III. 2. Egyes partnereink tanulmányai

A Doktori Iskola élénk és gyümölcsöző kapcsolatot épített ki, és tart fenn külföldi partnerintézményekkel, melynek bizonyítéka az a számos közös tudományos rendezvény, amely egyben a tudományos-oktatási együttműködés útjait, kínálkozó lehetőségeit is felvázolja. Az újvidéki *dr Lazar Vrkatić Kar*ral 2012. május 5-én kötött együttműködési megállapodás ünnepélyes aláírása után szervezett tudományos szimpózium témája egy aktuális kérdésre, Szerbia lehetséges uniós csatlakozására fókuszált. A *Sovereignty of the Member States in the European Union* címmel szervezett tudományos tanácskozás megmutatta, hogy az uniós magyar tapasztalatok és a csatlakozáshoz szükséges szerb jogalkotási lépések és egyéb előkészületek megosztása egy másik állam tudományos közösségének elismert képviselőivel egy jövőbeli sikeres együttműködés záloga lehet. Az alábbiakban a szerb partner képviselői (egyikőjük Doktori Iskolánk hallgatója) által tartott előadások írásos anyagait közöljük. Figyelemre méltó, hogy mindhárom tanulmány olyan kérdésekre fókuszál (emberi jogok és egyes jogvédő intézmények helyzete, a társadalom és a politikai intézmények felkészültsége a csatlakozásra, nemzeti kisebbségpolitika és az integráció), amelyek kulcskérdésnek tekinthetők egy csatlakozási folyamatban, főleg a sokat szenvedett, viharos múltú egykori Jugoszlávia utódállamai kapcsán.

A Doktori Iskola nyári és téli egyetemei a közép- és kelet-európai régió fiatal kutatóinak, oktatóinak egy különös, évi rendszerességgel megrendezésre kerülő találkozási lehetőséget nyújtanak a Budapest-Bécs-Pozsony fővárosok által alkotott háromszög középpontjában. Büszkeséggel tölt el Bennünket, hogy immáron kialakult eme egyetemek, szemináriumok visszatérő közönsége, ahol számos hallgató (hívhatjuk eme közösséget már *alumni*nak is) mellett elismert, nemzetközi hírű oktatók-kutatók iktatják be szokásos nyári vagy téli programjaik közé a Doktori Iskola rendezvényeit. Közéjük tartozik *Wawrzyniec K. Konarski*, a politikatudomány professzora a krakkói Jagelló Egyetemről, akinek a lengyel politikai berendezkedés 1989 utáni történetéről szóló áttekintése a partnerség interdiszciplináris jellegét ékesen bizonyítja.

III. 2. Some of our Partners' Selected Papers

Our Postgraduate Doctoral School has built and has maintained a vivid and fruitful partnership with several research units from abroad; under the aegis of this cooperation our partners regularly organize common scientific events, which exceedingly outline the scientific and educational background of our promising partnership. The Postgraduate Doctoral School and the *dr Lazar Vrkatić Faculty from Novi Sad, Serbia* ceremonially signed a cooperation agreement on 5th May 2012 and after the ceremony a bilateral scientific event, a symposium was held under the title of *Sovereignty of the Member States in the European Union*. This event focused on a current topic, namely on the possible accession of Serbia to the European Union. This bilateral meeting pointed out that the experiences concluded by an EU member state, such as the Hungarian one after several years of membership, evaluation, review of legislative steps and preparation taken by a candidate country such as Serbia could be shared via bilateral ways within the circles of scientific community and this method could offer very promising prospects for the future of partners' successful cooperation. Below, we publish papers of the Serbian partner's representatives (among them, one researcher is our Doctoral School's student); these papers are the written form of presentations delivered under the aegis of the symposium. It is worth mentioning that all of these papers concentrate on such issues (situation of human rights and their protection via institutions, preparedness of society and the political community to the accession, minority policy and integration), which are considered to be crucial key points in an accession process, chiefly, in case of the successor states of former Yugoslavia with their stormy and complicated history.

The Postgraduate Doctoral School regularly organizes summer and winter schools, seminars, which can offer an ideal meeting point for young researchers as well as master and PhD students of the Central and Eastern European region in the vivid and active city of Győr, in the middle of the triangle, framed by Budapest, Vienna and Bratislava. The Doctoral School is very proud of the fame of these events, since we already have a considerable alumni group of "homecoming" participants; and beyond, we are honoured that acclaimed and reputed professors perpetually accept our invitation to these events. Among those professors, we publish the paper of Professor *Wawrzyniec K. Konarski* from the Jagiellonian University of Cracow. The paper deals with the system of political governance of Poland since 1989; and it exquisitely proves the remunerative interdisciplinary cooperation of our Doctoral School with our esteemed partners.

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Ombudsman as an Independent Institution for the Protection of Human Rights in Serbia

I. Introduction

Serbia is among the last European countries still expecting the official date to start the process of negotiations related to EU accession. Countries aspiring to join the EU need to conform to certain principles and minimal standards, which often require thorough changes within many areas of social life. To this end, reforms of many social systems are necessary in Serbia. However, in spite of the lip service of overwhelming reforms in the last twelve years, some of them among the relevant factors were not the matter of concern at all (e.g. reform of the oligarchic political system based on *particracy* gradually fostered during the last two decades on all levels – national, provincial and local[1]; or the necessary reform of the pension system), whereas, carrying out of some others was formalistic and generally unsuccessful, sometimes even inducing serious harmful effects instead of proclaimed improvements (e.g. reform of the judicial system[2]; reform of health and educational sys-

1 Serbian pluralistic political system until now may be described as a facade democracy. See e.g. the interview with Vesna Pešić for Radio Free Europe, published on internet at: http://www.nspm.rs/hronika/vesna-pesic-nista-ne-smeta-da-qengleska-kraljicaq-u-srbiji-bude-tomislav-nikolic.html.

