period 2002-2011

	2002	2003	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
Crimes against life and body	68	70	90	82	83	72	84	103	107	88
Crimes against the freedoms and rights of humans	4	2	7	2	1	2	7	2	2	1
Crimes against honor and reputation	3	1	3	2	1	-	1	1	4	-
Crimes against sexual freedom and sexual morality	10	16	11	15	24	19	18	17	24	14
Crimes against human health	21	18	18	14	8	6	18	12	14	11
Crimes against public financial, payment operations and the economy	15	11	10	9	7	12	21	12	14	14
Crimes against property	1028	1029	1202	1015	1231	967	1023	1192	937	917
Crimes against general safety of people and property	5	18	10	7	13	11	4	1	10	14
Crimes against traffic safety	41	56	43	54	53	67	77	88	61	43
Crimes against legal transactions	10	12	28	9	6	36	25	8	1	7
Crimes against the public order	57	34	54	44	64	29	53	70	56	45
Other crimes	23	4	11	12	9	8	24	13	14	9

public order, 168 offenses against freedom and gender morality, 142 offenses against traffic rules, 140 offenses against the health of the people, and 127 other criminal cases, 125 criminal offenses against the use of public funds, 93 criminal acts against the general security of the people and its property, 30 offenses against the peoples' freedom and human rights etc.[4] So, although the juvenile are in their immature age and under psycho-physcical development , they still commit the same criminal acts as adults.

In the table below is shown that in the Republic of Macedonia in the period 2002-2011 are committed offenses of various kinds from the minors.

The above table indicates that offenses are almost the same in the whole country, but the difference exists in the largest number of offenses recorded as serious theft which are more a characteristic of adults as criminal acts. From the table as presented it is visible that serious thefts prevail. Like in many other countries, in the territory of the Republic of Macedonia the highest number is of those considered as serious theft and ordinary theft but also other crimes are not excluded. These delinquents usually belong to the lower strata of the society, and other offenses life traffic safety breaches are scarce and are mainly committed by people with a good material status.

As in many different countries of the world so in Macedonia, the institutions that deal with the registration and identification of criminal behaviors in general and juvenile crime in particular, such as police, courts,

[4] Evident from State Statistics in Republic of Macedonia 2002-2011, Skopje.

centers for social work, prosecution, different research institutes, other bodies usually cannot identify and find many of the crimes. These cases of crime that could not be revealed in the criminological literature are called as a "dark" numbers of crime.[5]

3. Conclusion

Juvenile delinquency as a negative phenomenon that has to do with the violation of legal and moral norms is considerably present in Macedonia too. Juvenile delinquency does not usually appear all of a sudden, but they undergo through an anti-social phase behavior from puberty. Anti-social behavior of children at this age are numerous and different. They emerge in a wide range as obstinacy, insults and slurs, beatings, disobedience, escape from school, running away from home, etc. If, appropriate measures for avoiding them at this age are not taken, they gradually grow and get reproduced and become real potential for delinquency, to a serious extent. Delinquency as a phenomenon present in the whole world, in general, emerges in roughly the same shape, but with some peculiarities related to the legislative system and economic development of a particular country, and through the same Macedonia has gone too. As a result of the different factors, delinquency among the youth seems to be very much growing in the future, based on present analysis and indicators, which also show that this phenomenon i rapidly developing as anti social-institutional behavior with the main protagonist "gangsters" and the "gangsters" of the future are the delinquent children. Schools are the main arena of clashes between minors; even Macedonian police often cannot identify all these cases of juvenile violence in Macedonia, because they usually decide to settle quarrels and problems with others themselves and do not report them to police.

With this study paper it is elaborated this topic since not enough attention has been given to it previously, as a country in transition where juvenile delinquency records alarming numbers. For studying and fighting this negative phenomenon some basic conditions should be met, such as: the lack of professional staff in state institutions, especially in educational institutions, teachers, psychologists, sociologists; lack of preventive measures to inform parents, school employees in order to avoid this negative phenomenon; organizing leisure activities by family, schools, municipalities, etc.

[5] Halili, R. Criminology, Pristina, 2002, P.55

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Transformation of the Slovak civil law after 1989

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Summary

This paper deals with the transformation of selected civil law institutes after 1989 in the Slovak legal order. After the Velvet Revolution in the Czechoslovak republic and the removal of the socialist state establishment, it was necessary to adapt the legal order to the new social reality. An amendment to the Slovak Civil Code in brought 1991 significant changes in the Slovak civil law. The amendment addressed the most pressing problems, but it was never meant to be a comprehensive solution for decades to come. It also caused the persistent unsystematic and illogical structure of the Slovak Civil Code to this day. Therefore, even at the time of its adoption, the amendment was subject to legitimate criticism, but at the same time it was accepted within application practice in the understanding that it represented a temporary solution. The makeshift that this amendment created though persists to this day. This paper focuses on selected shortcomings of the Slovak civil law, which the amendment either failed to remove or itself created. The first issue pointed out in this paper is the absence of the link to other private-law codes, since the Slovak Civil Code as a general code of private law should also serve the needs of other private-law sectors. Another unfortunate consequence of the pace of amendments to private law after 1989 is the dualism of the regulation of contract law in the Slovak legal system. The dual regulation of the contract law in the Civil Code and the Commercial Code in the Slovak legal system brings with it a considerable lack of transparency in this legislation. Lastly the article deals with the absence of the superficies solo cedit principle in the Slovak Civil Code. The superficies solo cedit principle has its origin in Roman law and used to be a stable part of the legal tradition in Slovakia. During the communist era, the socialist lawmaker chose to abandon the superficies solo cedit principle in 1950. The absence if this principle still causes many significant practical issues and this paper illustrates some of these problems.

Key words: Slovak Civil Law, Transformation, Velvet Revolution, Superficies Solo Cedit Principle.

1. Introduction

The 1992 Constitution of the Slovak Republic took over the legal code of the Czech and Slovak Federal Republic. In this manner, Act no. 40/1964 Coll. the Civil Code became part of Slovak law. Understandably, this Civil Code was greatly influenced by the conditions of its conception and suffered fundamental specifics against the classical civilian codes of the western world. In its original wording, the Civil Code was characterised by the "consumer concept" and regulated only relations between citizens themselves and the relations between citizens and socialist organisations. The second large part of civil-law relations, i.e. relations between socialist organisations themselves were regulated on the basis of the state-planned economy in a separate Economic Code. Furthermore, the International Trade Code was adopted for the purposes of legal relations with foreign countries.

After the Velvet Revolution in Slovakia and the related changes in society, it was clear that the division of civil law matters into these two, or more precisely three codes, would not stand up over time. Understandably, the regulation of civil law marked by state *dirigisme* and the preference of socialist ownership did not suit the new market-economy conditions. Following the Constitutional Act no. 100/1990 Coll., introducing equality of ownership, it was clear that a new regulation of ownership relations based on private ownership was necessary, as well as a new regulation of real rights to third-party things. For these reasons, in 1990 and 1991, a major amendment to the Civil Code was drafted, amending roughly 80% of the text of the original Civil Code. Even at the time of its adoption, this amendment was considered a temporary solution, intended to bridge over the brief period until a comprehensive recodification of civil law. It is quite common that it is makeshift solutions that are of the longest duration. This was also the case of this amendment, which still remains the largest and most comprehensive intervention in civil law since 1989. Recodification work performed in recent years has not resulted in the adoption of a new Civil Code, not to mention that it has now been thirty years since the Velvet Revolution. At present, the Ministry of Justice of the Slovak Republic is sponsoring the first stage of the recodification of the Civil Code, which, however, brings us only an amendment to the current Civil Code. This amendment contains a new regulation of the Obligations Part of the Civil Code and the Commercial Code, as well as the related provisions of the General Part of the Civil Code.[1]

[1] Explanatory memorandum to the proposed amendment to the Slovak Civil Code. Available at: http://www.justice.gov.sk/Stranky/Ministerstvo/Aktuality-obcianskeho-zakonnika.aspx?fbclid=IwAR0vHvja9Tf1jjg-pDJxBAbEnUb5UDzReJ16ZzdxbMEhaPAOa2vb2ynW0XE [the site visited on 31 March 2019]

It may perhaps be added that the regulation of Czechoslovak civil law stood for a unique solution, as it was, after 1964, shattered into three codes and the associated creation of economic law as a separate sector. As a result, the socialist lawmakers overcame their role models and went further than the Soviet Union in the distortion of civil law. Thereby, following 1989 it was all the more difficult to revert to the original pillars of civil law, unlike other post-socialist countries that at all times retained their broad concept of civil law regulation (e.g. the Hungarian Civil Code of 1959, the Polish Civil Code of 1964 and other) and did not require any such extensive changes of recodification nature.[2]

2. A hastily patched up amendment

The biggest change in the Slovak Civil Code came in the form of amendment no. 509/1991 Coll. of 5 November 1991, adopted by the Federal Assembly of the Czech and Slovak Federal Republic. The amendment addressed the most pressing problems, but it was never meant to be a comprehensive solution for decades to come. The explanatory memorandum to this amendment clarifies the need for its urgent adoption, which reflects the change in the social and economic situation in the state: *"The draft amendment to the Civil Code is part of a comprehensive process of transformation in the private law sector. The constitutional codification of civil rights and freedoms, the development of private entrepreneurship and the gradual emergence of a market economy place new demands on civil law, to which the existing wording of the Civil Code no longer corresponds."*[3]

The explanatory memorandum also clearly stated that the amendment should be only a temporary solution for the time of the inevitable recodification of the Civil Code and it also clarifies the sources that inspired its form: *"Therefore, in connection with the Commercial Code, prepared in parallel, which with regard to the Civil Code should have the relation of a special regulation to the basic regulation, comprehensive changes have been drafted in the form of an amendment to the Civil Code that should bridge over the necessary time until recodification. The proposed amendment is not just a mere return to some proven institutes of classical civil law. It draws both on the knowledge and experience in applying civil law in the territory of the present Czech and Slovak Federative Republic in the period between the two World Wars, but also takes into account a number of legal regulations in the legal states of our neighbours, which have a similar legal culture and tradition. The amendment also reflects in the Civil Code principles that, particularly in relation to the needs of international trade, the Czech and Slovak Federative Republic adopted in international treaties and undertook to implement in the national legal code."*[4]

The 1991 amendment to the Civil Code bears marks of haste in its drafting, namely by repealing certain provisions in the middle of the Civil Code (namely, Sections Three, Four, and Five, i.e. §§ 152 to 414) which were not replaced with new provisions of contract law, as they would not fit in there, and thus obligations were inserted only at the end of the Civil Code.[5] This caused the persistent unsystematic and illogical structure of the Slovak Civil Code to this day.

Despite many shortcomings, the amendment was an expedient solution, which, nonetheless, was intended only to bridge over the transitional period until the adoption of the new Civil Code. This was also confirmed by the words of K. Plank, who back in 1996 said with hope in his article the following: *"The fulfilment of this purpose is also evidenced by judicial and other practice, which adopted the new regulation with certain understanding that it was meant as temporary and in the hope that this temporary status quo would soon be remedied by the drafting of a new comprehensive Civil Code."*[6]

3. Shortcomings of changes to civil law after 1989

The mentioned speed of creating the 1991 amendment to the Slovak Civil Code gave rise to (or failed to remove) certain shortcomings that continue to exist to this day. We will try to briefly highlight a number of selected issues in this paper.

3.1 Link to other private-law codes

The Slovak Civil Code traditionally constitutes a basic, general code of private law, which should also serve the needs of other private-law sectors. As it contains comprehensive legal regulation of legal acts, natural persons, legal entities, representations, time-counting rules, and others, it is also applicable to other private-law sectors, for which it is a subsidiary regulation and its standards apply in the absence of a specific legal regulation.

Despite the above, the use of the Slovak Civil Code for other sectors of private law is limited. In particular, its relation to the Commercial Code is unbalanced and suffers from several shortcomings. The general provisions of the Slovak Civil Code cannot be applied in their entirety to commercial-law relations, even though the Commercial Code lacks a general part in its own sense. For instance, statute of limitations as a typical institute, which is subject to the general part of civil law, is specifically regulated in the Commercial Code, thereby excluding the application of civil-law regulation.

Regarding the link to labour law, it is yet again impossible to speak of an appropriate arrangement. After the major amendment to the Slovak Civil Code, these private-law regulations were fully separated, a deficiency pointed out by Lazar: *"There is a lack of the minimum interconnection required between general private law and special labour-law regulation for individual labour relations. Thus, civil law remains completely severed from labour law,*

[2] LAZAR, J.: Východiská a koncepčné otázky návrhu slovenského občianskeho zákonníka. [Starting Points and Conceptual Issues of the Draft Slovak Civil Code.] IN: Justičná revue, edition no. 50, no. 12/1997, p. 16-27, p. 18.

[3] Explanatory Memorandum to Bill no. 509/1991 Coll., the Government Bill amending Act no. 40/1964 Coll. the Civil Code (ref. no. 685).

[4] Explanatory Memorandum to Bill no. 509/1991 Coll., the Government Bill amending Act no. 40/1964 Coll. the Civil Code (ref. no. 685).

[5] PLANK, K.: Koncepcia rekodifikácie občianskeho práva hmotného v Slovenskej republike. [The Concept of Recodification of Substantive Civil Law in the Slovak Republic.] IN: Justičná revue, edition no. 48, no. 4/1996, p. 1-13, p. 3.

[6] PLANK, K.: Koncepcia rekodifikácie občianskeho práva hmotného v Slovenskej republike. [The Concept of Recodification of Substantive Civil Law in the Slovak Republic.] IN: Justičná revue, edition no. 48, no. 4/1996, p. 1-13, p. 3.

which is almost inconceivable in the developed countries of continental Europe."[7]

In its text after 1989, Act no. 65/1965 Coll. the Labour Code did not contain any reference to the Civil Code. Currently, Act No. 311/2001 Coll. The Labour Code contains in § 1 (4) a provision on the subsidiary's of the Civil Code: "Unless provided otherwise in the first part of this law, legal relations under point 1 are subject to general provisions of the Civil Code." Having thus defined subsidiarity, i.e. the possibility of applying only the general part of the Civil Code to the first part of the Labour Code, the lawmaker caused a problem with the possible application of certain provisions concerning the obligations part of the Civil Code for cases where the Labour Code lacks its own regulation (for example the regulation for the lapse of obligations). Concurrently, there are also cases where it is necessary to use the provisions of the general part of the Civil Code in relation to a specific part of the Labour Code, especially as regards the assessment of unilateral and bilateral legal acts laid down in a separate part of the Labour Code. Even under the current state of subsidiary scope of the Civil Code toward the Labour Code, there still remain some shortcomings in practice.

A problematic issue, for example, is also the regulation of the relative nullity of legal acts, which by its regulation in §40a of the Civil Code directly establishes the civil-law limits of this institute, as it exhaustively provides for the listing of the provisions of relative nullity.

3.2 Outdated dualism of contract law

The dualism of the regulation of contract law in the Slovak legal system is also an unfortunate consequence of the pace of amendments to private law after 1989. The new Commercial Code of 1991 was being prepared in parallel with the amendment to Civil Law, something that could have raised hope for a meaningful bond of both private-law regulations, nonetheless, the coordination of preparation both codes was unsatisfactory.[8] This is particularly evident in the area of the regulation of contract-law relations, where individual provisions of the Commercial Code are not sufficiently aligned with the relevant provisions of the Civil Code. Contract law also continues to overcome the dualism of contract types, which, however, is to be removed by the planned amendment to the Civil Code.[9]

The dual regulation of the contract law in the Civil Code and the Commercial Code in the Slovak legal system brings with it a considerable lack of transparency in this legislation. In addition to the contract types themselves, duplicity also results in the legal regulation of institutes such as statute of limitations, preclusion, contract withdrawal, damage liability, arrears, defects, all of these causing in many cases problems in application practice.[10]

3.3 Provision of §47 of the Civil Code

The provisions of §47[11] of the Civil Code were retained through a major 1991 amendment, with some modifications, and are worded in the current legislation as follows: (1) Where a law stipulates that a contract requires a decision of a competent authority, the contract is effective through that decision. (2) Provided that no proposal for a decision under paragraph 1 has been filed within three years of the conclusion of the contract, the parties shall withdraw from the contract.

There are a number of legal opinions regarding the issue whether this provision is obsolete or not. It is certain, though, that this provision arose under completely different conditions in which the state authorities used to decide on the law-of-obligation effects of transfer

[7] LAZAR, J.: Východiská a koncepčné otázky návrhu slovenského občianskeho zákonníka. [Starting Points and Conceptual Issues of the Draft Slovak Civil Code.] IN: Justičná revue, edition no. 50, no. 12/1997, p. 16-27, p. 20.

[8] PLANK, K.: Koncepcia rekodifikácie občianskeho práva hmotného v Slovenskej republike. [The Concept of Recodification of Substantive Civil Law in the Slovak Republic.] IN: Justičná revue, edition no. 48, no. 4/1996, p. 1-13, p. 4.