2 The outcome of the proclaimed reform of judiciary (finally started in 2009) is nigh to disastrous. Under the new constitution of Serbia adopted in 2006, judiciary remained under influence of political factors and execution. The relevant constitutional provisions fall short of providing adequate grounds for separate and independent judiciary. The same applies to the implementation of the set of acts on judiciary, adopted in 2009. See e.g. Grubač, Momčilo: Pravosuđe u predlogu novog ustava Srbije (Judiciary in the Draft of the New Constitution of Serbia), *Srpska pravna revija*, No. 5/2006, 33-42. Reforms included dismissal of *all* the judges and public attorneys and (re)election to the existing posts, but the proceedings turned out to be nontransparent, arbitrary and heavily influenced by deals among ruling political parties' leaderships. See e.g. Pešić, Vesna: *O izboru sudija i tužilaca* (On the Election of Judges and Public Attorneys), speech at the National Assembly of Serbia on 23 September 2009, published in: Republika, No. 470-471, February 2010; Rodić, Nebojša: *Kakvim sudom sudite, onakvim će vam suditi* (The Court One Tries With Will Try Him As Well) on internet at: http://www.politika.rs/rubrike/ostali-komentari/Kakvim-sudom-sudite-onakvim-ce-vam-suditi.lt.html. In May 2012, the Council Against Corruption officially submitted a Report on the reform of judiciary to the

tems; proclaimed reforms aimed at decentralization and regionalization of Serbia, an example of a highly centralized state; etc.).

All shortcomings and deviations in the political, economic and other mentioned systems also negatively affect the enjoyment of human rights. Serbian authorities have paid little attention to the improvements in this area. In comparison with the (Constitutional) Charter on Human and Minority Rights of Serbia and Montenegro issued in 2003,[3] the current Serbian Constitution of 2006 was a step backwards in the area of human rights. The adoption of many legal acts relevant for particular human rights issues was postponed for years, while final solutions found in them sometimes depart from the proclaimed intentions of those acts.[4] Some legal acts contain provisions that obviously violate constitutional principles.[5]

Still, one of the core problems in Serbia remains the lack of law enforcement.[6] The existing judicial system, which should be the watchdog of constitutionality, democracy and human rights, does not seem to be able to cope with the challenges required by the principles of independence, legality, efficiency and equality of citizens. Its weakness was partly demonstrated in a footnote on the previous page, while the rulings of the European Court of

then Serbian Government containing conclusions on severe violations of constitutional principles about judiciary (particularly its independence), infringements of individual judges' rights, serious shortcomings of the new network of courts followed by increased costs of the system, reduced accessibility to courts for citizens as a consequence of the abolition of certain courts and increased court taxes, etc. See: *Council Against Corruption*, The Report No. 07-00-3124/2012 on the Reform of Judiciary in Serbia, 24. April 2012, Belgrade, on internet at: http://www.antikorupcija-savet.gov.rs/izvestaji/cid1028/index/. Finally, on 12 July 2012, the Constitutional Court found that the High Judicial Council violated procedural and material legal provisions in the process of (re)election of judges, thus all the judges and public attorneys who were not reelected and who submitted complaints to the Constitutional Court are to be returned to their previous posts. The Association of Judges of Serbia demands resignations or dismissal of all members of the High Judicial Council. In brief, the judiciary in Serbia at the moment seems to be in a worse state than before the reforms.

3 The Union of States of Serbia and Montenegro, a remnant of former Yugoslavia, was established in 2003 and was dissolved in May 2006, after the referendum in Montenegro, where the required majority voted for an independent state.

4 The Act Against Discrimination, The Act on Access to Information of Public Interest, The Act on the Equality of Sexes, The Act on Protection of Personal Data, etc.

5 The Act on Churches and Religious Associations, numerous provisions of which violate the constitutional principles of secular state and equality of all churches and also indirectly the principle of non-discrimination of citizens on the grounds of religious affiliation. Several other acts included provisions according to which a warrant for eavesdropping may be issued by the Public Attorney, or the head of some security agency, contrary to the explicit constitutional provision that such a warrant may be issued only by court. Some of the latter provisions have been declared unconstitutional by the Constitutional Court of Serbia, but their repeated inclusion into various legal acts every now and then precedes their constitutional review and makes it difficult to remove them efficiently and permanently from the legal system.

6 As an example, the Act on Equality of Sexes, based on the principle of equality proclaimed by the constitution, introduced quotas of minimal participation of each sex in various areas, but in practice they are rarely respected.

Human Rights against Serbia indicate that undue delays of judicial proceedings and inefficient enforcement of court rulings make almost an endemic problem in Serbia. The introduction of independent controlling institutions for the protection of human rights was one of the means intended to improve the state in the segment of law enforcement.

The aim of this article is to present and compare the relevant legal regulations, the factual status of the Provincial Ombudsman of Vojvodina and the national ombudsman of Serbia (called „The Protector of Citizens"), as types of independent institutions for the protection and improvement of human rights established in Serbia in the last decade. Final subheading contains an overview of the main obstacles that these institutions have been facing during their work in the existing legal, cultural and political setting.

II. Types of independent institutions for the protection of human rights in Serbia

At the beginning of 21st century, the state of human rights in Serbia was rather poor in almost all respects, far from the firmly established international standards and even from the constitutionally proclaimed guarantees. Almost half of the century the socialist understanding of human rights (closer to positivist and collectivist than to the natural law concept), lack of tradition and culture regarding the notion of rule of law, judiciary heavily dependent on execution, a decade of armed conflicts between constituents of former Yugoslavia (where Serbia was a participant in each one of them) topped with NATO bombing in 1999, a decade of sanctions against Serbia that besides the economy also negatively affected the fields of education and science and endemic corruption are among the main reasons for the substandard state of human rights in Serbia. Its improvement required a wide set of measures – constitutional changes, adoption of numerous statutes, reforms of the political system, state administration and judiciary, introduction of practices in accordance with the rule of law and with the requirement of effectiveness, etc. In order to improve respect of human rights, introduction of several types of independent institutions for the protection of human rights was among the steps announced or taken in the last decade. Their status, authorities, organization and functioning are regulated by different legal acts. They share some common features, but also differ from each other in respect of the mechanisms they use in performing their tasks. Those institutions are, respectively:

1. *Ombudsman (Protector of Citizens).* Independent institution for the general protection of human rights. This institution was also established at local level, but given that relevant legal acts pertaining to that local ombudsmen vary from one local community to another and that the major-

ity of local ombudsmen lack one of the main features of this institution – independence from other branches, particularly from the executive - this article only deals with the ombudsman on the national and provincial level in more details.