[9] Draft amendment to the Civil Code (Contract Law). Available at: http://www.justice.gov.sk/Stranky/Ministerstvo/Aktuality-obcianskeho-zakonnika.aspx?fbclid=IwAR0vHvja9Tf1jjg-pDJxBAbEnUb5UDzReJ16ZzdxbMEhaPAOa2vb2ynW0XE [the site visited on 31 March 2019]

[10] For instance, the issue of the statute of limitations of the right to return performance made under a void contract subject to the Commercial Code resolved by the Constitutional Court of the Slovak Republic in its finding ref. no. IV. ÚS 214/04: "The statute of limitations for the right to return performance carried out under a void contract is though governed differently in §394(2) of the Commercial Code. It is set out therein that the limitation period begins to run as of the day when the performance was carried out. This provision is a special provision in relation to the provision of § 107 of the Civil Code, governing the statute of limitations of only one type of unjust enrichment – unjust enrichment again through the performance ensuing from a void business contract. Based on the above, in order to set at the beginning of the limitation period during which the exercised right became barred, it is necessary to use § 394(2) of the Commercial Code. Since the Commercial Code governs the statute of limitations in the case of the right to surrender unjust enrichment pertained in the form of performance from a void contract, due to § 1(2) of the Commercial Code it is not possible to use the provision of § 107 of the Civil Code for the statute of limitations of this right. This applies to the determination of the beginning of limitation period as well as for determining induration."

[11] In the original text of the Civil Code, the provision of § 47 had the following wording: "Where the parties have agreed in the prescribed form on the content of the contract and where a decision of the relevant authority is still required for its creation, the parties shall be bound by their statements until that decision. In the event that the decision is negative, the contract shall cease to exist." A decision of a state authority was a condition for contract's validity. The 1983 amendment changed this provision as follows: „§ 47
(1) Where a law stipulates that a contract requires a decision of a competent authority, the contract is effective upon that decision. In the event that the decision is negative, the contract is annulled. (2) Where a law stipulates that an contract requires registration by a state notary, the contract is effective upon that registration. In the event that the decision is negative, the contract is annulled.
(3) In the event that a decision of the relevant authority, or registration regarding the contract proposal filed has not taken place within three years of signing the contract, it shall apply that the parties have withdrawn from the contract." This made the decision of a state authority a condition for the contract to become effective. The major amendment deleted second sentences in the provisions of paragraphs (1) and (2) and shortly afterwards the original text of the provision (2), containing a reference to the registration with a state notary, was fully deleted.

contracts. Before 1983, pursuant to §47, a decision of the competent authority was conditional upon contract's validity, and in the period from 1983 to 1991 upon the effect of certain contracts following the amendment. It is therefore believed that §47 will not find application in a "democratic society". The case law has also rebutted the point of view that the decision of the competent authority could be interpreted as a decision to authorise an entry in the land register, since the contractual effects occur with the valid acceptance of the contract proposal, and from that moment the contract becomes effective.[12]

Professor J. Švetska expressed his conviction that this provision is obsolete and in a commentary on the 2008 Civil Code he stated that *"In this context, the continued existence of §47 as a remnant of the 1964 Civil Code and its original incorrect contractual concept is merely a matter of time. For the same reason, there are no practical grounds to comment further on the standing and the role of §47."*[13] I. Fekete is of a different opinion and in his commentary also mentions current examples where the application of this provision is still under consideration, which is understandably contrary to the statement of obsolescence (for instance, a transfer of state-owned real estate where the purchase contract to be effective requires consent of the Ministry of Finance of the Slovak Republic).[14]

4. Superficies solo (non) cedit

The superficies solo cedit principle has its origin in Roman law and was a stable part of the legal tradition in Slovakia. According to Š. Luby, this principle was applicable in Slovakia as well as in the interwar Czechoslovak Republic, as real estate property included all the vegetation planted in the land and everything that was built or set up at that real estate property for the purpose of being permanently connected to the land.[15] However, there is also an opinion out there contesting as to whether the *superficies solo cedit* principle was indeed part of the legal system in Slovakia (with the exception of the unquestionable period at the time of Bach's absolutism)[16], and if so, whether this perhaps concerned the latter period of the interwar Czechoslovak Republic. The incentive leading the 1950's socialist lawmaker to abandon the *superficies solo cedit* principle, or, where applicable, when the buildings were excluded from this principle, was obvious.[17] It resulted in the disruption of the naturally connected ownership of the land with the ownership of the building standing on the land: *"The building no longer forms a single unit with the land, but is a separate thing from it, owned by the person authorised in respect of the building. And since these are two different things – land and structure – this does not concern some sort of shared ownership, but dual ownership: the ownership of the land as one separate thing and the ownership of the structure as another separate thing. The land will remain the sole property of the present owner and the structure will be the sole property of the builder."*[18]

It is quite paradoxical that the 1964 Slovak Civil Code, in its original text, did not have any provision that would explicitly stipulate that structures were not part of the land, though it applied as an unwritten rule. It was not until the major amendment to the Civil Code dating from 1991 that structures were once more explicitly established as not part of the land. The amendment to the Civil Code of 2002 even extended this provision to include watercourses and groundwaters, which in accordance with §120 of the Civil Code likewise are not included as part of the land.

The superficies principle is common in most European countries and also in Anglo-American law.[19] The current Civil Code in § 120 (2) explicitly sets out that structures are not part of the land. I. Fekete points to a specific feature of this regulation: *"The provision of §120 (2) of the Civil Code lays down, in relation to the land and the structure built on it, the opposite principle to that known to and recognised by the whole civilised world."*[20]

In this section, we will point out some of the problems caused by the absence of the *superficies solo cedit* principle.[21]

4.1 Example of an apartment building

[12] For instance, decision of the Supreme Court of the Slovak Republic 2 Cdo 124/2003.

[13] ŠVETSKA, J. et al.: Civil Code I - commentary. Prague: C. H. Beck, 2008, p. 385.

[14] FEKETE, I.: Civil Code, Vol. 1 (General Part). Major comment, 2nd updated and extended edition. Bratislava: Eurokódex, 2014, p. 507.

[15] LUBY, Š.: Slovenské všeobecné súkromné právo. [Slovak General Private Law.] Vol. 1 (Introductory Part, General Part, Moral rights). Bratislava: Library of Legal Unity in Bratislava, 1941, p. 284.

[16] PETR, P.: Superficies solo (non) cedit aneb nad Tatrou se blýska. [Superficies Solo (Non) Cedit or There's Lightning above the Tatras.] In: Právní rozhledy, edition no. 24, no. 21/2016, p. 748-752, p. 749.

[17] In §25 of the Civil Code no. 141/1950 Coll. it was stated that land included everything that came out of it and that buildings are not part of the land.

[18] NOVOHRADSKÝ, V.: Opustenie zásady „Superficies solo cedit" a jeho dôsledky. [Abandonment of the "Superficies Solo Cedit" Principle and its Consequences.] In: Právny obzor, edition no. 34, no. 4/1951, p. 348.

[19] PETR, P.: Superficies solo (non) cedit aneb nad Tatrou se blýska. [Superficies Solo (Non) Cedit or There's Lightning above the Tatras.] In: Právní rozhledy, edition no. 24, no. 21/2016, p. 748-752, p. 748.

[20] FEKETE, I.: Civil Code, Vol. 1 (General Part). Major comment, 2nd updated and extended edition. Bratislava: Eurokódex, 2014, p. 776.

[21] For the application of superficies solo cedit de lege ferenda cf.: ŠURKALA, J.: Zásada superficies solo cedit v rímskom práve a jej aplikácia de lege ferenda v slovenskom súkromnom práve. [Principle of superficies solo cedit in Roman Law and its Application de lege ferenda in Slovak Private Law.] In: Civilnoprávne inštitúty a ich historická reflexia vo svetle moderných kodifikácií. [Civil Law Institutes and their Historical Reflection in the Light of Modern Codifications.] Banská Bystrica: Belianum, 2016, p. 194-201.

In practice, there are repeated cases of actions in Slovakia in which a landowner seeks the surrender of unjust enrichment from apartment owners within an apartment building. The claimant's arguments are that the apartment owners use the land without any legal justification and as a rule the claim is the normal amount of rent at the given location. These actions are rightly dismissed by the courts and the claim is not granted to the owner. The reason is that on the basis of the special regulation, § 23(5) of Act no. 182/1993 Coll. on ownership of apartments and non-residential premises effective as of 1 September 1993, an easement was established by law.[22] This is the case of the "legal easement", the regime of which is identical to that of contractual easements. Regarding this case, the courts had to handle the question of whether such an easement can be made against payment or not, as the regulation in the act concerning the ownership of apartments and non-residential premises omits this issue. Constant case law has come to the conclusion that this is an easement against payment, but the consideration for the creation of an easement is of a one-off and non-recurring nature. The claim arose to the person who owned the real estate property (land) at the time when the act on the ownership of apartments and non-residential premises entered into effect, i.e. on 1 September 1993, and naturally this claim was time-barred within the general three-year limitation period.[23]

As a result of this legal context, the current owners of the lands "stuck" under an apartment building are in a situation where they may have a title to the land but cannot use their land because a building sits on it; they have no financial claim against the apartment owners and any disposal of such land is hard to imagine. On the other hand, the ownership of such real estate property is, of course, linked to the obligation to pay the relevant tax. It is a paradox that in some cases the value of the land may exceed the value of the apartment building.

The provision of § 23(5) of Act no. 182/1993 Coll. on the ownership of apartments and non-residential premises was challenged before the Constitutional Court by the Pezinok District Court, which in its constitutional complaint stated that: *"The application of the provision of § 23(5) of the Act on Ownership of Apartments grossly thwarts the purpose of the landowner's right of ownership, which is the landowner's right to use the land, enjoy any fruits therefrom, as well as to dispose of the land. Such gross interference in the right of ownership firstly prevents, even disables the landowner from continuing to use and enjoy the fruits therefrom and, secondly, makes it impossible to dispose of the land in any way that is not under manifestly disadvantageous financial conditions. From the point of view of the landowner, such gross interference in the ownership right is even worse than expropriation, as the landowner must continue to pay land tax on such land, despite having no or very limited enjoyment of the land."*[24] *Nevertheless,* this constitutional complaint was rejected by the Constitutional Court, as it was presented by an entity unauthorised to do so.[25]

4.2 Example of a family house

A different situation arises if a family house stands on third-party land. Naturally, the provisions on legal easement as referred to in the previous case cannot be applied here. In the case of a structure standing on a third-party land without the landowner's consent, then we are talking about an "unauthorised structure". Yet again in this case, the landowner will lose an action for the surrender of unjust enrichment. The courts dismiss such actions on the grounds that the legal solution of such situation is governed by the provisions of § 135c of the Civil Code. The landowner may request the removal of the building at the builder's expense, but if such removal would not be expedient, the court may grant ownership of the structure to the landowner, provided the landowner agrees. The court may also arrange the matter by establishing an easement against compensation. In one such case, the court[26] also pointed out that the action for surrendering unjust enrichment would not resolve the unlawful situation in this case. In the event of granting the action, such court decision would not be final, but with the passage of time it would create a need for new and further actions. Such exercise of the claimant's right was considered by the court to be contrary to good morals.

5. Conclusion

[22] The provision of § 23(5) of Act no. 182/1993 Coll. has the following wording: "If the owner of the building is not the landowner, there arises a right to the land corresponding to an easement to be entered in the real estate cadastre."

[23] For instance, judgment of the Prešov District Court file ref. no. 8C/383/2007 dated 1 February 2011 argues as follows: "Financial compensation for the establishment of easement is an undisputed property right of a person who is the obliged entity of such easement. The easement in question arises "in rem" and relates to every owner of the burdened land regardless of the method of changing the ownership. Thereby, its creation cannot be assessed separately for each new owner of the burdened land. The financial compensation for the establishment of easement unquestionably has a form of performance that is of one-off and non-recurring nature. This claim is thus the only one and pertains solely to that owner of the burdened land to all that the real estate property at the time of establishing the easement, in the given case at the time of Act no. 182/1993 Coll. acquiring effect, i.e. on 1 September 1993."

[24] Cf.: https://www.ustavnysud.sk/documents/10182/8016873/022b89e8-1562-4efe-9ff4-f2df7f60549e [site visited on 31 March 2019]

[25] Finding of the Constitutional Court of the Slovak Republic of 7 December 2016, file ref. no. PL. ÚS 15/2016

[26] Decision of the Trnava District Court ref. no. 17C 156/2011 dated 31 July 2014, upheld by the judgement of the Regional Court in Trnava, file ref. no. 24 Co/616/2014 dated 9 September 2015.

It is clear that the transformation of civil law in Slovakia after 1989 remains to the present day an unfinished process. The 1991 amendment introduced the necessary changes that enabled the use of the Civil Code in the new social context of the market economy. However, some shortcomings, which are an outcome of the pace at which the amendment was drafted and also due to the general expectation of recodification of civil law, persist to this day. Therefore, the fundamental transformation of the Civil Code remains a current topic. At present, an amendment to the Civil Code is being prepared in the form of a legislative proposal, which is to once and for all remove the dualism of contract law. However, this amendment will apply exclusively to the Obligations Part of the Civil Code and the Commercial Code and the related provisions of the General Part of the Civil Code.

The mentioned amendment under preparation will therefore preserve the regulation of real rights. The introduction of *superficies solo cedit* into law is therefore still a challenge for the future. In our opinion though, the question remains as to whether the reintroduction of the *superficies solo cedit* principle into Slovak law would really contribute to resolving the issues outlined above in this paper. If our lawmakers were to adopt a model identical to that used in the Czech law under Act no. 89/2012 Coll. the Civil Code (new), the law would only prevent the emergence of new cases where the landowner would differ from the building owner, as is the case of the Czech Republic. The already existing separate ownership of a structure and a land cannot be "soldered together" by the Czech approach. The act though created a statutory pre-emption right for the landowner to the structure and an equally statutory pre-emptive right to the building owner to the land.

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Challenges in adoption of domestic violence legislation in Ukraine and ensuring its effective implementation

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Summary

Combating domestic violence and violence against women is important di-rection of the Gender Equality Policy and one of the priorities of the Ukrainian Government, reflected in the Action Plan on Implementation the Association Agreement between Ukraine and European Union, adopted by Cabinet of Ministers of Ukraine in October 2017, Government Decree #1106.

Scientific interest to the domestic violence is connected with wide dissemi-nation of domestic violence in Ukrainian society and necessity to find the ways to combat this crime. So, in 2018, the National Police of Ukraine has received 115,473 appeals related to domestic violence. The article is dedicated to the over-view of the main legislative documents, adopted by Ukrainian Government in 2018, the analysis of their practical implementation and formulation the main problems and obstacles in this area with the aim to propose the proper solution.

The year 2018 has become a year of intensive legislative activity, developing and conducting training courses for different groups of specialists, public discussions around some legislative novel sand in formative campaigns aim edonraisinga wareness of different target group sand society in whole. As the result of this activity, Ukraine already has strong legislative basement to prevent and combat violence against women and domestic violence. At the same time, there are the problems on the way of implementation already adopted legislation. Among others author stresses the lack of resources, lack of knowledge and understanding the problem of domestic violence and violence against women, lack of institutional and individual capacity, and strong gender stereotypes among different categories of specialists and society in whole.

The authors has concluded that intensive trainings for different groups of specialists are so important for effective implementation of adopted legislation and has presented the best practices of such activity.

Key words: domestic violence, combating domestic violence, Council of Europe Convention on Prevention and Combating Violence against Women and Domestic Violence, mobile team, police mobile team.

Combating domestic violence and violence against women is important direction of the Gender Equality Policy and one of the priorities of the Ukrainian Government, reflected in the Action Plan on Implementation the Association Agreement between Ukraine and European Union, adopted by Cabinet of Ministers of Ukraine in October 2017, Government Decree #1106[1].

Scientific interest to the domestic violence is connected with wide dissemination of domestic violence in Ukrainian society and necessity to find the ways to combat this crime. In 2018, the National Police of Ukraine received 115,473 appeals related to domestic violence. The article is dedicated to the overview of the main legislative documents, adopted by Ukrainian Government in 2018, the analysis of their practical implementation and formulation the main problems and obstacles in this area with the aim to propose the proper solution.

The Action Plan includes among others such tasks as:supporting ratification of the Council of Europe Convention on the Prevention and Combating of Violence against Women and Domestic Violence (Istanbul Convention) (para. 22); improvement of mechanisms and procedures for investigating and prosecuting human rights violations, in particular those related to domestic, gender and sexual violence, ensuring support to the Law of Ukraine "On Amendments to the Criminal and Criminal Procedural Codes of Ukraine in order to implement the provisions of the Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (para. 54);conducting interim assessment of the implementation status of the National Plan of Action on implementation of the UN Security Council Resolution 1325 "Women, Peace, Security" for the period up to 2020 and making proposals to improve the activities of the authorities responsible for the implementation of the National Action Plan (para. 56) and others.

In September 2018, Cabinet of Ministers of Ukraine adopted the updated NAP on UNSCR 1325 which was based on the results of evaluation and extended the circle of responsible actors (Ministry of Temporary occupied Territories), included new issues

[1] План заходів з виконання Угоди про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони, затверджений постановою Кабінету Міністрів України від 25 жовтня 2017 р. N 1106. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/KP171106.html

(preventing and combating conflict related sexual violence), concretized some tasks and actions according to the new demands.

In December 2017, the Laws 'On Preventing and Combating Domestic Violence' and 'On Amendments to the Criminal and Criminal Procedure Codes of Ukraine to Implement the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence'[2] were adopted by Ukrainian Parliament[3]. As result – the year 2018 has become a year of intensive legislative activity, developing and conducting training courses for different groups of specialists, public discussions around some legislative novels and informative campaigns aimed on raising awareness of different target groups and society in whole.

The next by-law legal acts were developed and adopted to enforce the legal rules in 2018:

The Cabinet of Ministries of Ukraine (CMU) Resolution 'On approving the Procedure for liaison between entities implementing measures in the field of preventing and combating domestic violence and gender-based violence' (No. 658 dated 22/08/2018);

The CMU Resolution 'On approving the Standard Regulations for domestic violence and/or gender-based violence shelter' (No. 655 dated 22/08/2018);

The CMU Resolution 'On approving the Standard Regulations for mobile psychosocial support team to provide psychosocial assistance to victims of gender-based and/or domestic violence' (No. 654 dated 22/08/2018);

The Order of the Ministry of Internal Affairs 'On approving the Procedure for issuance of urgent restraining orders against offenders by the authorized subunits of the National Police of Ukraine' (No. 654 dated 01/08/2018);

The CMU Order 'On approving the Concept of state social programme for preventing and combating domestic violence and gender-based violence' (No. 728-r dated 10/10/2018);

The Order of the Ministry of Education and Science of Ukraine 'On approving the Regulations on the psychological service in Ukraine's education system' (No. 509 dated 22/05/2018 and registered at the Ministry of Justice at No. 885/32337 on 31/07/2018) and others.

These documents are based both on the holistic approach towards assistance to victims and on the principle of interagency cooperation between main actors – police, social workers, prosecutors, bar associations, educational, health protection and social institutions, judges, local authorities and NGOs. As the result of this activity, Ukraine already has strong legislative basement to prevent and combat violence against women and domestic violence. Developing the legislation is still ongoing process and multidisciplinary working group as well as specialists from different governmental institutions, international and non-government organizations continue their work. Among new coming documents – the Order on Risks Assessment in cases of Domestic Violence adoption of which is a crucial condition for the issuance of urgent restraining orders against offenders by the authorized subunits of the National Police of Ukraine.

In 2018, police, social services and other ministries have been established the cooperation to combat domestic violence. As example of the implementation the Resolution on Mobile team regulation, operation of 49 mobile teams has been organized in 12 Ukrainian oblasts by the Ministry of Social Policy together with 'Ukrainian Foundation for Health Rights' and oblast state administrations, with the support of the UNFPA Office in Ukraine. Each mobile team includes a social worker, two psychologists and has been provided with vehicles to reach people in need. In during six months of 2018 assistance has been provided to more than 16 thousand people, 90% of them — women. In case of necessity of legal consultation, free legal aid system and its Coordination Center for Legal Aid Provision play important role in improving victim's access to justice. There are wide network of such centers and bureaus in Ukraine.

In order to ensure better access to information and services for victims of domestic violence, the National Toll Free Hotline for prevention of domestic violence, human trafficking and gender discrimination has been maintained 24/7 by Civil Society Organisation "La Strada – Ukraine" with the support of international organisations, including UNFPA and other donors. All consultations provided at the Hot Line are anonymous and confidential. The Hot Line is a part of the national referral mechanism in providing assistance to suffered from domestic violence. In 2018 - 22 542 consultations were given at the Hot Line. Among them requests regarding domestic violence - 97,8% of the total number of calls. Among those who call - 81,9% women, 18,1% - men.

Psychological and legal support is very important for victims of violence. But some of them ought to leave their houses to keep themselves and children in safe environment. For such cases, shelters are needed. It is not a secret, that lack of places in shelters for victims of violence or absence of the shelters in some regions was and still is a big problem in Ukraine. To solve

[2] The Law 'On Preventing and Combating Domestic Violence' entered into force in January 2018. Changes to the Criminal and Criminal Procedural Code – in January 2019 what gave opportunity to be prepared to implement crucial changes.

[3] The Council of Europe CETs 210 Convention on Prevention and Combating Violence against Women and Domestic Violence (Istanbul Convention) is not ratified by Ukraine (March, 2019)

this problem in 2017-2018 seven shelters for women – victims of violence have been set up in Kharkiv, Kryvyi Rih, Berdyansk, Slovyansk, Mariupol, the Lozivsky District in the Kharkiv Oblast, and the Vinnytsia District with support of Government, International Organizations and local authorities. Regionally these shelters are located in East part of Ukraine – region with high number of Internally Displaced Persons suffered from Russian Aggression in Donetsk and Lugansk regions and Crimea[4].

The last but not least example - Polina – Police Mobile Groups against Violence. In 2017, the Ministry of the Interior established the mobile groups to combat domestic violence named "POLINA" (Police against Violence) in three regions of Ukraine. The team includes police officers from various units with experience on the counteracting domestic violence (patrol police, district police officers, and juvenile inspectors). In 2018, operation of the POLINA network expanded to 12 oblasts of Ukraine. The key objectives of the project include: introduction of new forms and current practice of responding to domestic violence, identification and elimination of drawbacks in cooperation with units of the National Police or other entities working in the field of preventing and combating domestic violence, development of response algorithms in these instances, development and introduction of training curricula for police officers to teach them the latest techniques and forms of preventing and combating domestic violence, improved technical capacity of the National Police units operating in this field, as well as supply of information materials on preventing and combating domestic violence to police officers. In the second half of 2019, it is planned to launch mobile groups POLNA in all regions of Ukraine. As result of this decision, 450 police officers were selected to work in 45 Police mobile groups in each region of Ukraine.

On the background of the best practices in developing activity on combating domestic violence it is important to stress the existing problems of implementation process of already adopted legislation. One of the main difficulties is connected with the lack of knowledge and understanding of the problem of domestic violence and violence against women, lack of individual capacity, and strong gender stereotypes among different categories of specialists and society in whole. The assessment conducted in 2017 by DCAF - Geneva Centre on Democratic Control on Armed Forces, La Strada-Ukraine in cooperation with National Police, National Academy for prosecutors and National School of Judges gives base for conclusion, that gender stereotypes and negative attitudes toward victims of domestic violence and violence against women present in Ukrainian society are thus present within the criminal justice system as well.Some tendencies were: minimize the importance of phenomenon of domestic violence and violence against women - 39% of the criminal justice practitioners surveyed in 2017 believe domestic violence a private matter; blame victims for their own victimization – 60% of the criminal justice practitioners surveyed believe victims of sexual assault are sometimes responsible for their own victimization; approach cases of domestic violence and violence against women with scepticism and distrust of victims– 58% of the criminal justice practitioners surveyed believe that, in most cases, domestic violence reports made to police are false[5]. Prior to the reform of the Ministry of Internal Affairs, very little attention was devoted to the problems related to gender-based violence and domestic violence. These issues were considered as a minor problem and a non-serious matter. The victims could wait for a police officer for weeks. Police officer just compiled a report on the violation and left victim. Then in a meantime the protocol was sent to court.

As assessment's authors concluded, "these attitudes, built on stereotypes, not only mitigate the willingness of police officers, prosecutors, and judges to address domestic violence and violence against women but impact criminal justice practice generally and taint court decisions"[6].

That is why intensive trainings for different groups of specialists from criminal justice system and social workers are so important for effective implementation of adopted legislation. Look at some examples.

Preventing and combating domestic violence has been included in the functions of practical psychologists and social care teachers at educational institutions.

Thematic trainings on the instances of domestic and gender-based violence have been conducted for representatives of the free legal aid system, for the 102 police hotline operators, patrol police and district police inspectors.

The lecture 'The role of public prosecutors in combating domestic violence' has been developed by the National Prosecution Academy of Ukraine in cooperation with DCAF, La Strada-Ukraine (in the framework of the EU Project "PRAVO – JUSTICE") and EUAM support, and is to be integrated into the permanent educational process.Legislative changes in the field

[4] Council of Europe Gender Equality Strategy 2018-2023: First Year of Implementation in Ukraine (October, 2017 – October, 2018). – Office of Council of Europe in Ukraine, Kyiv, 2018

[5] K. Cherepakha, A.Laferté, K.Levchenko, M.Legenka, M.Socquet-Juglard, H.Huhtanen Assessment of the Readiness of the Ukrainian Criminal Justice System to Implement the Principles of the Istanbul. – Geneva, DCAF, 2017. – P. 8.

[6] K. Cherepakha, A.Laferté, K.Levchenko, M.Legenka, M.Socquet-Juglard, H.Huhtanen Assessment of the Readiness of the Ukrainian Criminal Justice System to Implement the Principles of the Istanbul. – Geneva, DCAF, 2017. – P. 8.

of preventing and combating domestic violence were discussed with specialists of newly created State Investigative Bureau as well.

The National School of Judges developed and implemented training course for judges "Peculiarities of the considering cases related to domestic violence". This activity was conducted in cooperation with DCAF, La Strada-Ukraine (in the framework of the EU Project "PRAVO – JUSTICE") and support of the USAID - New Justice Project. 25 trainers-judges – representing all regional divisions of the NSJ – were prepared during the ToTs held in 2018. More than 260 judges passed this training course in 2018. Since 2019 this course is planned to be obligatory for judges and candidates for judges in the system of preparing and improving qualification. Due to the Regional Project 'Strengthening Access to Justice for Women Victims of Violence in the Six Eastern Partnership Countries', a CoE initiative implemented via bilateral work with national authorities and regional exchange as well as in the development and promotion of a new online e-learning course on women's access to justice that targets judges, prosecutors, lawyers, and civil society advocates.

Since September 2018 to April 2019, selected police officers undergo specialized training supported by the OSCE and the UNFPA. Importance of training became high due to changing the law and criminalization of domestic violence since January 2019 and not only for police, but all main actors in the field of prevention and combating domestic violence. With the financial support of the OSCE PCU and the European Union Advisory Mission (the 'EUAM'), training on the topic of 'Ways of preventing and combating domestic violence' was organized for members of these mobile teams. As it is seen, cooperation between governmental and educational institutions and international donors and organizations as well as civil society organizations is a crucial factor of the effectiveness of the training courses developing and conducting and strengthening capacities of the criminal justice sector actors.

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Chart of signature sandratifications of Treaty 210 Council of Europe Convention on preventing and combating violence against women and domestic violence. Status as of 23/02/2019. URL:https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures

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Public administration, ethical integration and globalization

Drahomíra Ondrová

Summary

The presented paper deals with globalization in connection with the ethical and moral dimensions in public administration, global ethics, ethical conceptions and a feasible ethical integration in the area of public administration. The core of the article is concentrated on the most influential and debated ethical theories and their influence on public administration decision making and professional traits which have to take a dominant place in the field of administrative profession. Special attention is put on the role of public administration procedures of taking ethical decisions.

Key words: globalization, ethics, integration, public administration, decisions.

1. Introduction

Globalization is a phenomenon which dominates our contemporary world in all spheres of our life. It is mostly evident in the economic and technological interconnections, in the fields of trade, financial sectors and mobility of capital and labor producing thus fastening of our interdependence not only in the field of commerce but at the same time networking our culture, habits, minds and way of our everyday lives. As it is expressed by Kimberly Hutchings the word *"global"* is generally used *"to signify something pertaining to the world as a whole. If something has global causes or global effects, then the suggestion is that either its causes or its effects are worldwide"* (Hutchings, K., p. 2). With its positive as well as negative impacts and effects it touches all world regions, and sometimes it is difficult to distinguish between the local, regional and global. Deep influences are evident on the European Union as a whole influencing its big countries as well as smaller ones. At present the most depressing consequences of worldwide financial crisis are bringing excessively difficult burden especially on smaller countries, such as Slovakia, and terribly ostentatious effort on public administration attempting to moderate the most extreme depression consequences on their citizens.

According to Hutchings living in a world in which all humanity shares a common situation the concept *"global"* indicates the following implications:

a. **a)** a worldwide scale of commonality or sameness; commonality across people and peoples in which even the statement *"we"* signifies humanity as such; we participate in world markets, all of us are the subjects of international law, we all have some human rights, etc.,

b. **b)** a worldwide scale of interconnection and interdependence; thanks' to the easier communication, transport and media events in one part of the world have an immediate effect on other parts of the globe and a direct influence on people to an unprecedented scale.

In spite of the widening spread of globalization supported by the integration processes, enlargement, and concentration on the increase of the knowledge-based society underlined with the ideas of bringing up progress and improvements of citizens` lives, it is noticeable that all those proclamations are pretty far away from the common European citizens lacking legitimacy in their eyes together with the absence of a pan-European loyalty to those institutions. The vague conception and pronouncements of generally accepted ethical values, principles and norms are somewhere at the edge of all those processes. What is rather depressing in this situation is the existentially lost individual.

2. Public administration and integration processes

Unification of globalized world and integration processes are with us, they are even accelerating, but at the same time they are successfully avoiding such intrinsic worth as common decency, honesty, integrity, openness, generosity, morality and the rest of all human ethical and moral qualities. So in spite of the speedy European integration, the integration in the ethical infrastructure is lacking behind, if not missing at all, being sometimes purposely, sometimes accidentally pushed to the margins of our attention. In some way it is more advantageous and profitable to close our eyes, being blind not seeing awful and appalling things around us and just let them unnoticed as they are. Generally speaking, at present it is still much more comfortable and easier to be unethical than ethical. We have only to agree with the words and opinion of Törbjörn Tännsjö that what we have left behind us when we look back at the 20th century are just unbelievable cruelty, terror, violence, devastating wars, holocaust, inhumanity and injustice. It is true that in Europe at the beginning of the 20th century most people accepted the authority of morality which had to be observed and obeyed as it is expressed by Immanuel Kant in his writings articulated in the following way: *"the starry heavens above me*

and the moral law within me" (Tännsjö, T., p. 1). In spite of the generally respected morality, morals, ethical principles and moral law by the 20th century, let us say, by the decent and highly civilized public, it seems to be that all those values and virtues had been relevant only in theory and, as we all know, their practical application had been in fact far away from was theoretically and officially declared. At the start of the 20th century the Europeans had some ideas and believes in moral progress and to see human ferociousness, brutality and civilized barbarism in retreat, but at the end of century, as expressed by Tännsjö, Singer, Krejčí and many other authors and scholars, and also as we feel it ourselves, it is hard to be confident either about the validity of moral law or about any moral progress done, not only at that time but at this time as well. Even today, when discussing global processes and the European integration, we must admit that there are still lacking certain general and integral global or at least European ethical standards, which would create a kind of broad-spectrum of some clearly defined values, principles and norms which might serve as a kind of guide for the appropriate and decent ethical behavior to be followed. As mentioned by Margozata Perzanowska and Marta Rekawek –Pachwicewicz, today it is the high time to call for more ethics in public life, using their words: *"This is the time to build a different kind of European integration – ethical integration."* (Perzanowska, M., Pachwicewicz, M. R., p. 217). Ethical integration is wanted if we wish to make interdependent and mutual relations among human beings more ethical and more human. This calls for the creation of globally accepted European human identity and human relations. It is here where ethical issues arise and a link between global, Europe and ethics is formed, *"without morality, without universally binding ethical norms, indeed without ´global standards´, the nations are in danger of maneuvering themselves into a crisis which can ultimately lead to national collapse, e.g. to economic ruin, social disintegration and political catastrophe"* (Küng, H., In: Hutching, p. 11).

As it is presented by Kimberly Hutchings ethics in its original meaning refers to codes of behavior or sets of values that state what is right or wrong to do in particular contexts and, accordingly to what was said, an ethical person denotes someone who aims to act following such codes of values. In a view of that, global ethics can be defined as *"a field of theoretical enquiry that addresses ethical questions and problems arising out of the global interconnections and interdependence of the world`s population"* (Hutchings, K., p. 9).

Of course, there are differences concerning the ethical values or what is good and right to do in our relations with others, not only among the individual European countries, but individuals as well, regarding their traditions, cultural and historical backgrounds, language differences, attitudes, standard of living and last but not least, their own individual perception of understanding moral and ethical values. So moral truth might be perceived to be relative, what from one culture or temporal perspective is right from another cultural or temporal perspective might be wrong. Anyway, there are some thinkers who try to find out a core of common beliefs, values and principles that operate across different conceptions and cultures in order to come to some reasonable starting point to arrive at global ethical standards that should govern human behavior, e.g. there are theoretical conceptions from theological point of view, such as Hans Küng`s *"Global Responsibility: In Search of a New World Ethic"*, or secular ones based on a set of wide-ranging universal moral standards that might be commonly accepted across different cultures and the world.

3. Ethical theories and ethical standards

Most conceptions on Global ethics find their inspiration and arguments developing the basic ideas of some traditional and most widely debated ethical theories. In all of them we can distill some important principles that can guide us in our ethical-decision-making. Let us mention at least some of the major ones which might provide the most practical assistance for creating theoretical as well as practical grounds for the European ethical integration in the area of public administration.

One of them is the theory of ***ethical relativism*** which considers that it is not possible to come to certain type of ethical values unification as each individual, culture or time is allowed to act in accordance with its own moral outlook. For the first time this conception had been proclaimed in Ancient Greece by Protagoras and his disciples known as sophists. According to their philosophical outlook, law is the creation of people, and therefore, it is always in accordance with the interest of legislator. Following this idea relativists come to the conclusion that law is nothing else than the enforcement of free will of those who are in power and who can do what they want to do. Even in the Ancient Greece their conception of ethical and moral relativism had been criticized and firmly refused by Socrates and Aristotle for sophists `conviction that truth is losing its objective foundation and for their commencement that when there is not an absolute truth, right and wrong are just vague and relative concepts.

Contrary to their theory is the conception of ***virtue ethics,*** developed during the period of antiquity, some 300 years before Christ. According to this theoretical conception, the most basic idea is not what we ought to do, but what kind of persons we ought to be. The virtue ethics approach focuses more on the integrity of the moral actor than on the moral act itself.