2. *Commissioner for Information of Public Interest and for the Protection of Personal Data*. Established as such in two stages: first, as the Commissioner for the Information of Public Interest, by the Act on Access to Information of Public Interest of 2004. In 2008, upon adoption of the new Act on the Protection of Personal Data, the Commissioner's authorities were expanded to include data protection, as well. Main differences from ombudsman are that the Commissioner deals with specific areas of human rights, whereas ombudsmen cover all human rights and that the Commissioner may issue legally binding orders, while ombudsmen may issue only recommendations, opinions and suggestions which are not legally binding.
3. *Commissioner for the Protection of Equality*. Established by the Act Against Discrimination of 2009. Its main function is to supervise the enforcement of this Act. Unlike two other institutions, this Commissioner may investigate cases regardless of whether the subject who was allegedly discriminated against someone is a state body, public service or a private individual and s/he may start proceedings for discrimination and upon the complaining party's acceptance, actively participate in them before the court.

The latter two institutions are not presented in details in this article. The following subheadings contain the presentation of the legal framework for the institutions of ombudsman at provincial and national level.

III. Ombudsman (Protector of Citizens)

This institution was first established at provincial [7] and local level and only several years later at national level as well.[8] Because of the variety of solutions on local level and the fact that most local ombudsmen are not independent institutions under relevant local regulations, these local institutions are not

7 Provincial Ombudsman was established in the Autonomous Province of Vojvodina. Legal grounds for that were set by the Act on Establishing Certain Authorities of the Autonomous Province, adopted in February 2002, by the National Assembly of Serbia. In December 2002, the provincial Assembly of Vojvodina enacted the Decree on Provincial Ombudsman and the first Ombudsman of Vojvodina was elected in September 2003.

8 At the state level, this institution was introduced by the Act on the Protector of Citizens of 2005, whereas the first Protector was elected only two years later, in July 2007.

included in this review.[9] The title of the institution on republican level is Protector of Citizens, while on the provincial level it is named as Ombudsman.

Both Provincial Ombudsman and the Protector of Citizens apply the so called „soft law" in their work. They have no authorities to annul decisions of agencies that they control, or to decide on issues themselves. They investigate whether there was any kind of violation of one's human rights through agencies which control is within the ombudsman's competence. If they find that a violation has occurred they may issue recommendations, opinions or suggestions, neither of which is legally binding. Although they may apply certain measures against public officials who have violated human rights or obstructed their work in any way, their findings stated in recommendations, etc. are not enforceable. Thus, successful performance of the functions of ombudsman depends primarily on the authority of the institution, which should be based on competence, demonstrated impartiality and objectivity, quality of investigations and the persuasiveness of argumentation used in recommendations. Given that ombudsman's decisions are not binding, an important, even crucial feature of this institution is its independence from other branches of state power, as well as from any other interest or ideological groups and organizations (e.g. business groups, political parties, religious organizations, etc.).

1.

The *Provincial Ombudsman of Vojvodina* was the first institution of the kind in Serbia. The Decree on Provincial Ombudsman (hereinafter: the Decree) defines Provincial Ombudsman as an independent institution for the protection and improvement of human rights of any person through the control of legality, appropriateness and efficiency of provincial and local administration and public services in Vojvodina. The mandate of Ombudsman lasts for 6 years. The Decree prescribes rather strict requirements for the election of Ombudsman and enumerates a long list of activities that are incompatible with this post.[10] Candidates may be proposed by at least 30 deputies at the

9 Grounds for establishing the local ombudsmen were set by the Act on Local Self-Government of 2002, according to which this institution is not obligatory but local communities decide if they need it or not. This act contained only one article with few general principles related to ombudsman, while all the rules on particular institution were to be set by regulations of respective local assemblies. This resulted in various solutions in practice, in some cases even contrary to ombudsman's functions. Instead of fostering the core principles necessary for this institution to fulfill its tasks, the new Act on Local Self-Government of 2007 further reduced the general legal framework for local ombudsman. Less than 10% of local communities in Serbia introduced this institution in these 10 years.

10 Position of Provincial Ombudsman is incompatible with membership in any political party or organization, labor union, governing or supervisory boards of public or private companies; with the

Provincial Assembly (out of 120), or by a parliamentary committee of matters of administration. Provincial Assembly elects the Ombudsman with 2/3 majority of the total number of deputies,[11] which is the highest threshold for the election of a public servant on any level in Serbia. Besides central office in Novi Sad, according to the Decree, the Provincial Ombudsman must organize two more branch offices, one in Subotica, in the north of the Province and the other in Pančevo, in the south.

Ombudsman investigates alleged violations of human rights both upon individual complaints and *ex officio*.[12] During the process of investigation s/he is authorized to try to mediate between the parties with the aim of reaching a peaceful solution to a controversy. Provincial Ombudsman has wide investigative authorities. If s/he finds that an administrative agency has violated one's human rights, Ombudsman shall recommend measures to that agency with the aim of removing the violation and/or preventing such violations to occur in the future.

If agencies do not follow Ombudsman's recommendations, s/he shall inform competent authorities (the provincial assembly and/or government, other supervisory bodies if there are any) about the established maladministration and failure of the agency to remedy the violation that was committed and may inform the general public on human rights violations through the media. S/he may also initiate criminal, misdemeanor, disciplinary, or other appropriate proceedings with the competent authorities against the head and the employees of an agency that violated one's human rights, or against those who obstructed the Ombudsman's investigation.

Once a year s/he delivers an annual report on the institution's work and on the state of human rights and legal certainty in the Province and may submit special reports on particular issues, if needed. Upon Ombudsman's request, his/her reports shall be put on the agenda of the Assembly, shall be debated upon and should be published in the Official Gazette of the Autonomous Province of Vojvodina[13] (however, in spite of the explicit provision in the Decree, none of the Provincial Ombudsman's annual reports have been published in the Gazette until now, with a repeated excuse that there are no sources in the provincial budget for that purpose!).

performance of any other public or professional activity except fields of education, science and art; as well as with service in a number of enumerated public offices on any level in the year prior to election. Decree on Provincial Ombudsman of 2002, Art. 7.