For the first time the classification of virtues was done by Plato. However, his list of virtues is closely interconnected with characteristic traits of his ideal state representatives. Virtue ethics had been more precisely elaborated by his successor Aristotle in his work *Nicomachean Ethics*.

Typical of virtue ethics is its interest in general traits of character in contradiction to the traits of personality. It is assumed that traits of character can be developed by means of training and education while traits of personality are closely tight to our biological nature. The prime moral virtues are: wisdom, justice, compassion, and respect for persons, courage, temperance, generosity, kindness, reliability and industry. If we develop these virtues, we are more likely to act rightly; a good character is a character that tends to lead to right actions. It is suggested that the most proper thing to do is instead of analyzing what makes right action right to focus our attention on those character features which ought to be fostered in ourselves and in our children through bringing up and education. Although virtue ethics as a philosophical tradition began with Aristotle, a number of contemporary ethicists have brought it back to the forefront of ethical thinking, especially the idea that ethical culture and behavior in public administration can be thought, e. g. Linda K. Treviño and Katherine A. Nelson.

Virtue ethics may be particularly useful in determining the ethical qualities of an individual who works within a professional community that has well-developed norms and standards of conduct. But it is also inspiring for management administration posts within the public administration, of course, not excluding deontological and consequentialist approaches which are discussed below.

The action, its outcomes and consequences for individual human being are in the center of attention of the theoretical conception of ***utilitarianism***. Utilitarianism is probably the best known ***consequentialist ethics***. According to the principle of utility, an ethical decision should maximize benefits to society and minimize harms, so a consequentialist thinks about ethical issues in terms of harms or benefits. On the other hand, virtue ethics would suggest thinking about ethical issues in terms of community standards.

In consequentialist ethics a sharp distinction is made between actions that are right and those which are wrong. If an action is not right, then it is wrong, and if an action is not wrong then it is right. The actions which we ought to do or the obligatory actions form a specific kind of sub-class actions that are right for us. So the utilitarian criterion for rightness of particular actions is stated by Tännsjö in the following way *"…an action is right if and only if in the situation there was no alternative to it which would have resulted in a greater sum total of welfare in the world"* (Tännsjö, T., p. 18). The idea that we ought always to act so as to maximize the sum total of welfare in the universe is hold by the utilitarian conception. According to classical utilitarianism we have to maximize happiness and well-being, utility means usefulness and convenience in order to bring pleasure. Our degree of pleasure is a quality of our total experience; the more our desires are satisfied, the better.

The utilitarian theory was for the first time presented by the English philosopher, lawyer and social reformer Jeremy Bentham. He based his arguments on a view of human beings as naturally driven towards pleasure and happiness away from pain and unhappiness. And therefore, they have an interest in pursuing the former and avoiding the latter. On this basis he built up an ethical theory that had one basic principle – the principle of utility. He makes a distinction between higher and lower qualities of well-being and according to his conception of utilitarianism we should try to maximize higher forms of well-being rather than lower ones following the idea that it is better to be dissatisfied Socrates than a satisfied fool.

Another essential aspect of Bentham`s utilitarianism is the principle to act impartially meaning that in his decision-making the moral subject must respect the equality of other subjects` interests, even the interests of animals. So there could be no moral justification for putting one`s own interests ahead of anyone else`s.

The radical ethical conception is the idea that ends up with the formation that we must always act so as to maximize the sum total of our own welfare. This most extreme conclusion is known as ***ethical egoism which is an extreme form of contractualism***. The egoist need not bother about the far reaching consequences of his/her actions; it is only the welfare of the agent that counts. You act wrongly whenever you do not maximize your own best interests, so any decision is right, so long as it satisfies the interests of the agent. Ethical egoism confers too much moral license to the agent, who is according to Thomas Hobbes in his fundamental nature egoistic and selfish, even if not, he lives in a constant fear of attack from others and desire for self-protection. When Hobbesian individuals are put in a state of nature, in which there is no external regulation of their deeds and actions, Hobbes argues that there will be a condition of *"war of all against all"*; *"Bellum omnium contra omnes"*; in this state of conditions there is no meaningful distinction between just and unjust, as Hobbes puts it, life in the state of nature is *"solitary, poor, nasty, brutish and short"*. The only solution to normalize the given state of nature consisting of self-seeking individuals who live in a state of constant fear, danger and violence is the idea of agreement, he terms it *"covenant"* that has become known as the idea of *"a social contract"*, where the individuals

will give up their natural rights to the newly created overarching power - the state rule which would guaranty order, justice and security. According to Hobbes, people must be forced to some extent by the state to cooperate; the state must supervise their actions and if they fail to respect the rules of law, threaten them by all sorts of punishment. Hobbes ethical contractualism is closely combined with politics. It is based on the social contract between people and the sovereign state power. Nowadays there are several different applications of contractualism.

On the other hand ***deontological ethics or principle-based theory*** is founded on respecting duties, prohibitions which are bound to the agent irrespective of the consequences which might follow them. The best known representative of deontological ethics is the German philosopher Immanuel Kant. According to deontological ethics, some types of actions are prohibited and some are obligatory to do irrespective of their consequences. He declares that there is one general idea and that is the supreme and absolute duty, he calls it ***"categorical imperative"***, which has to be followed, using Kant words: *"to act only in accordance with that maxim through which you can at the same time will that it become a universal law"* (Tännsjö, T., p. 58). So a maxim is simply the rule we follow in any deliberately intentional act.

By Kant`s critical philosophy human capabilities are limited and conditioned by human inclination to natural passions and needs similar to Hobbesian view of human nature. But according to Kant at the same time human beings are endowed by pure *"practical reason"* which offers us possibilities of transcending and take priority over our passions and natural partiality, *"…human perfection lies not only in the cultivation of one's understanding but also in that of one`s will, moral turn of mind, in order that the demands of duty in general be satisfied. First, it is one`s duty to raise himself out of the cruelty of his nature, out of his animality more and more to humanity…"* (Kant, I., pp. 44 - 45). Only a rational human being has the power to act according to his conception of laws, it is the capacity of being able to detect and act on what is required by the moral law, so acting morally is ultimately equivalent to acting rationally. Moral principles are universally prescriptive and acting morally does not mean to act according to those moral principles but unpromisingly acting because of those moral principles. As it is mentioned by Hutchings the criterion of universality is central in Kant`s apprehension of human beings as non-angelic who act morally only respecting and acting according to the universal categorical imperative. The moral law stands for all rational human beings, human or non-human as well. *"The difference between humans and angels is not to do with different moral standards, but with human imperfection that means that we experience moral rules as a constraint on our non- rational drives and desires"* (Hutchings, K., p. 42).

Kant's philosophical theory is quite often comprehended as contradictory to Bentham`s utilitarian ethics, when in Bentham`s theory dominates importance of utility as an outcome, Kant considers the importance of moral principles regardless of their consequences in particular contexts. Where Bentham accepts some toleration of swapping some rights in pursuit of the maximization of utility, Kant persists on the obligation to respect every individual as an end in him or herself.

However, all of the presented ethical theoretical approaches have some limitations; no one in itself provides a perfect guidance in every situation, each of them finds its own areas of application which are more practical and useful to be applied following the dictum of the specific case and situation. In spite of many differences among the various theoretical conceptions all of them are interconnected by generally accepted universal human values, principles and norms which are more or less respected and observed by everybody and everywhere. As it is emphasized and put into our attention by Jan Vajda, this common foundation which ought to be followed as the leading principle for the code of behavior of all human beings in all spheres of our life should be ***the basic principle of humanism, the principle of justice and fairness, and the principle of honesty and meticulousness*** which cover in themselves a deep awe and respect not only to all human beings, peoples, nations, one's own homeland, love and respect to freedom and qualities of other individuals, but at the same time they articulate responsibility and a deep respect and esteem towards all alive creatures, natural world and the entire environment around us. In its essence the principle of humanism is many-dimensional highlighting qualities of human being, which ought to be placed at the top of the value pyramid, expressed by Kant`s words: *"Act so as to treat humanity in oneself and others only as an end in itself, and never merely as a means; …the freedom of the agent…can be consistent with the freedom of every other person according to a universal law…"* (Kant, I., p. XIX, p. 39), or by the well-known classical Biblical ruling *"to regard a neighbor`s interests as we do our own."*

As it has been already mentioned before, it is without any doubt that global changes have an evidence of their progression and thus shaping the world around us, especially, by exercising deep impacts on the state governments and public administrations, and in this way directly influencing citizens as they are the citizens who are most closely interconnected with them. Decisions taken by public servants and dignitaries affect considerably the fulfillment of individual and collective needs. The time of economic transformation

in Central and Eastern Europe was a period which left enough room for unethical deeds and actions in the area of public administration. Carrying out public services leads to many situations that put the individual against difficult choices, either to gain personal advantages, which are a big temptation, or to be honest and serving their society following the public interest. Furthermore, even when people know the right thing to do, they often find it difficult to do because of the environmental pressures; it might be the pressure from society, group, organization or institution.

Another thing is that even when they are aware that they are facing some ethical dilemma, cognitive limitations and biases often limit their ability to make the best moral judgment. We have to be frank and we have to admit that there are such situations when it is hard to take the proper stance and to decide. Therefore, a certain kind of standardized European system of socio-ethical norms and guidance in decision-making processes is necessary. The European proper standard system of values, principles and norms seems to be very urgent mainly in the public administration which plays the most decisive role in future of the European integration processes since there are the quality and effectiveness of ethical values and norms which are creating conditions for the decent and human social order in all aspects of life. To acquire ethical standards and values means setting up some definite determinants this might lead and regulate individual relations among people. Social trust and ethical standards produce the most fundamental elements of the needful European social capital.

At present it is generally accepted that there is a crises of values and authorities affecting nearly every sector of public life, that`s why there is a pressing need to seek new ways of motivation in carrying out our professional duties. In this connection a certain kind of revival of ethics initiatives have increased and have their continuation since 1970s, especially in the USA and some Western countries. At present some initiatives have been slowly finding their place in Eastern European countries as well. There is no doubt that at present the quality and effectiveness of public affairs management comes to the fore and it is extensively debated and evaluated by scholars as well as by practitioners.

The right to good administration which is guaranteed by ***the Charter of Fundamental Rights of the European Union*** in paragraph 41 refers to the right to good administration. It says: *"Every person has the right to have his/her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union."*. Besides that, the right to participate actively in public matters governance is guaranteed by the majority of the European countries constitutions, e.g. the right of the Slovak citizens to take part in public matters is stated in Article 30 of the Slovak Constitution. The comprehensive analyses of the Article is presented in monograph *"Proceeding on Legal Regulations Control before the Constitution Courts of the Slovak Republic and the Czech Republic"* by Julia Ondrová. Further on, she accentuates in her article *"Constitution Relevant Conflict Interpreted by the Constitution and/or by Constitution Law"* to respect rights and duties by all administrative bodies as it is stated by the Constitution and law (Ondrová, J., p. 138). Besides the legally stated rights to good administration, the direct participation of all subjects by means of direct democracy plays one of the most decisive roles. The difference between the legally stated norms in comparison to moral and ethical norms consists in reality that they are stated by the norm - creating authority and consequently they comprise in themselves a kind of binding enforcement including sanctions and punishment. Anyway, between morals and law there are dual interrelated complementary relations who in many aspects complement and adjust each other (Geffert, R., p. 210). Besides that, public administrators should have strong obligations to self, democracy, general welfare, and humanity and at the same time they should have strong obligation to Constitution, laws, organization-bureaucratic norms, and professionalism. This is the appropriate balance that should always be observed in terms of ethical administration.

Finally, concerning good administration it would be convenient to mention one of the recent ethical theories of the Slovak scholar Vasil Gluchman which might create a serious theoretical ground for the practical application in the area of public administration. It combines in itself universal validity of moral and ethical values and principles, but not excluding a certain kind of ***moderate situation relativism*** which is applicable mainly in decision-making processes. Moderate situation relativism put a special importance on taking into consideration the significance of the particular and specific contexts which might decisively influence our taking decisions. His theory is called ***ethics of social consequences***; the core of his theoretical thinking is his theoretical conception of the crucial social consequences on individual human beings and their social and natural environment caused by the moral subjects` decisions. Furthermore, he stresses the importance of the traits of moral subject character, such as his views, attitudes which play a decisive role in moral subject`s decision-making processes directly influencing his actions and deeds which might have had an unprecedented impact on conditions of people`s life and the locality where they live. In the ethics of social consequences the priority is given to action consequences, motives and intentions are the subject of investigation, especially, in connection with the negative social consequences. The positive moral social consequences to which the action

of the moral subject should be aimed at constitute the highest principle of the ethics of social consequences. Positive social consequences create good resulted from right and just decision-making which is in accord with the principle of humanity and human dignity. To reach goodness is not achievable without justice. Goodness is in compliance with the highest moral principle which is aimed at the fulfillment of human being happiness guaranteeing for people peace, social security, providing them with feelings of satisfaction and safety.

So at the beginning of the 21st century ***the ethical theory of positive consequences*** might be the answer in which way to drive the European ethical integration in order to foster the creation of such conditions which would assure fulfillment of decent economic, social, cultural, spiritual, family and professional aspirations for as many people as it is possible to achieve. The basic Moral Code of the European Public Administration regarding their decisions is to eliminate to minimum negative consequences and to promote positive ones to maximum.

4. Ethical decision-making processes in public administration

Having in mind the importance and impacts on the general public of taking decisions in public administration, it is necessary to follow the main idea of public administration, and that is to serve citizens and to pursue general welfare of a community in order to fulfill one of the most important factors in public administrative processes to respect and defend public interests which must be guaranteed by means of these processes. Another factor important in taking decisions is necessity to avoid irrationality of spontaneous-immediate-deciding, which might be determined and influenced by one`s personal character traits, tensed situation, operating working voltage or by a specific social background of a definite organization, as it is emphasized by many authors and ethicists, it is necessary to take decisions which are based on the rational thinking and reasoning. The theory of taking eight linear steps elaborated by Linda Treviño and Katherine A. Nelson regarding taking decisions in the area of business might be applicable to public administration as well.

The first step is defined as *"Gathering the Facts"*, it concerns with gathering necessary data and facts required for the objective, proper and impartial decision in order to solve the problem in question. Sometimes it is not so easy to find out all needful information and facts, but in spite of limitations of this first step, we have to try to bring together all facts which are available.

"Define the Ethical Issues" is the second step in order. The aim of this second step is to avoid quick decisions and solutions of problem-areas without taking into consideration all ethical and moral aspects. To solve occurred dilemma of our deciding, the deontological, or the principle-based theory or other theories discussed above might help us. While virtue ethics would suggest thinking about the ethical issues in terms of community standards, a consequentialist approach would think about ethical problems in terms of harms or benefits. The dilemma might be helped to be solved when we present the problem to our colleagues who might help us to see the matter-in-question from a different angle.

The third step covers the art of empathy known as *"Identification of the Affected Parties"*. It means to try to see the problem from the point of view of the citizen who comes with his/her complains problems and objections. This is especially important in the case of public administration since one of their main goals is actually the need to deal with issues important for citizens and communities in the best possible way. Empathy or ***role taking method*** as it is called by Lawrence Kohlberg finds its practical relevance in decision-taking processes in various organizations and institutions including public administration as well. This theoretical and practical approach is based on moral reasoning to see the situation through others` eyes in order to take into consideration all affected parties and to comprehend the particular situation from different perspectives. In this theory the Golden Moral Rules incorporated *"treat others as you would like others to treat you, or try to put yourself in their shoes"* (Treviño, L., p. 96 - 97).

The fourth step concentrates on *"Identification Consequences"* of our decision. This step is derived from the consequentialist approaches. The impacts on citizens and community have to be identified and in our decisions we have to try avoiding particularly negative ones, at least to minimize the negative ones. Here the application of the approaches of ethics of social consequences is relevant.

Step five gives attention to *"Identification of Obligation"* which are indispensably to be fulfilled, e. g. obligations towards community, the affected parties of our decisions and the people involved.

Step six points to *"Consideration of Character and Integrity"*, meaning whether we will feel comfortable if our decisions are disclosed and made public. Public Administration decisions have to be transparent, open, fair, objective and unbiased. Linda Treviño and Katherine A. Nelson used the words of Thomas Jefferson to express the spirit and real meaning of this level of decision-taking: *"Never suffer a thought to be harbored in your mind which you would not avow openly. When tempted to anything in secret, ask yourself if you would do it in public. If you would not, be sure it is wrong."* (Treviño, L., and Nelson, K. p. 9).

Step seven emphasizes *"Creativity in Thinking regarding Potential Actions"*. Before taking any decision it

is good to think over all alternatives into consideration and to choose the best one. Being the representative of public administration we cannot allow to be forced to the corner by some interest groups, individuals, even bound by some measures which are usually being applied in similar cases, it is always wiser to focus on finding out even if different but more proper equivalent.

The seven step concerns with not excluding ones *"Intuition and Insight Perceptions"* means to be sensitive to situations where something is not quite right. If facing ethical dilemma it is advisable to combine our inner intuition with rational thinking. Nevertheless, we have to say that the ethical decision in public administration is not always a linear process and the presented steps of decision-taking might be useful only as a kind of guide, inspiration or a helpful tool to make public administration decisions more accurate and righteous.