11 Decree on Provincial Ombudsman, Art. 5.

12 Some European ombudsmen may not act upon their own initiative – e.g. in Belgium, Liechtenstein, Luxembourg or United Kingdom. See Kucsko-Stadlmayer, Gabriele (ed.): *European Ombudsman-Institutions,* Springer, Wien-New York, 2008. p. 490.

13 Decree on Provincial Ombudsman, Art. 37 and 38.

The Provincial Ombudsman is also authorized to join the sessions of the Assembly and its boards, to participate in the debates on issues within his/her competencies and to submit opinions and recommendations on draft laws before the Assembly. In order to improve the legislation on human rights in accordance with international standards, s/he may advise the Provincial Assembly to enact new, or to amend existing legal acts and may initiate proceedings before the Constitutional Court.[14]

Provincial Ombudsman may be removed from office if s/he was sentenced to prison for crime, if s/he is not performing his duties in a competent, impartial, independent and diligent manner,[15] and if s/he performs activities incompatible with this office (*see supra*). The removal procedure is initiated by at least 1/3 of deputies, or by the board of administrative matters, while votes of 2/3 majority of the total number of deputies is required for Ombudsman's removal from office. The term of Ombudsman ceases upon his/her own request, in case of his/her death, upon expiry of his/her mandate, if s/he becomes permanently incapacitated to perform this duty, or when s/he fulfills the requirements for retirement.

After the expiry of the first Provincial Ombudsman's mandate, neither of the two succeeding ones fulfilled the legal requirements, i.e. their election was illegal (one had been retired for 16 years before his election, contrary to the explicit provision in the provincial decree that the Ombudsman's mandate expires once s/he reaches the age for retirement; current Ombudsman is a member of the Democratic Party, which is incompatible with this office by an explicit statement of the same decree). This shows that after the first ombudsman's mandate, political considerations and interests prevailed over legal requirements for the election of Ombudsman, which decreases the authority and independence of the institution and threatens to jeopardize the trust of citizens in its impartiality. From the explicit provisions of the Decree, another serious departure occurred during the mandate of the third Provincial Ombudsman, who closed the two aforementioned branch offices that were established at the beginning of the institution's work. The latter (illegal) move reduced the accessibility of the institution to citizens.

14 *Ibid*. Art. 14.

15 This particular group of reasons is not specific enough, which particularly applies to the requirement of "diligence". Given that no criteria were set by the Decree that would aid the assessment of one's departure from this requirement, this ground may be abused to put a pressure on an incumbent in respect of his/her findings in certain cases, or to remove a him/her from office if s/he is to critical.

2.

The Protector of Citizens at the state level. According to the Act on the Protector of Citizens of 2005 (hereinafter: the Act), this is also an independent institution that protects human rights through controlling the work of state administration and other organizations vested with public authorities, providing that alleged violations of human rights come as a result of the violation of legal acts adopted by the republican (national) Assembly.[16] The Act explicitly enumerates what state agencies the Protector may not control: the Assembly, the President of the Republic, the Government, the Constitutional Court, regular courts and public attorneys.

The requirements and the procedure for the election of the Protector are less strict than in case of Provincial Ombudsman. Candidates are proposed to the Parliamentary Board for Constitutional Matters and only parliamentary political parties may submit such proposals. By simple majority of its members, the Parliamentary Board decides on the candidate to be proposed to the Assembly. Finally, the National Assembly elects the Protector if absolute majority (of the total number of deputies) has voted for the proposed candidate. This post is incompatible with simultaneous performance of other public services, professional activities, or any other activities that may affect his/her impartiality and with membership in political parties. The Protector's mandate lasts for 5 years.

The authorities of the Protector are generally the same as those of the Provincial Ombudsman. The Protector is accountable to the Assembly of Serbia.

16 Act on the Protector of Citizens of 2005, Art. 1 and 17. This is further specified in Article 34, stating that in cases where the complaint relates to the violation of a national (republican) legal acts the Provincial and local ombudsman shall immediately transfer that case to the national Protector and *vice versa*. These norms, inserted into the Act intentionally or out of ignorance, created a potential source of conflict of competences between the national Ombudsman on one side and the Provincial and local ombudsmen on the other. Human rights are guaranteed by the constitution and elaborated by legal acts adopted on the national level, whereas by-laws (the only form of legal acts that may be adopted by the provincial or local assemblies) very rarely deal with human rights. Therefore, majority of cases before ombudsman, arise from violations of republican legal acts, which in practice means that this norm, basically, stripped all the other ombudsmen in Serbia off a large part of their authorities – investigation of individual cases - making them a surplus in the system rearranged in this manner. As for the other of the two main functions – control of the work of administration – consequences are similar but to a lesser extent. Namely, the Autonomous Province and local communities may autonomously regulate the work of their own agencies, so ombudsmen may control the work of agencies at those levels. Still, such control is performed in order to protect human rights and if this aim is in fact taken away, ombudsmen of lower levels are reduced to bodies that mainly control the procedure performed by provincial and/or local agencies, while issues pertaining to the material law remain only a small fraction of their cases. Finally, given that the Autonomous Province has the authority to autonomously create its own agencies and regulate their work and that Provincial Ombudsman is responsible before the Provincial Assembly for the performance of tasks vested to it by the provincial Decree, this provision is also unconstitutional since the Republic factually infringed the original authority of the Province by indirectly reducing the authorities of Provincial Ombudsman, which is not within the scope of authorities of the Republic.

Certain provisions in the Act, which do not exist in relation to the Provincial Ombudsman, weaken the position of the Protector. The first of them forbids the Protector to make "statements of political nature". Such a restriction is too vague. Human rights generally restrict the authorities of a state, thus, most issues related to human rights violations are in substance political issues *per se*. Moreover, most ombudsmen in the world, including the Protector, have legal obligation to assess the state of human rights at least once a year, in their annual reports. Would it be a prohibited "political statement" if an ombudsman states in his/her report that, for instance, the rights of ethnic minorities are seriously violated by the state; or that certain groups are systematically discriminated against by state bodies; or that the poor state of human rights is largely induced by the corruptive and incompetent practices of the government and its administration? Such statements are undoubtedly of "political nature" and some deputies might not like them - but should they be banned because of that? This provision may be abused by political factors to remove the incumbent from the office and replace him/her with one who is less critical about human rights violations of the current administration. Besides, what would occur if some Protector's statements were found to be "political"? This is not mentioned as a ground for his/her removal from office (unless construed as a form of careless performance of his/her tasks, or a conflict of interests – *see infra*) and there is no procedure or sanction foreseen in such cases. On the other hand, politically biased statements, or the Protector's active participation in the electoral campaign of certain political parties and the like, are indeed contrary to the requirement of his/her impartiality. The conclusion is that this norm was incompetently drafted and it should have been worded more carefully - instead of "political statements", in order to prevent or at least diminish the possibilities for abusing and/or retaliating against the Protector who is according to someone's opinion is being too critical, it should read: "politically biased statements", or "political statements outside the scope of the authorities of the Protector of citizens", or the like.