5. Conclusion

Finally we can conclude our short discourse in ethics using the words of Linda Treviňo and Katherine Nelson that *"ethics is not about connection we have to other being - we are all connected - rather, it is about the quality of that connection"* (Treviňo, L., and Nelson, K., p. 18).

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To some theoretical and practical problems using information and technical resources in the Slovak criminal proceedings

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Summary

The present paper deals analytical treatment options and conditions use of information and technical means in criminal proceedings. It highlights some of the shortcomings of the current Slovak procedural arrangements and those presented on the basis of their own scientific analytical processing which is complemented by considerations de lege ferenda. It notes that legislation of such institutes, where the law of the State involved and should in any case be exact. In this connection, it is critical to the Slovak criminal procedural arrangements for the information technology resources.

Key words: information and technical resources, command, timing of application, extension orders, particulars of the order.

1. Introduction

Information and technical means can be used in criminal proceedings, as well as outside the context of criminal proceedings and on the basis of special regulations. In criminal proceedings, it is possible to use them in various stages of the procedure and the basis from which you can derive the conditions of use, the Code of Criminal Procedure. Information and technical resources at their use greatly affects the areas of fundamental human rights also in the light of their nature and method of implementation. They are carried out secretly, so that the persons concerned do not have the time of application knowledge that it is against them use these means as a prerequisite for obtaining fair and undistorted knowledge that will be important for criminal proceedings. Given the nature of these funds, it is necessary consistently to enforce criminal procedural provisions and conditions to use each of them bound. The basis of the relevant provisions of the Criminal Procedure Code (Act no. 301/2005 Z.z, as amended, hereinafter referred to as „TP" or „Criminal Procedure"), which more or less strictly regulate the possibilities and conditions for the use of information and technical resources law proceedings.

2. Legitimate use of information and technical resources

To have the information and hardware used in accordance with the law, it is necessary to meet any legal requirements, the use of which they are bonded. These arise from the provisions of the Criminal Procedure Code of the relevant provisions. Are specified in relation to any information and technical resources, but in general it could be summarized that are required to:

a.) has been clearly specified group of crimes, their group or at least certain types of offenses for which it is possible to use information and technical resources,

b.) administration of criminal justice - because we are talking about criminal procedural level, the use of information and technical means in criminal proceedings,

c.) depending on what stage of the criminal proceedings should be information-technical means used by the naturally varies, the entity that should prescribe their use,

d.) should at the same time is reasonable to assume that if these resources are used, by doing so, they discover facts that are important for criminal prosecution; If we ask ourselves what the facts actually are, so it will definitely all of which provide a focus of criminal proceedings and the progress it further practical direction to take certain decisions on the procedure in the case.

That the information and the technical means of action could be used in criminal proceedings if it is assumed that this will be acquired facts important for criminal proceedings, it is possible to derive mainly from the fact of how much crime goes - from its nature and character. They are in most cases different information regarding the modus operandi of all the previous and following acts which it is composed. Given the nature of the information-technical means, with respect to production of records and wiretapping, in its entirety, it can never be ruled out that their use is detected by the facts, which are other than those to whom a statement. Therefore, it should be noted that the thus obtained results must be carefully considered.[1]

If the capture of factors, not covered by the order, they cannot be used in criminal proceedings and

[1] Ivor, J.: Odpočúvanie ako legálny zásah do práva na súkromie. In Zborník príspevkov z vedeckej konferencie s medzinárodnou účasťou „Aktuálny stav a perspektívy ochrany ľudských práv a slobôd". Bratislava: APZ v Bratislave, 2001, s. 30 a nasl.

must be legally destroyed. In addition, it is prohibited to use such information arising from communications of the accused or defendant with his defense counsel in criminal proceedings. Even when these are required to be legally destroyed and cannot be in any way be used in criminal proceedings.

3. The application and its requirements (justification)

Information and technical resources are used on an application for their use, which gives the competent entity prosecutor. Here it can be seen that although the prosecutor in pre-trial status Lord of this proceeding, though the authorization of the most intense interventions in fundamental human rights, is entitled to an independent and impartial tribunal, thus not alone prosecutor. An examination of the issue and use of these funds is safeguarded in court, as in pre-trial proceedings. In the proceedings before the Court issued an order on the use of these funds by the judge. In pre-trial proceedings emitting the investigating judge to the prosecutor. This aspect of the authorization process respectively for ordering the use of information and technical resources it is very important. To ensure that in the case decided by impartial and independent body, which from its position that examine whether they are actually fulfilled the conditions for using such intensive intelligence resources. However, if there is a case where the matter is urgent, and in such a hurry is not a command to use to get the court may issue an order in some cases the prosecutor himself. That does not diminish the authority of the court, as well as those cases are required to make additional order of a judge and to a certain defined period. It is in the nature of a confirmatory act in respect of an order issued by the prosecutor. If it had not been a judge for an order, it is not possible to continue with the performance of the information technology means, to be ordered prosecutors must terminate this activity and even though they thus obtain information relevant to criminal proceedings, cannot be used. The obtained records must be in the prescribed manner and within legally stipulated period destroyed.

Design authorized prosecutor is entitled to is very important. Already in the design, it is possible to state that the essential facts that will be of such relevance that the judge under their weight will be reviewing the draft decision, issue a command. It is the main substantive part of the request, to which you should give the prosecutor greatly depend. Contents and the main justification for the legality and necessity of the use of these funds should therefore be sufficiently clear, they should include facts that show the need for legal regulation of use of this institute. The draft prosecutor must be clear:

a.) the legality of the use of information and technical means

b.) the legitimacy of the use of such means,

c.) meet the proportionality requirement when used.

How consistently prosecutor describes all these important aspects of the use and regulation of information and technical resources that are ultimately reflected in the actual issue or to issue an order for its use. Naturally, the Court has on these issues available discretion, so even if those requirements very carefully described and specified, there is no legal entitlement to the order was issued. It must realize that ultimately it is the body responsible for the use of information and technical means judge. It is so for him and for his thought-free reasoning, which is based on theoretical knowledge and practical experience to closely examine the proposal on the issue and assess it as such on the basis of which it is possible to issue an order or on the basis of which command to use information-specific technical means cannot be issued. It cannot be reduced or prosecutor responsible for what the court's proposal is made, although this aspect of the current legislation is largely unresolved. Responsibility for whether to use these funds and hit them in the fundamental human rights, is largely transferred to the court. This would ultimately be to assess the merits of the situation and the need to use the following intensive institutes. The responsibility of the judge will ensure that these funds are spent only in cases where it is necessary and justified, and just as well that have not been used in cases where it was needed and which would thus obtain facts important for criminal proceedings. However, the judge in each case is determined by the prosecutor.

The nature, form and content of the proposals on the part of prosecutors, however, are not consistently addressed. The provisions of the Code of Criminal Procedure is not found on the following aspects of the proposal hardly any provisions in addition to the minimum requirements that are imposed on the content of the proposal. Content of the proposal is not carefully designed, sometimes, but not always, provides the requirement that the order has been sufficiently justified. In contrast, although in criminal proceedings in the criminal-procedural level, these issues are not addressed in detail in the inter-procedural arrangements we find elements such orders. Thus, if contained in the forms outside criminal proceedings can only be explicit requirement that they should also be included in the provisions of the Criminal Procedure Code. The law on protection against eavesdropping (Act no. 166/2003 Z.z. as amended), specifically § 4 sec. 3 addresses what matters should be given to proposals that also well under that scheme approved by the court. Specifically, the proposal should include:

• the type of use of information and technical means,

• the place where the equipment is to be used,

• the time in which the composition will be used respectively. during which it will be used (duration of use),

• data relating to persons involved in the use of these funds relate,

• demonstrate that the steps in the procedure that preceded the filing of the proposal was not relevant to addressing the issue or issues effectively, or if it has been largely complicated, difficult, so shall also state that,

• the reasons for the use of the information-technical means.

If the proposal does not contain the information required it should be including. This would be modified and criminal procedural arrangements so as to promote accountability for prosecutors submitted proposals and their website content and thereby to some extent facilitate the work of judges who reviewed the draft. They would find in it all the necessary elements that are crucial for assessing the potential regulation or absence of the use of this agent. Only with such comprehensive knowledge, it is possible to judge correctly assessed the necessity of using such an information-technical means or that it is not necessary and should be used (are not met legal grounds for its use). Proposal while its content determines the possible commands to use information-technical means. If the austere, currently a judge generally assess that on the basis of this proposal not be used for information-technical means and the command to use issued. If the provisions of the Criminal Procedure Code contain at least the basic minimum requirements for the content of the proposal, and these should draft does not, then the judge could reject or return the prosecutor to supplement the team that are not met legal requirements for its content. So clearly it can say that the legal definition at least a basic minimum requirement, which should include proposals for an order to use certain information-technical means would direct to streamline the permitting process decision. It would strengthen the current position of the prosecutor and also its responsibility to complete the application for issuance of the order and on the other, thus creating better conditions for the assessment of proposals by the courts, which should have all the basic and necessary information on the legality and necessity of using the information-technical means. This would reduce the percentage of such cases where the command is not issued, because the proposal to issue demonstrates the reality of what is necessary and legitimate need for its use, but is thwarted in this way obtain evidence relevant for criminal proceedings. It should also reduce the percentage of cases when the rights and legitimate interests of persons illegally intervene because the order has been issued on the basis of the draft, which did not all essential terms and the judge in its activities assessed as legitimate and issued the order. In practice, for such a conclusion, sometimes appearing opinions that prosecutors should there actually micro-manage the judge should strictly define all the reasons and relevant facts already in the proposal and the judge shall then only transcribed in a specific order for the use of information and technical means . But there should be noted that the judge is always available its expertise into account and within it assesses the design and its content. If it determines that it is required and the lawful use of information and technical means, the command issued on the other hand, if it finds that it is justified, issue a command. There is no legal claim that if the proposal contains specific requirements that would determine the legislation, the judge had to issue an order. The judge is not automatically obliged to issue such an order. If this is the case, then would not this process at all judicial and Article aspect assessment figures and it is enough if the prosecutor fulfilled this role. So it can hardly think in the sense that the prosecutor should not replace the work of a judge. Draft and subsequently released or unreleased command would become each other better reviewable, so if the judge issued an order and the proposal would be absent the necessary and obvious reasons for these differences, or vice versa, if the judge issue an order, even though it was clear that they were filled all legal conditions and reasons (reviewed and objective), it would be necessary to look for reasons for doing so. A naturally to impute responsibility for them. Not only judges but also prosecutors should be held accountable for the proper and consistent fulfillment of its obligations in this process - that the prosecutor in relation to the application and the judge in relation to its assessment and the absence of the regulation or use of relevant information and technical resources. Moreover, the work of judges with the proposal, which should set requirements should accelerate in terms of time. The judge would know better and faster to assess the legality and necessity of using such funds on the basis of said content requirements and it might be beneficial for their use.

The way that courts and judges shall act in relation to the review and regulation of information and the use of technical means, it is of course very individual. They are judges who ASSESS proposals very strict and rigorous, so sensitive to the protection of the rights of individuals possible. But then there are also judges who do not Adopt the contents of the site follows strict and the result of this is that the judges are of weaker Considered. These findings law enforcement procedures, thus initiating the prosecutors, often abused. Often waits until the services carried out by the judge who issued the order easier. Directly

were often waiting, when will dry and the judge shall review and more easily achieved an order.[2]

4. Command, its form and content

The proposal by the prosecutor, the judge who assesses, directions to be issued with a use-specific information and technical means. This order represents the basis on which these facilities may be in the classic, standard cases. The Code of Criminal Procedure is strictly designed to who the subject is authorized to issue such an order. Depending on the stage of criminal proceedings that may be different entities, but in both cases it will be a court:

a.) pre-trial issue orders to use pre-trial judge on the proposal of the prosecutor; at some institutes it is possible that an order issued by the prosecutor or police officer; it comes to things that cannot be delayed and it is not possible in such a short time to achieve an order the judge; it also requires that the order was confirmed by the investigating judge, thus ensuring that the judicial review,

b.) before the Court issued an order to use the presiding judge.

Commands to use information and technical means must be issued separately, separately for each specific case. In each individual case it is required to review the conditions for the possible issue, and consequently it is necessary to carefully examine their fulfillment to be in this case to interfere with the fundamental human rights and interests protected by unreasonably and unlawfully. The command also represents an act of law enforcement, is an individual act that addresses the particular case.

Command, ordering the use of information and technical means it is actually a form of decisions in criminal proceedings. But it is also a decision which content page is not some specific solutions. It is used for many questions of criminal proceedings, to address them, and therefore only general defines what matters should be given command and contents, and what part does not. Of this decision, the form of, for example, that it is not necessary in any event not justified. That is why it is very important that the competent authorities strictly formulated a proposal for an order and entities which decide to issue an order to closely examine the particulars and legal conditions for such a decision.

In relation to the order to use the various information-technical means, it is concluded that the money must be in writing. It required here with him, in those provisions on information and technical resources that must be justified. After a competent judge issued this moment has become final and shall be based on the services responsible to proceed. Criminal procedural provisions governing the essentials commands in § 181 sec. 2 TP. The pattern is clear, in the order or the order should be understood as follows:

a. who issued it - says the signs that a specific organ or body which issued the decision,

b. when and where it was issued - The date and place of issue,

c. for each case must be separately justified such an order,

d. determining the length - the duration of the use of such information and technical means, where their use is limited in time; this is only relative data, since it is possible to turn on the proposal of extending the period of their use and even repeatedly,

e. there must be above statement that prescribes the use of a specific information-technical means and in relation to this it is necessary to mention all the legal provisions on which the decision is based,

f.describes the act for which it is allowed to use this resource, provide the legal qualification (name and designation of the relevant provisions of the Criminal Code), where the right information and technical means required to be used for specific offenses or for the them some kind.

The command has enforcement nature of the classified information even after the end prosecution. The period during which conceals is limited only by the approval of archiving commands as follows from the time of filing. Such a degree of confidentiality is important precisely with regard to such crucial and sensitive details in the order given. It is therefore possible that the orders actually contain specific information including the names and identifying information concerning persons as well as the context and the various aspects of crime for which the information and authorize the use of specific technical means.[3]

Although the provisions of the Criminal Procedure Code directly with specific information and technical means determine Whether the command and justify how and sometimes in practice met with various opinions about justification commands. General provisions Relating to this form of decision in criminal proceedings, it does not always require. The relevant provisions governing the information and technical resources directly, already meets that states, however (§ 115 paragraph. 3 TP and the provision of § 116 paragraph. 2 TP). It is only possible to recommend that the fact that not only justify commands, but in addition to this and their reasoning

[2] Perhács, Z., Perhácsová, A.: Právna úprava používania informačno-technických prostriedkov (2. Časť). In Justičná revue č. 5/2013, s. 699

[3] Perhács, Z., Perhácsová, A.: Právna úprava používania informačno-technických prostriedkov (1.Časť). In Justičná revue č. 4/2013, s.554

was not sufficiently clear and detailed. Čentéš[4] stress here that reasoning is important in Assessing the possible legitimacy of the objective pursued and to be specific information and technical means to Achieve. It allows to consider the precise order as a form of decision, where it would be important. Such reasoning is also significant in terms of life outcomes, which are as follows - the use of information and technical resources Obtained as evidence in criminal proceedings. Therefore justification should not in any case be very general and vague, it should only contain a transcript of the legal provisions of the Code of Criminal Procedure, it should only be austere. It is a fact that part of the Decision Concerning the lawfulness of interference and droughts affect the possible use of Information Obtained in this way.

And in terms of time is criminal procedure inconsistent treatment. It sets out the requirement that these funds are used in terms of time-limited - the provisions of the Criminal Procedure Code we find a specific period during Which they can be used. It's the upper limit when determining that no more than 6 months. The specific period during Which these assets are used, must also be given in the statement. In principle, so we can be satisfied with the fact that it is a modification that allows time-limited interference with fundamental human rights and is sufficiently clear and precise. This is not quite true. Here, it already provides that the extension can be achieved by 2 months and even repeatedly. Of course, extend it again DECIDED by a court and the one that the original order was issued. Unless problematic is just the possibility to extend the use of these means it can be repeatedly. It does not specify the maximum period of use of information and technical means - we make the total, in which they can order and use the extension, respectively. Over Which I can no longer use this resource or extended. There shall be no maximum number of repeated requests from the extension of the use of information and technical means. So it is reasonably possible that it will be repeated several times to ask for an extension of the use of these funds and their use so it will take a very long time. This use will be bound by the duration of fulfillment and legal reasons for which the use of the sums committed. In terms of time, however, it may take a long time indeed unlimited. And it cannot be seen as a clear and precise time limit use of these funds and the clarity and precision, consistency of the legislation requires the ECHR.

[4] Čentéš, J.: Zásahy do práva na súkromie z pohľadu judikatúry ESĽP. In Zborník príspevkov z medzinárodnej vedeckej konferencie „Juridizácia ľudských práv v judikatúre ESĽP. Bratislava: FP PEVŠ, 2015, s. 59

5. Conclusion

Information and technical means in criminal proceedings are institutes, which allow very strongly interferes with the fundamental human rights and freedoms. Due to the possibility of interfering in them in terms of European law, it is necessary that legal regulations allow the use of such funds were exact, clear and unambiguous. To present aspects of the use of these funds in the process level, in criminal proceedings, it is seen that although the Slovak legislature rather regulates in detail the possibilities of their use, these provisions are not absolutely consistent, clear and exact. We pointed out yet only for certain applications and theoretical issues using those means that can, and now also significantly influence the possibility of proving serious crime. In this respect, it is necessary in the future to reflect on a consistent treatment possibilities and conditions for using the information technology in criminal proceedings and to amend the provisions in question consistently**.**

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The hungarian system of the legal relationships which determine the civil responsibility of the healthcare service providers

Judit Zákány

Summary

We examined the legal possibilities which are usually used during medical activities. It can be said the there are many variable possibilities. I dealt preferentially with the liability rules of the legal relations, which are important and actual because of the tendencies, concerning the liability for damages of the healthcare service providers and make this liability more malevolent, and because of the explanation which is getting harder. Because of the wider liability there is the possible chance that the damage amount, or its part can be avoided to the employees who do the medical activities. The measure of this depends on the legal form in which the medical activity is being done. Not only a person with qualification can be in legal relation with the healthcare service provider, but – in favour of complete the personal and objective resources – the healthcare service providers can make contracts with each other. This means collaborate contracts which are significant in the area of the medical services. The term of starting the services, the costs and the liability are mainly diverge from each other in the legal relations. This is beneficial because the qualified medical person can find the form which is the most sufficient for his prioriries and possibilities. Ha can operate in contractual relation at a healthcare service provider, or independently, or – in the form of a joint enterprise – he can operate a healthcare service provider. But there is the disadvantage that the possibilities are hardly seen clearly because of the many legal relations and the fragmented regulation.

Key words: hungarian system of the legal relationships, civil responsibility, healthcare service providers, patient, damages, medical employee.

1. Introduction

The aim of my paper is to demonstrate the legal relations which are fundamentally important in Hungary in the view of the civil responsibility of the healthcare service providers. I want to analyze three legal relationships, first to demonstrate the legal relationship between the healthcare service provider and the patient. This is important because the feature of this relationship determines which liability rules are applied in the sues for damages by the courts against a healthcare service provider. By the effect of the new Hungarian Civil Code, the V. Act of 2013 on the Civil Code (hereafter: Ptk.) the liability rules have changed fundamentally, and this has required the change in the liability rules of the healthcare service providers, which will be also mentioned in my study.

The next relationship which will be demonstrated is the legal relationship between the healthcare service provider and the liability insurer, which is important because of the financing of the amount of the compensation. The liability insurance contract is destined to guarantee the legal and the wealth safety both to the healthcare service provider and the patient in cases of the culpable tort arosing during the healthcare service. Sadly, because of the existing problems – which will be also demonstrated – in many cases the amount of the compensation is on the budget of the hospital.

The third legal relationship is the legal relationship between the healthcare service provider and the medical employee, which influences many factors. This is fundamentally important in this topic, because it determines who has the direct obligation for the damage arosing during the healthcare service and it determines the possibilities to fend on the amount of the compensation.

In the end the – by the analysis of the legal relationships – the reader will become acquainted with the possible appilication of the delictual and contractual liability rules in a medical action for damages in Hungary, and with that who and in what form is responsible if the healthcare service provider is condemned.

2. The legal relation between the healthcare service provider and the patient

One subjective of this legal relation is the healthcare service provider, so - irrespectively of the proprietary form and conservator – every individual medical contractor, legal person or organization without legal personality which has the operational permit from the medical government body and is entitled to service healthcare service.[1] The patient is the person who has resort to the medical activities – connected to his

[1] CLIV. Act of 1997 on Health (továbbiakban: Eütv.) 3. § f) point.

health condition – so the medical service, or the person who takes part of the mentioned ones.[2]

There are disputes between the jurisprudence and the practice about the nature of the legal relation. One question is which area the legal relation belongs to. According to the earlier Health Act from 1972, some literates say that this relation is an administrative relation.[3] It is a serious problem that according to this idea, the patient is a client and is an underling to the provider – by the specialities of the public law relations. Instead of this the ruling theory is which says that the relation between the healthcare service provider and the patient is fundamentally belongs to the private law, more correctly to the civil law and has administrative elements.[4]

The other question on this legal relation is to decide whether there is or isn't a direct contractual relation between the parties? The jurisprudence and the pracice has different opinion. In most cases of the courts on the liability of the healthcare service providers, judgements have been born on the base of the torts which are actionable per se, and there hasn't been any reference to the prior contractual connection between the parties.[5] There are judgements when there are expressly: /in which it is expressed that "the aggrieved party has no contractual connection with the healthcare service provider, but there was a medicinal operation based on the state insurance." [6] Against this, the representatives[7] of the jurisprudence say that it is not the tort which causes a relative legal relation between the healthcare service provider and the patient, but the contracutal contractual connection is born by the use of the service. The debate was decided by the 244. § from the CLIV. Act of 1997 on the Health Care (hereafter: Eütv.) in January 2010, which says: „in cases of the claims which are correlating to the healthcare services, the rules of the liability from the civil law must be applied."

We can name a – from the other ones - special feature of creating a legal relation between the healthcare service provider and the patient: the contracts are often born with an implied conduct, the recourse of the service. In this legal relation, many elements of the principle on contractual freedom partly prevail. For example, in the area of territorial supplying obligation and in the case of urgent need, the provider doesn't have the contractual freedom or the freedom to choose partners, he must enter into a contract. But the patient does not have the right to choose about entering a contract, for example in case of authorital medical interventions or compulsory vaccinations. The freedom of the contractual content is limited, because the health care rules have operative role in determining the content of the contract, these rules prescribe rights and obligations for both parties, and the written and unwritten professional rules in connection with the medical activity have operative role too.[8] The obligation of communication and information is determinative in the legal realationship.

This legal relation is often related to the mandate contract - from the named contracts - because – in both cases – the point is the careful, professional and ethical proceeding of the healthcare service provider and the activity is not engaged to a result.[9] Although there are specific features of the mandate contract which can't be applied in this specific legal relation. For example, the right of order of the client has other meaning in the relation between the healthcare service provider and the patient. The Eütv. gives the choice of the investigational and therapeutical method as a right for the therapist with the limitation that the patient must accept the method after the appropriate information. So, the right of order is limited, it incarnates in the right of autonomy.[10] The feature of the mandate contract os the obligation of personal proceeding, and the rare possibility of employing a contributor. In connection with the healthcare services this feature is not always there. It is there when the patient resorts the service of a private doctor, but the health care institutions have become multidisciplinate factories, there is the division of labour, many employees work in service, simultaneously or sequentially. In this meaning, the personal proceeding can't be interpreted, so the confidential element – which is typical for the contract – has a minor role.[11] The man-

[2] Eütv, 3. § b)-c) points.

[3] Jobbágyi Gábor, Az orvos-beteg jogviszony az új Ptk.-ban, Polgári Jogi Kodifikáció, 2005, 3. szám, 15.

[4] There are cases when the aim of the medical activity is public – besides the aim to cure the individual patient – and the patient has no choice about the preventive curing (for example compulsory vaccinations, compulsory medical examinations, measures against contagion). The administrative elements occur in cases for example when the doctor decides about disability or the loss of capacity or doing forensic activities. Lásd: Törő Károly, Felelősség az orvosi működésért – Orvosi műhiba, Magyar Jog, 1987, 2. szám 137.

[5] Havasi Péter, Összefoglaló jelentés az orvosi műhiba perek gyakorlatának áttekintéséről, különös tekintettel a nem vagyoni kártérítésre, Budapest, 2008. január 14., 17.

[6] LB Pf. III. 25.898/2001/5.

[7] For example: Törő Károly, Jobbágyi Gábor, Sándor Judit, Dósa Ágnes, Kemenes István, Szeghő Ágnes.

[8] Jobbágyi [2005] i.m. 17.

[9] There are cases when there is the liability for the result, so the enterprise-feature of the contract. There is the obligation for result for example in the case of making a prothesis, and some dental interferences, or some plastic interferences have enterprise-feature too. (Hídvéginé Adorján Lívia – Sáriné Simkó Ágnes, Műhibák és kártérítési perek az egészségügyben, Medicina Kiadó, Budapest, 2013, 18.).

[10] Sándor Judit: Gyógyítás és ítélkezés, Medicina, Budapest, 1997, 59.

[11] Szeghő Ágnes, A kezelési szerződés, In: Papp Tekla (szerk.): Acta Conventus de Iure Civilii, Tomus XI., Lectum Kiadó, Szeged, 2009, 83.

date contract is often about the representation of the client, which in a legal relation between of a doctor and a patient also does not prevail, the subject of the contract is not the representation of the patient. Paying the fee is specific in the case of resorting a public-financed service, because in this case the financing of the service happens not directly, but through the state insurance.[12] If the patient goes directly to a private service provider, he pays directly the costs of the service.

I must mention that at the same time when the V. Act of 2013 on the Civil Code (hereafter: Ptk.) entered into force, the 244. § from the Eütv. was modified, so now it orders to apply the criminal liability rules of the Code to the liability of the healthcare service providers. The change was needed because the liability system of the new Ptk. has significant changes according to the prior Code, the parallel regulations of the criminal and contractual liability has narrowed, the rules of the liability for the damages caused by breaching the contract have placed to new, more objective bases, the possibilities of the explanation have become stricter.

Separating sharper the rules on torts and the rules on contractual liability in the new Civil Code is an acceptable, logical move, and this comply with the judicial practice[13] and the international documents.[14] The liability comes from different legal relations each case. In the case of liability of rules on torts the first base is an absolute legal relation, which becomes into a relative obligation between the injured party and the tortfeasor because of the tort. In this case, the general ban of the tort is injured. Contrarily, the conclusion of a contract means a knowlingly undertaken risk, in the case of breach of the contract there is the breaching of predetermined obligations between determined parties, and the breaching party has to honor these, and has to ensure the compensation of the caused damages. The patterns for the liability concept were the contracts in business relations. Anyone, who does businesslike activity, taking risks, in the case of breach of the contract the sanction can't depend on the sedulity of the breaching party, the reasonable behavior in the actual situation can't be sufficient base for the explanation.

However the contractual relation between the healthcare service provider and the patient is a special area, for which the changes in the liability system – motivated by the contracts of the business area - aren't appliable fully. Just think for example the healthcare services within the confines of territorial attendance obligation – in these cases the institutions don't have deliberation possibility whether or whether not to conclude a contract with the patient, so they can't be exempted from the service obligation.[15] This is a significant difference compared to the business contracts, in these cases of the latter ones the contractual risk is a volunteer decision, so the increased liability is reasonable.

In Hungary there is a very strict judicial practice on the liability of the healthcare service providers, the explanation is hard even in the imputation system for the healthcare service providers.

The new, objective system of the liability for the damages from breaching the contract would have unforeseeable consequences if it was applied for this legal relation. The legislator has recognized and remedied properly the problem with the changing the 244. § of the Health Act, which orders that the rules on criminal liability – based on imputation – of the new Civil Code must be applied in the case of the liability of the healthcare service providers.

3. Legal relation between the healthcare service provider and the liability insurer

If the harmed patient, or his relative sues for damages, the action must be started against the healthcare service provider. In point of the extent of the financial liability of the healthcare service provider, the contract with the liability insurer and its elements are fundamental, so I will analyse them hereafter.

In the phrasing of the Civil Code of Hungary (hereafter: Ptk.), an insured party is entitled, on the basis of a liability insurance contract, to request the insurer to exempt him, up to the limit specified in the contract, from paying for damages for which he is legally liable.[16]

The charasteristic of the liability insurance that it makes a special legal relation with three subjectives by linking an insurance and a damage obligation legal relation.[17] The insurance contract is made between the insurer and the insured. The insured is also a subjective of the damage obligation, he is responsible for the damage, but he is not every time the tortfeasor.[18] The other subjective of the damage obligation is the

[12] Kovácsy Zsombor – Dósa Ágnes, A vállalkozó orvosok nagy kézikönyve, Complex, Budapest, 2011, 672.

[13] Menyhárd Attila, Felelősség szerződésszegésért, Polgári Jogi Kodifikáció, 2001, 3. szám, 25.

[14] E.g. the relevant rules of the CISG and PECL. In: Csécsy Andrea, Előreláthatósági klauzula a szerződések jogában, Debreceni Jogi Műhely, 2009, 1. szám, http://www.debrecenijogimuhely.hu/archivum/1_2009/ (letöltve: 2013. december. 5.).

[15] Kereszty Éva, A helyi önkormányzatok és az egészségügyi szolgáltatók kapcsolata, Magyar Közigazgatás, 1999, 11. szám, 620.

[16] Ptk. 6:470. § (1)

[17] Jobbágyi Gábor - Fazekas Judit, Kötelmi jog, Szent István Társulat, Budapest, 2005, 374.

[18] For example, when the health institution makes the liability insurance, claims will be against this institution, the liability is its, but the real tortfeasor is the doctor who is in a legal relation with the institution.

harmed party, whose damage is compensated – fully or party – by the insurer, instead of the insured one. So, the liability insurance is the security of the satisfaction of the damage obligation, an establishment of the obligated part, which makes it possible – maintaning the original obligatory situation and without changing the subjectives – for the insurer to comply instead of the obligated.[19]

In 1989 the pursuance of private medical practice and healthcare enterprises was authorized. The provisions of law on licensing[20] first required mandatory liability insurance in the abovementioned two areas. Despite the fact that in this period there was no mandatory liability insurance for state-run healthcare institutions, almost all of them have purchased coverage by 1992. In the initial period, insurers also enthusiastically embraced the opportunities inherent in the new market and competed for satisfying the needs of hospitals with a diversity of offers. The Eütv. extended the obligation of purchasing liability coverage to all healthcare service providers.[21] Initially the system worked well, and it meant real safety for the service providers, assurance for the patients that the damages would be paid and, also a new source of income for the insurers. Changes of the ideal condition as described above and the decline of our medical liability insurance system can be primarily traced back to the change in the practice that can be observed in the lawsuits against the healthcare service providers. This was the circumstance disrupting the identity of interests that had previously existed between insurers and service providers. It was only in the interest of profit-oriented insurers to provide the service as long as it generated a profit for them. However, between 1997 and 1999, the proportion of the income from the insurance premiums relative to the insurance amounts paid began to gradually deteriorate. Due to the increase in the number of lawsuits and the amounts paid, this line of business was no longer profitable, and insurers recognized that it was no longer in their interest to provide insurance services in this market segment.[22]

In the following, I would like to highlight three factors that were, in my opinion, the genesis of all other problems. Firstly, the dwindling of the supply side of the insurance market. Currently there are a few insurance company that offers its service to all healthcare providers, which means that there is practically a monopoly on the market. Furthermore, there is a unilateral obligation to contract, since the healthcare service provider is required to take out liability insurance as a condition of its operating permit,[23] but the insurer will only conclude a contract with a healthcare provider if and when it is worth it for them. Finally the relevant authorization has been declared for more than a decade, the Hungarian Government still has not issued the decree concerning the minimum conditions of professional liability insurances for healthcare service providers.[24] As a result, nothing else determines the detailed rules of operation of this special type of liability insurances than the business policy, i.e. the general terms and conditions of the insurance company. These general terms and conditions, on the other hand, include numerous elements that are unfavourable for the institution and that do away with the essence of the liability insurance and disregard the original aim of this legal institution.

In the following, I will mention some problematic contractual provisions set forth by the insurers. Insurance premiums have increased significantly in recent years.[25] The level of the services provided by the insurer, however, did not increase. The insurance limits are still at the level they were 15 years ago, generally 5 million HUF per insurance event.[26] Damages above this limit are paid by the hospital from their own budget, i.e. the amount earmarked for running costs, or the maintaining entity fulfils the payment obligation.

Insurers interpret the concept of insurance event in an increasingly narrow way, and risk factors causing large amounts of damage are excluded from those covered, thereby practically dissipating the essence of liability insurance. The problem is that these exclusions[27] are beginning to take irrational proportions, and insurers are now excluding entire medical fields (e.g. plastic surgery), diagnostic methods (e.g. CAT,

[19] Gergely Edit - Péterffy Éva, A felelősségbiztosítás, Biztosítás Oktatási Intézet, Szolnok, 1998, 12.

[20] 30/1989. SZEM rendelet, 113/1989. MT rendelet

[21] Eütv. 108. § (2) bekezdés

[22] The so-called first insurance crisis, lásd: Simon Tamás: Kezelhető-e a szakmai felelősségbiztosítás Strucc Malvin módjára?, Kórház, 2005 (12. évf.), 10. szám, 15. o

[23] Eütv. 108. § (2) bekezdés; 96/2003. korm. rendelet az egészségügyi szolgáltatás gyakorlásának általános feltételeiről, valamint a működési engedélyezési eljárásról 6. § (3) bekezdés; 2003. évi LXXXIV. törvény az egészségügyi tevékenység végzésének egyes kérdéseiről 7. § (1) bekezdés e) pont

[24] The closing provisions of the Healthcare Act originally only gave an authorisation to the Minister of Health to draw up the detailed rules of the liability insurance of healthcare service providers. This provision of the Healthcare Act was amended in 2002. The Government has since had the authority to create the relevant decree (Section 247 (1), point f) of the Healthcare Act); however, this decree has not been adopted since.

[25] Lásd például: Harmat György: Az orvosi felelősségbiztosítás kérdései és lehetséges válaszai, Egészségügyi gazdasági szemle, 2003 (41. évf.), 6. szám, 36. o.

[26] 5 million HUF per insurance event (in exception cases, 8 or 10 million HUF), with a maximum of 50 million HUF per year. By way of comparison: in case of automobile liability insurance, the limit is 500 million HUF per insurance event for damage to property and 1,250 million HUF per insurance event for personal injury.