Another questionable provision is related to reasons for the Protector's dismissal. The Act prescribes that the Protector may be removed from office if s/he is not performing his/her duties in a competent and diligent manner; if s/he simultaneously performs another public service or professional duty, or any other activity that may be in conflict with his/her independence, or is against the laws regulating conflict of interests, or if s/he is sentenced for a crime which makes him/her unfit for this office.[17] The last of these reasons is not specific enough. It is clear from the wording that not every crime is suffi-

17 Act on the Protector of Citizens of 2005, Art. 12. Similar reason in the Decree on Provincial Ombudsman is more specific and reads: "if sentenced for a crime to prison". In the latter case the criterion is the type of criminal punishment (prison), which can be objectively established

cient ground for the Protectors removal from office. Certain crimes obviously fall within this category (e.g. taking a bribe, falsifying official documents and the like), but it remains open to interpretations (and certain deals among deputies, i.e. political parties) what other crimes may indicate that one is not suitable for this office. For this vagueness, this reason may be abused to get rid of an incumbent.

The Protector is also authorized to act upon complaints or own initiatives. His/her investigative powers are generally the same as those of the Provincial Ombudsman (*see supra*). The Protector has another explicitly formulated authority: s/he may propose to the relevant body that the public officer responsible for human rights violations be removed from office.

IV. Challenges in the practice of ombudsmen in Serbia so far.

I. Successful work of this institution depends a lot on the character of the legal system. Firmly established rule of law and respect for it is an important prerequisite for adequate fulfillment of controlling and protective functions of these independent institutions for the protection of human rights. Unfortunately, such setting has not yet been established in Serbia. Thus, cases of not responding to ombudsman's requests, ignoring his/her recommendations and opinions by agencies or other organizations whose work is controlled by ombudsman, or even obstructions of its work are not rare exceptions. On the positive side, the practice has shown that after some time of adjustment, which may last for years, the majority of agencies accepts the existence of a new controlling institution and cooperates with it in investigations or in carrying out its recommendations.
II. There seems to be no genuine political will to support and improve this institution. So far, the supervisory function of the Assembly over the execution remained underdeveloped in the Serbian legal system. Parliamentary debates on annual reports of ombudsman institutions are usually just a formality, problems in the area of human rights and/or in the work of administration are often neglected. Relevant assemblies usually make no steps after debating these annual reports (e.g. adopting conclusions on the recommendations made in the reports, ordering the relevant agencies to answer to those recommendations or suggestions and the like). Thus, sometimes it seems that ombudsman's findings and recommendations, generally aimed at the improvement of the performance of administration, are not taken as seriously as they should be.
III. Respective governments still tend to ignore the findings of ombudsman, particularly those that are critical of the performance of administration. Sometimes members of the execution also tend to obstruct the independ-

ence and functioning of ombudsman (e.g. in the process of preparation of the institution's budget, in providing offices and equipment necessary for its work, avoiding or delaying communication with ombudsman even contrary to explicit legal provisions, etc.), which, to some extent, is the consequence of the fact that supervisory bodies are often seen by the administration as adversaries rather than collaborators.

IV. In general, the level of citizens' awareness of their rights is rather low. In practice it is demonstrated through numerous applications to ombudsman in matters, or against bodies, which are not within the competences of ombudsman. On the other hand, expectations of citizens who address ombudsman are often rather high (various surveys suggest that this is at least partly the result of a rather low trust that citizens have in state institutions in general), even if a concrete issue is not within the authorities of ombudsman.

V. Lack of adequate funding, as a consequence of objective (economic crisis, high unemployment rate), but also some other reasons (these institutions are usually not on the priority list when it comes to securing the budget necessary for their work), adversely affect ombudsmen's work.

V. Summary and conclusion

In the last decade, several types of independent institutions have been established in Serbia for the protection of human rights. The article deals with institutions of ombudsman on the provincial and national levels. Major part of the article consists of the presentation and comparison of legal framework for these institutions, with an analysis of certain solutions that should be improved in order to alleviate ombudsmen's work and fulfillment of their major functions – control over the administration and other public services in order to prevent or at least decrease violations of human rights by the execution. These institutions face various challenges during their work, the most important of which are also presented in the article.

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Serbia's Preparedness for the EU-Accession

"One should stop pretending that the European Union post-1989 is simply an enlarged version of what existed before. The identity of the EU simply cannot be the same as it was when there is an open border to the East – and increasingly to the South too."
(Giddens, Anthony)

I. Preface

The process of *Eurointegration* is the activity that all former socialist countries have to experience. Serbia, owing to a much belated transition/transformation, is notably falling behind in this race. The process of Eurointegration has two components; vertical (*EU-isation*) and horizontal (*Europeanisation*). This paper explains the causes and effects of both components.

Two hundred years after the greatest overthrow in the history of the world, the French Revolution in 1789, Europeans geographically located in Central and East Europe, by turning autumn into spring (known as "The Spring of Nations"), were determined to take their sovereignty back from the eastern vastness,[1] decide their destiny on their own and choose how and with whom they should share it. We, the citizens living within the borders of the old and different Yugoslavia, realized far too late that the activities on the streets of Berlin were not "*painting and decoration works*", but rather overthrowing of an epoch – the epoch of fear, single-mindedness and a system in which a person was not treated as a unique individual, a world of its own, a unique micro-cosmos. Some among us have never realized this fact, especially, the elite leading our tragic people.[2] The demand to live in truth prevailed. And it did so in the way Vaclav Havel[3] cried out and was followed by millions of people in the streets and squares of Warsaw, Prague, Berlin, Budapest, Kaunas,

1 According to famous Brezhnev's "doctrine of limited sovereignty", the borders of the Soviet Union were borders of the member states of the Warsaw Pact, i.e. the territory that the Soviet Union liberated/occupied during World War II.