[27] The exclusions are discussed on the basis of the general terms and conditions published by the insurance companies.

MRI, X-ray) from the coverage they provide. In addition insurers exclude claims based on the failure or insufficiency of information, despite the fact that this is the legal grounds most frequently identified by patients.[28] Among the exclusions there also appeared damages caused in connection with obstetrical and gynaecological activities, from the onset of labour until midnight of the fifth day after delivery.[29]

Several strong reasons can be enumerated to support the importance of restoring the operability of the system as early as possible. The most urgent problem is that in the current situation there is no adequate solution for the financing of insurance events occurring in the course of providing healthcare services. As mentioned above, the approximately 5 million HUF limit offered by insurers is far less than the tens or hundreds of millions claimed. We could say that the proportions of payment have almost been reversed in such a way that the insurer pays the amount corresponding to a deductible,[30] and the healthcare institution has to pay the amounts above that. The other issue that I would like to emphasise is that the solution must also be found because of our obligation to harmonize with the laws of the European Union. In case the Directive on cross-border healthcare is adopted, there will be pressure from the EU on the member states, including on Hungary, to institute an efficient liability insurance system or other guarantees for the financing of insurance events occurring in the course of the healthcare services.[31]

In point of the liability insurance of the state healthcare service providers there is an actual fact, that the National Healthcare Services Center (hereafter: ÁEEK) has the competence to conduct public procurement procedures contractedly in case of the health institutions which are under its direction.[32] On behalf of this, the ÁEEK and the health institutions have made an agreement on conducting the public procurement procedure. The ÁEEK by the licence and in the name of the health institutions as prospective constractors conducted an explicit public procurement procedure in 2016 to procure an insurance service. As a result of this the prospective constractors have made their contracts one by one with the insurer.[33] Unfortunately, this procedure has not changed much in connection with the contractual terms, so it has not given a solution.

4. Legal relation between the healthcare service provider and the medical employee, and other healthcare service provider

If the patient or his relative sues for damages successfully against the healthcare service provider, in the view of shifting off the payed amount it is significant that which legal form is used to occupy the medical employees who have had part of the service of the injured patient. The legal form of the healthcare service provider is also significant, and if the healthcare service provider has contractual connection with other healthcare service provider this also can affect to shifting off the damage.

The possible forms of the healthcare activities are determined by the LXXXIV. Act of 2003 (hereafter: Eütev.),[34] which can be various. A person can do medical activity in more legal relation even at the same provider, but it is important that the medical activity can't be more than 60 hours a week, on average 12,6 hours a day – within a month.[35]

In the following sectors I will mention some legal forms which have important role in practice, in the middle there will be the liability rules in connection with these legal relations. The stress is on compensating the damages caused to a third, outside party in connection with the legal relation. First, I chose the legal possibilities, to which the operational permit of the healthcare administrative organization is not necessary. In these cases the activity is done in the name of a healthcare service provider which has operational permit and in a contractual legal relation with it. In this case I will analyse the labour relation, the public servant legal relation and the professional legal relation.

The common employment form of the Hungarian medical employees is the public servant legal relation, and the medical activity which is done in a labour relation. The XXXIII. Act of 1992 on the public servants

[28] Lásd részletesen: Dósa Ágnes: Az orvos felelőssége a tájékoztatás elmulasztásáért, Lege Artis Medicinae, 2001 (11. évf.), 1. szám

[29] This exclusion is only in the terms and conditions of Allianz Hungária Zrt.

[30] The essence of a deductible is that the insured is to bear a certain part of the full insurance amount, as defined in the insurance policy. The extent of the deductible is typically 10% per insurance event. The deductible must only be paid if the insurance amount remains within the limit of the insurer per insurance event, and therefore, its main point is that the healthcare service provider cannot escape the payment obligation, not even if the damages awarded are lower than the insurance limit.

[31] The draft version of the Directive on cross-border healthcare, page 14.

[32] According to the 27/2015 (II. 25) government decree 5. § I) point.

[33] http://www.biztositasiszemle.hu/cikk/hazaihirek/nemelet-biztositas/nyilt_kozbeszerzest_irt_ki_az_allami_egeszsegugyi_ellato_kozpont_96_korhaz_biztositasara.5772.html (letöltve: 2019. március 26.)

[34] According to this, everyone who has appropriate skill has the possilbility that as a professional, or medical contractor, or a member of a joint business, member of an individual firm, ecclesiastic, volunteer he can do medical activity in labour relation, public servant relation, government serving relation, state serving relation, serving relation. [Eütev. 7. § (2)]

[35] In point of duty work, only the term of the actual medical activity must be taken notice of. [Eütev. 5. § (5)]

(hereafter: Kjt.) orders that for the other, unregulated questions the I. Act of 2012 on the Labour Code (hereafter: Mt.) should be applied.[36] Subjectives of the public servant legal relation are the employer and the public servant, labour relation is made between the employer and the employee. For doing medical activity by public servant, or the employee, the appropriate qualification is necessary. Public servant legal relation can be made by competition, the legal relation is born by nomination and its acceptance. The labour ralation is made by signing the labour contract which testifies the mutual and concurrent manifestation of will of the parties. The liability rules of the two form are connected strictly, so they will be demonstrated side by side. If the employee or the public servant causes damage to a third party in connection with the labour relation or the public servant relation, the employer is liable for the injured party directly.[37] In the case of obligation to fulfil his commitment, the provider has the chance to devolve a part of the damage to the employee – in consideration of the form of the medical activity. According to the rules[38] of the Mt., the employee and the public servant is responsible fully in the case of willful and recklessly careless tort too, in other cases he is responsible with his 4 months absence fee maximum. This rule would make significantly harder even the position of the most protected medical employee in labour relation and public servant relation in regard to the wilder liability of the healthcare service providers, the increase of the fees for damages and the explanation from the liability getting harder. The legislator has got wise to this fact and the necessity of the special regualtion for the healthcare services. With the 15/C. § of the Eütev. he has overwritten the mentioned rule of the Mt., but not generally, only in point of the damages caused for the patients with the medical activity. Although the orientation is favourable, I think that the rule must be modified not only in relation to the damages caused to the patients, because in sues for damages the claims from the relatives are frequent and mean large amounts. So the rule must be applied to these, which says that in the case of careless tort the amount of the compensation is maximum 4 months absence fee of the employee.

The main point of the professional legal relation is that the medical employee engages to do a medical activity – to which he has the competence – in a mandate contract. A special mandate contract is born between the parties with the elements determined by the Eütev.[39] The factual terms are secured – essentially – by the healthcare service provider, which pays a fee – determined in the contract – for the professional activity. The professional legal relation is an appropriate solution if the employee. The professional legal relation is an appropriate solution if the employee wants to take part of an activity of a bigger, or private healthcare service provider on some occasions weekly for some hours, wants to take part of duty activities, but he does not want to work as a healthcare contractor, or he does not have the personal and objective terms which are necessary for the operational permit.[40] If the professional causes damages to the patient or to his relative during the healthcare service or correlating with it, the liability is based on that if he is a legal relation with a healthcare public service provider[41] or healthcare private provider.[42] In the prior case the healthcare service provider – which gives the public service – honors obligations directly towards the injured party, which can sue the tortfeasor professional by the rules of the civil law.[43] There isn't any special protocol for the healthcare service providers who service private service, for them the rules on the mandate contracts from the Ptk. must be applied. According to these, if the mandated – in his position – causes damages for a third party, he has joint and several liability with the principal. The principal can be excused if he can prove that he has acted as it has been reasonable under the circumstances with choosing, instructing and supervising the supervising the mandated. If there is a permanent mandate betweent the healthcare service provider and the professional, the rules on the healthcare public service providers must be applied. But, if the mandated has caused the damage willfully, he has has joint and several liability with the principal.[44]

Hereinafter I will deal with the legal possibilities, when the medical activity can be done only with operational permit. The subjectives who have operational permit are healthcare service providers, so they give medical services in their own names. According to the law, private healthcare enterprise, private firm, and joint enterprise must require operational permit (from the Chief Medical Officer or the township office – depending on the feature of its activity)[45] to work as a healthcare service provider. For this, it must complete

[36] Kjt. 2. § (3)

[37] In accordance with Ptk. 6:540. § (1) rule, 19/A § from the Eütev.

[38] Mt. 197. § (3)

[39] Kovácsy Zsombor: Az egészségügyi jog nagy kézikönyve, Complex, Budapest, 2009, 241.

[40] Varga Antal: Magánpraxis alapítása II., Med et Jur, 2013/2, 17.

[41] Under healthcare public service the legislator means a healthcare service which is – partly or fully – financed by the central budget and the Healthinsurance Foundation (CXXXII. Act of 2006 on innovating the healthcare supplier system.)

[42] Hídvéginé Adorján Lívia- Sáriné Simkó Ágnes: Műhibák és kártérítési perek az egészségügyben, Medicina Kiadó, Budapest, 2013, 23.

[43] Eütev. 19/A. §

[44] Ptk. 6:542. §; 6:540. §

[45] 96/2003. (VII.15.) government decree 6. § (1) and 7. § (2)

the personal and objective terms from the acts[46] and must make liability insurance.

Operational permit can be given to private healthcare enterprise from the administrative healthcare organization if it has qualification, it is in the operational register of the medical employees, it proves its health competence, and the planned medical activity is not limited by the law, or the law does not name a specific healthcare service provider to this planned activity. The condition to start the work is to report the activity to the organization which making the register of the private enterprises,[47] this report is free.[48] The benefit to work as private enterprise that there is not a boss, but the terms to get the operational permit must be made, and this means costs. As to the liability for damages, the private healthcare enterprise is liable with its whole private wealth for the damages caused in connection with the medical activity, and it is can be limited only by the mandatory liability insurance. If the enterprise has an employee, and he causes damage in connection with the healthcare activity to the patient or his relative, the healthcare enterprise will be responsible in front of the injured party, but in the case of willfull tort the enterprise can avoid the whole amount, in the case of negligent tort the enterprise can avoid maximum 4 months absence fee to the employee.

The private firm – acting as a healthcare service provider – is strictly connected with the prior legal form, because this form – without legal personality – can be founded only by a private enterprise. This possibility is favourable for everyone who wants to act not in their own name, but under a corporate name, and a private firm can turn into other business association.[49] The private firm is born with the registration to the register of companies, and at the same time, the status of the private enterprise ends.[50] A private firm can have only one member, but the firm can have employee in employment relationship. As to the liability, if there is a loss during the healthcare activity, the private firm will be liable towards the injured party directly. For the debts which are not covered by the wealth of the firm (to found the firm the law does not require a minimum subscribed capital) the founding member will be liable fully, with his whole private wealth. In the case of the tort caused by the employee, the mentioned rules on the employees of the private enterprise are applied.

Business association can do healthcare activity too, the work can be done as a member of a joint enterprise. It is indispensable to found a business association to draw up the the instrument of constitution in a notarial document, or in a private document countersigned by a lawyer, which have to be signed by all of the founders.[51] The administrative healthcare organization with competence can give operational permit to the association, if the planned medical activity is not limited by the law, or the law does not name a specific healthcare service provider to this planned activity. And because the medical activity is connected to qualification, it is necessary that the enterprise has at least one member who constracts personal cooperation, or has at least one person who is in employment relationship or civil law contractual relationship with the association, and who suits the qualification requirements,[52] who is in the operational registration of the medical employees and proves his competence.[53] This legal possibility is practical in the case whent more medical employees want to cooperate permanently, it has the advantage that they can prove the necessary terms – to the service – more easier together, they can partake from the common gain and have the chance to make an uniform image.[54] In Hungary there is form pressure for the business associations, they can be founded only in the forms determined by the law. In Hungary joint enterprises operate mostly as limited partnerships or limited liability partnerships. In the prior case the costs of the foundation are more favourable, because the law does not require a minimum subscribed capital for the limited partnership. For the obligations of the healthcare service provider – in the form of a limited partnersip – so for the case if its member or employee causes damage during the medical activity for the patient, principally, the association will be liable with its whole wealth. But, for the debts which are not covered by the wealth of the association, at least one general partner is liable with his private wealth vicariously and unlimitedly. The foundation of the limited liability partnership is more expensive, because it needs minimum 3 million Ft subscribed capital,[55] but the financial liability of the members – fundamentally – reach only to the paid primary stake, so they are in a more protected legal status in the case of an action for damages.

The healthcare service providers can act in their own names and liabilities – as it was mentioned earlier – but there is the legal possibility to cooperate in other activities which are in an operational permit of other healthcare service provider. The collaborate

[46] Eütv. V. chapter, 60/2003 (X. 20.) ESzCsM decree

[47] At present, this organization is the Central Office for Administrative and Electronic Public Services.

[48] 2009. évi CXV. törvény 8. §

[49] Rónai Ferenc: Az egyéni cég előnyei [www.gymskik.hu/download.php?id=2844 (2017 március 23-ai letöltés)] 26.

[50] To ban the unlimited liability, the member of the private firm can't be – at the same time – pirvate enterprise, general partner of a limited partnership, or member of other private firm. [CXV. Act of 2009 20. §, 27. § (3)]

[51] Ptk. 3:95. §

[52] Ptk. 3:97. § (2)

[53] 96/2003 (VII. 15.) government decree 11. § (2)

[54] Varga Antal: Magánpraxis alapítása I., Med et Jur, 2013/1, 21.

[55] Ptk. 3:161. §

contracts are very common, especially in connection with inspection activities, and they are used in connection with specialist consultations too, so it is important to mention them.[56] The collaborate contract is a special mandate contract, both of its subjectives are healthcare service providers. The point is that the collaborator personally or with his medical employees gives medical service in the name of the other healthcare service provider and for the latter one's patient, secures the necessary objective and personal terms, and the other healthcare service provider pays for the service. It is important that the subject of the collaborate contract can be only a medical service to which both healthcare service providers have operational permit.[57]

5. Conclusion

The aim of my paper was to demonstrate the laibility for tort of the healthcare service providers in Hungary, which legal relations define them, which liability rules are applied, which are the methods to avoid the liability.

First, we analyse the legal relation between the healthcare service provider and the patient. It can be said that it is fundamentlly a private law contractual relation with public law elements. But the legislator has realized appropriately that the stricter form for the compensation of the damages caused by the breach of the contract, inspired by the business contracts isn't suitable for the liability of the healthcare service providers. With changing Section 244 of the Healthcare Act, the legislator has already referred to the rules on torts which are actionable per se, and doesn't refer to the rules on contractual liability from the Civil Code. It must be mentioned that the prior form of Section 244 of the Healthcare Act has ended discussion between jurisprudence and practice in connection with the qualification of the legal relation between healthcare service provider and the patient in 2010. If we accept the contractual feature of the legal relation, the regulation is logically oppositional, because it orders to apply the rules of the out of contract liability for damages to a contractual relation. It would be better and necessary if the legislator – taking adventage of the private legal codification – had regulated in the Civil Code the legal relation between the healthcare service provider and the patient as a substantive contract, or as a subtype of the contract of services. [58] In this case the special rules of liability would be acceptable too.

In point of the measure of the financial liability of the healthcare service providers the contract with the liablility insurer is determinative important, its system of terms, so we dealt with them next. There are problems with financing the amounts of the compensations, because of the „vacating" of the compulsory professional liability insurance these amounts are mostly covered by the budget for the function of the healthcare service providers. In the beginning, the compulsory professional liability insurance was a legal institution which has given real legal protection, security for patients and providers too and has worked according to the legislator's will. But the increase of the borders of the liability of the healthcare service providers has disrupted the compatibility between the providers and the insurance companies. Because of the closed character of the supplying part of the healthcare professional liability insurance market, the unilateral contracting obligation for the healthcare service providers, the lack of the regulation on determining minimum conditions of the healthcare liability insurance, the contractual conditions determined by the insurance companies „are vacating" the legal institution. Without real legal protection this legal institution is a fetter for service providers, and the financing of the amounts of the compensation isn't solved yet.

Finally, we examined the legal possibilities which are usually used during medical activities. It can be said the there are many variable possibilities. I dealt preferentially with the liability rules of the legal relations, which are important and actual because of the tendencies, concerning the liability for damages of the healthcare service providers and make this liability more malevolent, and because of the explanation which is getting harder. Because of the wider liability there is the possible chance that the damage amount, or its part can be avoided to the employees who do the medical activities. The measure of this depends on the legal form in which the medical activity is being done. Not only a person with qualification can be in legal relation with the healthcare service provider, but – in favour of complete the personal and objective resources – the healthcare service providers can make contracts with each other. This means collaborate contracts which are significant in the area of the medical services. The term of starting the services, the costs and the liability are mainly diverge from each other in the legal relations. This is beneficial because the qualified medical person can find the form which is the most sufficient for his prioriries and possibilities. Ha can operate in contractual relation at a healthcare service provider, or independently, or – in the form of a joint enterprise – he can operate a healthcare service provider. But there is the disadvantage that the possibilities are hardly seen clearly because of the many legal relations and the fragmented regulation.

[56] For example – according to the data from – in 2013 more than 7200 collaborate contracts were in force.

[57] Kőszegfalvi Edit: Hogyan köthetünk közreműködői szerződést?, Kórház, 2003/10, 24.

[58] Jobbágyi [2005] i.m. 17.; Szeghő Ágnes, Az egészségügyi szolgáltatás nyújtásával összefüggésben okozott károkért való felelősség szabályainak változása napjainkban (http://jesz.ajk.elte.hu/szegho42.html letöltve: 2019. április 6.).