2 See the introduction by Pusić V. in: Cviić, K. and Safney, P. (ed.): Od konflikata do saradnje [From Conflicts to Cooperation] In: *Jugoistočna Evropa*, Zagreb, 2008. 10.

3 For more information on transformation/transition see Radosavljević, Duško: *Elite i transformacija* [Elite and Transformation]. Centar za istraživanje demokratije, Novi Sad, 2001.

Riga, etc. They were determined to break loose from the existing regimes and to make a new start. Responsible people in responsible countries have developed a change-making strategy debating at round tables, where the "former" together with the "future" have shown the necessary level of awareness to preserve the essence of people, the minimum of the country and security as well as to take all possible routes for the development of the country and the society. They reached three key agreements. Their societies, or, as they called them then, transitional societies were about to follow three basic principles:

1. *Democratic rules of the game* will be determined based on multiparty democracy along with the establishment of institutions for the protection of human rights followed by adequate legislation.
2. *Market economy* shall be introduced with all its implications and it will be based on private property.
3. *Active participation in the Euro-Atlantic integration process*. The European Union will have priority in international relations.[4]

This decision has been made by the elite of the "old" and the "new" regime taking into account their responsibility and historic role at time of great social turbulences. Unfortunately, this kind of agreement was not reached in Serbia and the result is known by all of us! Millions of refugees, thousands of destroyed homes, thousands of dead and wounded, a ruined industry and an overall disaster of cosmic proportions. The principle "if we don't know how to work, at least we know how to fight" prevailed and eventually, "the story had a bitter end"! Of course, the results achieved in structural changes differed from country to country; "*partially because the enthusiastic transitional missionaries did not always understand two crucial things. First, the main reason why the local society wanted changes was the urge to reach the West European living standard. And the second, the same society was completely unaware of the hard work that the process required.*"[5] Actually, this is where our story begins…

The accession of Serbia to the European Union is not brought into question[6] at all, even though members of different political options offer different interpretations of this rather demanding venture.[7]

4 Radosavljević, Duško: Političke elite u socijalnoj transformaciji – od kolektivističkog ka liberalnodemokratskom etosu: Sedam poglavlja jedne zajedničke povesti [Political Elites in Social Transformation – from Collectivist to Liberal-Democratic Ethos: Seven Chapter of One Common History]. In: *Anali poslovne ekonomije*, 2008/ 2. Banja Luka.

5 See Cviić-Safney: *op. cit.* 90.

6 Public opinion polls have revealed so far that the majority of the citizens of Serbia are *pro* on joining the EU.

7 It is important to point out that many offices, starting at the former federal level, the ones in the Republic and in Vojvodina, which have been involved in the preparations for the accession of Serbia to the EU, have always been up to the task, but the problem was the will of political mandatories in the country.

II. Serbia – what the problem is; what the task is?

The accession to the European Union is evaluated at two basic levels: the vertical and the horizontal one. The first one is similar to the one accepted by the post-communist elite when taking "*the road less travelled*", the path into the EU where one stage of development ended. That path presupposed the fulfillment of the so-called "*Copenhagen criteria*", meaning that candidate countries are expected to fulfill certain requirements regarding the establishment of democracy and institutions guaranteeing human rights, the development of effective market economy mechanisms and accepting the legacy of the European Union legislation – *acquis communautaire*.[8] This process is completed through several stages: Feasibility Study, Stabilization and Association Agreement, Candidacy, Negotiation and Accession. It presupposes the following activities: minimum convergence of politics, harmonization of legislation and political integration, which requires partial transfer of the sovereignty to the EU. In a nutshell, the minimum fulfillment of conditions from the Community Acquis is required.

The problem with some political mandatories in Serbia is that they see this process as a way of acquiring means allocated in the form of pre-access assistance and later in the form of European structural funds. However, it has to be noted that the aid provided by the EU does not exceed a total of 4% of the national GDP in a particular country so that this issue should be taken into consideration. Obviously, detailed analyses, empirical data and expected growth projections should be conducted to adjust the proper accession time.

This vertical process of the accession is colloquially referred to as *EU-isation*. It is a political project, carried out by politicians and/or skilled bureaucrats. The problem with this project is that it involves only a small number of those who will actually access the EU, such as politicians, parts of the establishment, upper bureaucracy levels and a small number of citizens. Nevertheless, the challenges caused after the accession of Bulgaria, Romania[9] and even Greece, indicate that the process of accession requires more than just the following steps:

- Proliferation of the legislation harmonized with thousands of already translated EU standards and norms;
- Development of incoherent national development strategies that do not comply with European objectives;

8 Radosavljević, Duško – Matijević, Nikolina: *Evropska unija – Razvoj, institucije, proširenje* [European Union – Development, Institutions, Enlargement]. Fakultet za pravne i političke studije, Novi Sad, 2007.

9 Bulgaria and Romania, who did not fulfill the criteria for the accession to the EU in 2004, were given the promise that they would be accepted on 1st January 2007. The waiting time was not invested in any changes, it simply ran out and the problems of these two states were simply transferred to the EU.

– Establishing provisional institutional arrangements hardly contributing to the achievement of developmental objectives through relatively democratic governing;
– Spinning achieved through people close to the government used as evidence of their achievements and relative reform results. Though constantly multiplied, they can be completely effectuated only after the accession;
– Politically motivated oaths to cherish European values without actually adopting them.

The other level of the accession to the EU is deemed to be a horizontal reform process, representing the overall influence of European values on economic and any other development, such as the efficiency of institutions, social relations and everything that comprises ordinary citizens' quality of life. This process is referred to as *Europeanization* and the date of the accession of Serbia to the European Union is conditioned by what we manage to accomplish during this process.

Modern society has determined certain values as European; among others they include peace, democracy, human and minority rights, as well as sustainable development. If we integrate these values into our own system of values, we are not only closer to the EU, but are also bound to overcome some of the basic issues in our society, such as the completion of social reforms, recovery from the effects of a delayed transition, stabilization of weak democratic institutions and institutions for human rights protection, strengthening the economy and creation of conditions for sustainable development. If we really want Serbia to improve, the decision to join the European Union is a logical one; the process of adopting these values is expected and has as equal value as the accession to the EU itself. It is important to mention that the accession to the EU is part of a carefully planned domestic policy based on structural change of the country to accept the upcoming challenges rather than argue about foreign policy issues on a daily basis. Quoting *Zoran Djindjić* seems more than appropriate at this point: "*Serbia will not change if we all remain the same. To change Serbia, we all have to make a change – in the way we approach problems, in our mentality, in our work habits… Because Serbia is a collection of all of us. First of all, we have to be optimistic and stop perceiving all that is unfamiliar as if it were created by an enemy. Or, stop thinking that whatever we do not understand, is working against us.* "

To clarify, European standards and norms are not obligatory. They are inevitable and should be regarded as guidelines, useful advises and parameters. If they were incorporated into our domestic activities, they might lead to the optimization of existing developmental capacities and the creation of new developmental policies, especially at regional and local level. Such incorporation would benefit the cooperation with some parts of the EU at all levels but also strengthen the European Union itself as a new world player protecting

the interests of every member country and the whole EU. Already in 1953, *Konrad Adenauer* prophesied: "[*t*]*hough our national ego might be hurt, we have to admit that nowadays, no single European national country by itself and on its own is capable of providing prosperity and freedom to its citizens or protect its national territory.*"[10] Therefore, only uniting can make European countries able to respond to the upcoming challenges and achieve their national interests. This includes Europe as a whole because "*without its integrity, Europe will not be stable and will not be able to play a leading role in the world history.*"[11] This is especially important for Serbia because there is no "strategic partnership" more important to Serbia than the accession to the EU.

III. What should be our next step?

Despite being still predominant in society and among political mandatories, at least in writing, it has to be accepted that there are fewer and fewer supporters of the idea of the European integration. Therefore, we believe that an essential precondition for the development of society is determining institutionalized assumptions for an independent and responsible judicial system. Recent activities in that area have caused far more regrets about the process than satisfaction with it. The next step would be to strengthen the independence of regulatory and controlling authorities, agencies and institutions, starting with the Constitutional Court of the Republic of Serbia, the National Bank of Serbia, the Council of the Broadcasting Agency of the Republic of Serbia, the Anti-Corruption Agency, the State Audit Agency, the Commissioner for Information, the Commissioner for the Protection of Equality, etc.

Furthermore, they would have to be liberated from political pressure and the pressure caused by the system itself. In addition, the role of the Serbian parliament, that is the National Assembly of the Republic of Serbia, should be redefined in order to be transformed into a representative body of citizens as opposed to its current role of a mere collection of party delegates devoid of initiative, responsibility and reasonable judgment. A fundamental issue to resolve is to enable citizen participation through their own active engagement or via their organizations (NGO sector), as well as enable the involvement of local self-governments in making political decision of crucial importance for the society. Therefore, Serbia should re-examine the content of its 52 devel-

10 Evropska integracija kao teritorijalna nužnost [European Integration as Territorial Necessity], in: *EVROPA S DUŠOM - Govori koji su odredili Evropu* (ed. Popović, Aleksandra). Fondacija Konrad Adenauer, Belgrade, 2009. 75. http://www.uef.rs/materijal/dokumenta/Evropa%20s%20dusom.pdf

11 Đinđić, Zoran: Evropa s dušom [Europe with Soul], in: *EVROPA S DUŠOM - Govori koji su odredili Evropu* (ed. Popović, Aleksandra). Fondacija Konrad Adenauer, Belgrade, 2009. 175. http://www.uef.rs/materijal/dokumenta/Evropa%20s%20dusom.pdf

opment and reform strategies, adjust them to the developmental programs of the EU[12], as well as plan, support and control the implementation of policies for an overall national and a balanced regional development by establishing institutional arrangements furnished with qualified personnel who are capable enough to carry out such tasks. In addition, a functional process of decentralization and regionalization of Serbia has to be implemented because the process of Europeanisation is so broad that it has to be shared with the authorities from regional and local self-governments. This process should not be an exclusive activity of only central authorities. Due to its complexity, it would become an impossible mission, if it were. Local authorities must respond to those needs of their citizens, associations and educational organizations, which have developed as real and concrete, which are directed at improving the quality of life at the local level, securing European standards and strengthening human and social capital that has deteriorated over the years.

To sum it up, Europeanisation is an essential process in the framework of activities contributing to the accession of Serbia to the European Union and it includes social, economic, political and legal aspects. If politicians, the economic and intellectual elite, active citizens and the NGO-sector enter this process together and give their best, success may be expected. A successful Europeanisation requires a coalition because only then will our engagement, as a state and a society, while handling all the demanding and usually painful activities, known as vertical accession or EU-isation make sense. EU-isation without Europeanisation leaves us no hope for a confirmed development. It leaves us halfway through. And Serbia is tired of waiting for her Godot.[13] In the Serbian play, just as in the one written by the famous Irishman, Godot is simply gone! We measure our own time, we decide for ourselves about when, how and why we will join the European Union.

12 See: Jelinčić, J. (work sheet) – *Europe 2020 Monitoring Platform underlines three priorities that complement each other* /COM (2010) 2020 from 3 March 2010/ is in fact a revised version of the Lisbon Agenda from 2000, the objective of which has been defined as turning the European economy into the most competent world economy based on knowledge and it actually suggests the restructuring of the European economy); *smart growth*: developing an economy based on knowledge; *sustainable growth*: promoting a more resource-efficient (using energy and raw materials in an economical way) and greener economy; *inclusive growth*: fostering a high employment-economy (especially for the population between 20 and 64) and contributing to the social and territorial cohesion (in the sense of providing equal regional development and equal population density) of the Union and each member state, individually.