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Evolution of theories of new institutional social economics

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Summary

The article explores the development of scholarly views on the nature of the notion "institutionalism". The research findings show that some elements of the institutional system have a quite dynamic character (for example, laws, statutory acts, agreements, etc.), while others are objective by nature and make up the full range of the superstructure of economic relations (for example, market, competition, property, etc.), in other words, are hardly responsive to influences. The article provides reasons for the actions and functions of factors that make up the institutional system. It makes a distinction between the notions "institution" and "institute". It also examines the current theories of institutionalism to define the transition of economy to the market system and, further on, to post-industrial society. It considers abstract definitions of the basic categories of institutionalism and neo-institutionalism. The article also explores scholars' views on the nature, the structure and future of modern institutionalism in economic science. It outlines basic theories of neo-institutional economics. It emphasizes that the game theory has gained wide currency in neo-institutional research. It describes the process of the formation of institutions.

Key words: institutionalism, institute, institution, institutional environment, neo-institutionalism.

1. Introduction

People's economic activity is social by its very nature; it is carried out through individual or collective actions in a particular social environment rather than in isolation. Moreover, both general and specific societal response to those actions is of great importance. A strategy that is competitive in some processes of social and economic development may turn out to be unprofitable in others, even provided the business environment is the same, for example, a person's religious and cultural restrictions on economic activity.

Within economic and social orders, it is possible to achieve an agreed outcome of a myriad of external factors affecting successful decision-making or even probability of reaching a particular decision by developing behaviour patterns or sequences that prove to be the most effective under certain circumstances. These patterns and sequences, or individual behaviour matrices, are institutes in their nature.

2. Research findings

Institutionalism is a conception of economic theory which integrates the role of social, legal, organizational, political, ethical, mental, economic institutions in the process of their functioning in the economic system.

Institutionalism emerged primarily due to the transition of capitalism to the monopoly phase, which was accompanied by the significant centralization of manufacturing and capital and caused social divisions in society.

Institutionalism (from Latin institution "disposition, instruction") is a school of economic thought that was established in the 20-30-ies of the 20th century to explore a multitude of social and economic factors (institutions) through time and for society to impose social control over economy. Nowadays, this school is considered to be one of the most powerful from the point of view of interpreting and forecasting social phenomena. Taking into consideration a large number of economic schools that are classified as integral components of institutionalism, it has quite a complex structure. Unlike schools whose chronological framework and research findings are clearly stated, institutionalism is still in the process of development, which gives rise to discussion around topics relating to the structure of the institutional theory and interrelations between its integral components.

Proponents of institutionalism treat economy as a system according to which relationships between economic agents are established under the influence of economic as well as social, political and psychological factors. Their research focuses on institutes which should be understood as corporations, trade unions and the state as well as different legal, moral-ethical and psychological phenomena, in other words, customs, codes of conduct, instincts, etc.

In economic theory, institutionalism is represented by a broad variety of schools and conceptions; however, all the schools tend to place a heavy emphasis on the empirical analysis of the institutional environment, in particular, on the impact institutions have on the efficiency of the use of limited resources and securing economic growth. The main idea of the theory of institutionalism is focusing attention on

non-economic nature of driving forces of social development apart from the technology factor.

Institutional criteria take into account a particular historical environment of a particular country, the observance of traditions, ideas, people's spiritual world and their value system. It should be noted that these factors cannot be reduced to the exclusively psychological features; on the contrary, they are established due to the interrelations between individual elements, which builds the integrity of the economic system on the whole.

Research findings show that some elements of the institutional system possess quite a dynamic character (for example, laws, statutory acts, agreements, etc.), while others are objective by nature and make up the full range of the superstructure of economic relations (for example, market, competition, property, etc.), in other words, are hardly responsive to influences. Hence, it is necessary to make a distinction between the notions "institution" and "institute" in order to provide reasons for actions and functions of the factors that make up the institutional system. These notions were differentiated as early as the initial phase of the development of institutionalist conceptions.

The term institution (from Latin institum "an ordinance; a purpose; a custom") was borrowed from jurisprudence. This is why the essential features of this category are both rules of law and the procedure for establishing connections between them, which makes it possible to regulate (standardize) the relationships between legal entities in order to put them on a steady course; it is for that reason that respective organizational structures and control authorities are established.

W. Hamilton defines institution as "a verbal symbol which for want of a better describes a cluster of social usages", "a way of thought or action of some prevalence and permanence, which is embedded in the habits of a group or the customs of a people". W. Hamilton claims that institutions "impose form upon the activities of human beings". His statements according to which "institutions fix the confines of and impose form upon the activities of human beings" and "The world of use and wont, to which we imperfectly accommodate our lives, is a tangled and unbroken web of institutions" make his definition of institutions close to their modern interpretations as "systems of effective social rules".

Institutional theories are divided into two schools: "old", traditional institutionalism (Th. Veblen, J. Commons, and W. Mitchel) and "new" institutionalism, neo-institutionalism (O. Williamson, R. Coase, D. North, and H. Demsetz).

The founder of institutionalism Thorstein Veblen defines institutions as "prevalent habits of thought with respect to particular relations and particular functions of the individual and of the community". According to Th. Veblen, the subject matter of economic science is institutions that are human instincts which manifest themselves in economic life under the influence of social psychology (a self-preservation instinct, a competitive instinct, etc.). Institutions grow into institutes which are the main notion of institutional economics. They are in the centre of institutionalist research.

Unlike Th. Veblen, John Commons pays close attention to social and legal institutions rather than to technological factors of production and their bearer – the engineering personnel. J. Commons describes institutions both in the narrow sense as «a framework of laws or natural rights within which individuals act like inmates» and in the broad sense as «collective action in control, liberation, and expansion of individual action». Viewed from this perspective, a collective action, in substance, ranges from an unorganized custom or tradition to a multitude of organized going concerns such as the family, the corporation, the trade union, the trade association, and the state.

The representative of market-quantitative institutionalism Wesley Clair Mitchell attempted to justify the validity of the provisions of institutionalism with the help of quantitative methods (statistics). W. Mitchell associated institutions with widely prevalent and highly standardized social habits.

The aftermath of World War II saw the decline of pure institutionalism, however, this school was restored to life in a somewhat different form in John Kenneth Galbraith's works. His most cherished work "The New Industrial State" is devoted to the exploration of the "technostructure", which is a social stratum made up of scientists, engineers and specialists in technology, management, finances, i.e. everything that is needed to make corporate giants work properly, and defining its role in the economy. According to Galbraith, modern market economy is increasingly governed by giant corporations (oligopolies) that produce sophisticated technologies: automobiles, aircraft, communication systems, computers and software. Corporate giants also have partial control over the market price.

Since its emergence, "old" institutionalism has failed to gain wide currency, which can be accounted for by the vagueness of the fundamental notion of institution, focusing on the actions of such bodies as the trade union and the state, and the lack of its own methodology, in particular, the tendency to move from particular instances through all instances to generalisations. Institutionalism has found a new lease of life within the framework of "new" institutionalism, which pays far closer attention to an institutional environment in which economic agents act. "New" institu-

tionalism is known under several names: neo-institutionalism, transaction cost economics, property rights economics and contract theory. Moreover, in spite of some similarity in the names, "new" institutionalism significantly differs from the "old" one.

The neo-institutionalism theory, like institutionalism on the whole, is far from being a homogenous school; hence, it embraces several schools. The most general criterion for classifying neo-constitutional schools is the emphasis on the type of institutions: either rules or contracts. Rules are emphasized within the following schools of neo-institutionalism: new economic theory, social choice theory, constitutional economics, and property rights economics. Contracts are studied by the proponents of the following schools: contract theory, agency theory, and the organization theory.

Within neo-institutionalism, traditional methods of microeconomic analysis are employed to explore social relations from the standpoint of homo economicus, or economic man, who acts rationally. This is why within neo-institutionalism any activity is regarded as exchange. Institutions structure incentives in the process of human exchange, be it political, social or economic. Such an approach was called the contractual paradigm.

The starting point for the emergence of "new" institutionalism is claimed to be R. Coase's "The Nature of the Firm", which offers an explanation for the existence of firms which are described as hierarchical structures, thus, are opposed to markets [10]. Neo-institutionalism treats institutions as "the rules of the game" and a system of means that ensure the rules are obeyed. They shape human interaction. The fact that two distinguished representatives of neo-institutionalism R. Coase and D. North won the Nobel Prize is yet more proof of the recognition of the outstanding contributions of the new school.

In a market economy, ownership transfer is mediated by the formal agreement or for most current contracts by the informal contract. Contracts reflect incentive and disincentive structures that are found in the property rights structure and their enforcement mechanisms.

R. Coase's ideas established a framework for institutionalism, which accounts for the structure and evolution of social institutions based on the notion of transaction cost. It should be noted that, in R. Coase's opinion, it is the absence of market institutions which are responsible for minimizing transaction costs that is the root cause of the failure of the former socialistic countries.

While institutions are "the rules of the game", organisations are their players. Economic theory of organization (or organizational economics) is another approach offered by neo-institutionalism. According to R. Coase, transaction nature of the firm manifests itself in the fact that the organizational form and size of a firm are determined by such a criterion as transaction costs. R. Coase's disciples (A. Alchian, H. Demsetz, W. Mackling, M. Jensen, O. Williamson, and D. Kreps) developed the transaction nature of the firm having focused their attention on some of its aspects. Their research makes it possible to identify the benefits of cooperation (A. Alchian and H. Demsetz); to choose the optimal contractual form that minimizes transaction costs (W. Mackling and M. Jensen); and to understand the organizational culture (D. Kreps).

Within the framework of new institutional economics, whose famous representative is O. Williamson, there has recently been established a view on the economic nature of an institution that is different from the standpoint adopted before. The scholar treats institutions as mechanisms for managing contractual relations. This is why the most important economic institutions are firms, markets and relational contracting. This approach focuses attention on the transactions encompassed by institutions and on the issue of their minimization. In particular, O. Williamson states that "institutional environment is the rules of the game" that define the context in which economic activity takes place.

Contemporary proponents of institutionalism take two distinct views on interpreting and defining the basic category "institution". The first point of view is advocated by those scholars (G. Hodgson, E. Ostrom and others) who lay special emphasis on clarifying the category, defining it, developing a single approach to defining it, etc. In particular, G. Hodgson states that social sciences have recently demonstrated the increasing tendency to employ the notion "institution", which the scholar considers to be yet more proof of institutional economics gaining higher prestige. However, the scholar agrees that nowadays there is still no accord on the issue with regard to the nature and sense of this category. Moreover, protracted discussions as to clarifying the key terms "institution", "organization", etc. have made some scholars stop searching for definitions in favour of performing practical tasks. However, G. Hodgson argues, it is not possible to carry out any analysis of how institutions and organisations function without having a clear idea of their nature.

The scholar offered abstract definitions of the basic categories of institutionalism. Let us examine them in more detail. Social structures are an array of social relations which include the episodic ones and those without rules as well as social institutions. Institutions are types of structures that belong to the social realm and constitute the essential core of social life. They are systems of established social rules that structure social interactions, for example, language, money, laws, systems of weights and measures, table manners, and

firms (and other organizations). Viewed from this perspective, rules are customary normative injunctions or immanently normative disposition operating in society. Conventions constitute a specific type of institutional rules. Organisations are institutions that possess specific features. Habituation is a psychological mechanism that individuals use to acquire new skills to behave according to previously established codes of conduct.

The author of a number of works in the field of contemporary institutionalism E. Ostrom describes the basic category "institutions" in the following way: "the sets of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed or constrained, what aggregation rules will be used, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individuals dependent on their actions. All rules contain prescriptions that forbid, permit, or require some action or outcome. Working rules are those actually used, monitored, and enforced when individuals make choices about the actions they will take".

Another opposite standpoint as to the issue of the nature of the notion of institution is adopted by those outstanding scholars (K. Arrow, V. Yefimov and others) who are sceptical about current disputes over the need to give clear definitions of the key notions of institutionalism, primarily the category "institution". With regard to G. Hodgson's attempts to clarify the basic terms of institutionalism, V. Yefimov quotes the American philosopher Ch. Pierce: «The machinery of the mind can only transform knowledge, but never originate it, unless it be fed with facts of observation". By analysing the definition, it is not possible to learn anything new.

Hence, at present institutionalist definitions of the basic category "institution" and its inherent attributes are diverse – both in form and content. The category is defined as a set of formal and informal rules and mechanisms that ensure the rules are observed. Any institution primarily aims at shaping individual human behaviour. Depending on how successful they are at performing this task, institutions provide a structure to everyday life, thus reducing uncertainty. As such, institutions "define the incentive structure of societies and specifically economies".

D. North regards institutions as composed of three dimensions: informal constraints (traditions, customs, conventions), formal rules (constitutions, laws, precedents, administrative acts) and enforcement mechanisms that ensure the rules are observed (courts, the police, etc.).

Informal institutions form spontaneously without any conscious design resulting from the interaction of lots of people pursuing their own purposes. Game theory, which has gained wide currency in neo-institutional research, provides lots of keys to this issue. Formal institutions and mechanisms to protect them are designed and maintained purposively, mostly by the strong arm of the state. Formal rules can undergo radical discontinuous change (in times of revolutions), whereas informal rules change only gradually.

Another issue of economists' concern is connected with the process of the formation of institutions. In professional literature, at least two views on this issue are offered. According to the first one, institutions emerge spontaneously (as "spontaneous order") from individuals' self-interested actions. In this case, individuals can self-organise "without any agreement, without legislative compulsion, even without any consideration of public interest". To describe this process, F. Hayek employs the term "evolutionary rationalism". According to the other interpretation of the formation of institutions, they can emerge as a result of a conscious design. Specific affluent actors (the parliament, the government, the entrepreneur, etc.), acting absolutely rationally can create a specific institutional structure which they consider efficient. F. Hayek views this as an example of "established order" which is opposed to "spontaneous order". O. Williamson describes the respective situations as "purposeful order" and "spontaneous" order". However, the operation of any institution depends on individuals who use it. Indeed, as K. Popper writes, "Institutions are like fortresses. They must be well designed and manned".

From the point of view of institutional economic theory, interest lies in both exploring attributes of institutions and in making them integral components of the general economic model.

According to D. North, there are two primary sources of institutional changes. The first source is changes in relative prices. Technological progress, the establishment of new markets, the population growth, etc. – all this leads to either changes in the output price in relation to the price of a factor of production or changes in prices of factors of production under the influence of the prices of other factors. Such changes make some of the previous forms of organizational and institutional interaction ineffective, thus, getting economic agents to experiment with new forms. As far as informal rules are concerned, they "decay" gradually due to price changes, when they start to be less observed.

The other source of institutional changes, according to D. North, is ideology. D. North views ideologies as subjective frameworks through which individuals perceive and interpret the environment. Ideological issues are also affected by cost analysis: the more profit-making possibilities a particular subjective world view blocks, the stronger are the incentives to reconsider it. At the same time, D. North argues, ideology often acts a s an independent factor.

Institutions together with people who take advantage of opportunities created by these institutions are called organizations. Modern institutional economic theory studies both institutions and organisations, in other words, institutions without people and with them. Hence, new institutional economic theory encompasses as its special constituent element the so called new economics of organization. A formal organization, as defined by K. Arrow, is a group of individuals who strive to achieve a common goal or, in other words, maximize the target function. According to K. Arrow, the issue of organizational control is solved through what we call order. Ideally, order is established in the way which will definitely maximize the target function of the organization. Given this interpretation, it may be stated that economic theory of formal organizations (i.e. "purposely developed") encompasses a number of the same elements as the neoclassical theory does, thus, is congruent with the general context of institutional economic theory.

Proponents of neo-institutional economics think that an institution forms when it is not possible to make market decisions or they are ineffective. In addition, social expenses on the formation and operation of an institution do not have to exceed the costs connected with its absence.

The basic component of the activity of an economic organization is data processing and the use of information systems in the process of management. Institutional theory of organizations examines the interrelations between the agents through the structure of incentives, motives, and decision-making which form the hierarchy of relations, power, choice and control; moreover, it is information that defines the whole set of interactions that take place.

The formation and management of any institution (or organization) require sufficient real resources. Expenses arise which are called transaction costs. Provided there are "disagreements" in an economic system, the analysis must radically change. When there are such "disagreements", it is not possible, momentarily and without spending resources, to identify the ownership rights or contractual rights, monitor them and protect them. These fundamental activities are likely to allow for expenses on covering transaction costs. In the same way, the ownership transfer or contractual rights transfer inevitably leads to transaction costs. In particular, there are expenses that are connected with the operation of market (for example, negotiations costs) as well as expenses of administrative coordination within a hierarchical organization including expenses on the formation of hierarchies themselves. In short, in the modern economic system transaction costs are universal by nature and considerable in size.

3. Conclusion

Theories of institutionalism and neo-institutionalism are internally heterogeneous; they are constantly evolving acquiring fragments, provisions, tenets of other theoretical schools, which has given rise to the synthesis of new approaches to the analysis of the complicated market environment. Neo-institutionalism combines scientific ideas of economists across different counties and epochs. However, in spite of that, neo-institutionalism has managed to establish an in-depth and logical system of knowledge which accounts for different phenomena taking place in the market economy. This system of knowledge may be used in the process of managing Ukrainian enterprises that are experiencing difficulties and cannot find their causes or, what counts most, solutions and way-out options.

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