13 Becket. Samuel: *Waiting for Godot*. 54.
Estragon: Well? Shall we go?
Vladimir: Yes, let's go.
They don't move.
Curtain

IV. Concluding remarks

In 1989, the former socialist countries "*voted with their feet*"[14] are determined to leave the past behind them, to tear down the "Iron curtain" (*Winston Churchill*) and return back to Europe, their home. A shortcut to the European house was identified in the project that was then in its infancy – the European Union, supported by *Jacques Delors*, the President of the European Commission at the time. He determined the criteria and developed a strategy to assist those countries in becoming member states after they fulfill those criteria. The citizens of former Yugoslavia, though belonging to the most developed socialist world at the time, believed their leaders that the path to independency, prosperity, reputation and happiness was to be achieved by means of wars, destruction, immorality and the breaking of human dignity, as opposed to the principles of the European Union, based on a strong respect of antifascist values, human rights, as well as the right to be different and unique. It all ended by leaving former Yugoslav countries in the last compartment on the train of European integration with different explanations for not being there, with an array of excuses telling them why they should not fulfill the criteria to join the European Union and avoid fulfillment of international obligations, which would actually improve the life of their own citizens. For this reason, we believe that a certain change in the behaviour of governing authorities can be achieved only through the interaction with the European Union, whereby the following should be kept in mind: "*One of the few great moments in the history of the EU is its role in the consolidation of the transitional countries of Eastern Europe. Leaving the regimes they did not want, they had to accept the task to define the kind of country they wanted to live in. For all revolutionary movements, even the velvet ones, this seems to be the hardest task. Almost an insurmountable one. The EU was there, waiting with its acquis communautaire, the Copenhagen criteria and the guidelines for building a country. That influence as well as the opportunity given to them have been crucial for the countries of South Eastern Europe. Among all the types of power exercised by the international community in this region, this kind of soft power has had the strongest influence.*"[15]

Serbia is a European country and it is her time to play its role in the family of the European people and countries in the most efficient, rational and effective way. We owe to ourselves and to the younger generations that much. And to our neighbours, of course.

14 Statement made by the former minister of the Federal Republic of Germany, *Hans-Dietrich Genscher*.
15 See the introduction by Pusić, V., in: Cviić-Safney: *op. cit.*14.

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Serbia's National Minority Policy in Light of the EU Integration Process

During the spring of 2012, media was thick with Romania's statement, namely, that it does not support Serbia's EU accession if the latter does not change his policy toward the Vlach minority. Although this statement is more a hyperbole than a case in point, it proves that status and guaranteed rights of national minorities in national states are of high political relevance in light of eastward enlargement. The European Union primarily formed as supranational organization of economic character has become more and more sensitive regarding national, ethnic questions in the last years but these problems still lack the real resolution. Maybe adoption of the Lisbon Treaty will revise the current situation but until then the question hangs: whether respect of minority rights is precondition of EU accession or not.

Hereinafter, the paper is going to present legal development of this field together with challenges connected to the further EU integration, especially focusing on Serbia's opportunities of successful accession. In the second part of the paper, the European Commission's opinion on Serbia's application for EU membership expanded by the author's subjective reflections on the topic will be in details discussed.

I. Aspects of minority protection in the EU

Lawyers engaged in the field of human rights know that talking (and writing, as well) about the EU's national minority policy is not an easy task at all. Up to this day it has been unambiguous that in regulation of human and minority rights there have been international legal norms and national rules implementing the international ones with the condition that „the protection of national minorities is *ius cogens* of international relations which realization does not depend on state's deliberation and constitutional concept"[1]

1 Hegedűs, Dániel: *Az Európai Unió nemzeti, etnikai és nyelvi kisebbségeket érintő politikáinak rövid összefoglalása.* [Brief Resume of the Policies of the EU in the Field of National, Ethnic and Linguistic

(statement of the *Badinter Arbitration Committee*). By introducing EU standards in national minority protection, a new, third factor, the so called supranational level would show up eventuating in formation of the EU's own standpoint on legal standing of national minorities. In other words, instead of the member states, the EU should define the subject, object and content of the regulation that has been, up to this day, without bigger success in international law. The lack of a generally accepted legal definition of national minority just burdens this process. In the *Recommendation 1201*[2] the Council of Europe attempts to compensate this defect but this optional act does not provide correct ground for evolution of Community Law. By an oppositional opinion, national minorities' legal status living in the territory of the EU cannot be uniformly regulated on the Community-level without constitution of a so-called EU majority. EU majority should be a new category of EU population as group of EU citizens with common "*EU identity*"; this would provide benchmark for determination of "others", the EU national minorities as such.[3] We can debate with this statement but up to its realization it is more reasonable to talk about national minority policy of the member states than national minority policy of the EU itself. Currently, EU policy includes only few criteria up to which each candidate state should be measured. Having in mind the main topic of the paper, the question is whether this system of prerequisites exists at all or not.

At first, respect for and protection of national minorities as requirement for accession besides democracy, rule of law and stable institutions guaranteeing human rights has appeared by adoption of the *Copenhagen criteria*,[4] even though it was quickly discovered that "issue of minorities is not value but more interest principled engine of the accession."[5] For example this prerequisite was only "forgotten" by the Amsterdam Treaty among the political criteria.[6] Also double standards have evolved between the full members and candidate states because the accession criteria do not concern the "olds" just the new ones (e.g. some member states, like France, still deny that national minorities live in their territory at all, so in these cases, the best opportu-

Minorities] 13. http://www.europeer.hu/tanulmany_EUkisebbsegek.pdf

2 22th Sitting of the Parliamentary Assembly of the Council of Europe, *Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, Art.* 1.

3 Toggenburg, Gabriel N.: *Minority Protection in a Supranational Context: Limits and Opportunities*. In: Minority Protection and the enlarged European Union: the way forward (ed. Gabriel N. Toggenburg) Open Society Institute, Budapest, 2004. p. 10. http://lgi.osi.hu/publications/2004/261/Minority-Protection-and-the-Enlarged-EU.pdf (24.08.2012.)

4 European Council in Copenhagen – 21-22 June 1993 – Conclusions of the Presidency DOC/93/3, 7. A iii) http://ec.europa.eu/bulgaria/documents/abc/72921_en.pdf

5 Hegedűs: *op. cit.* 15.

6 Amsterdam Treaty, Art. I. 8)

nity to enforce national minority rights lies in the protection of minority languages). On the one hand, this fact decreases credibility of the EU and on the other hand, asks for the question: on which basis can the EU control the fulfillment of concerned criteria on national minorities without own control mechanism, rules and procedures. There are two opportunities: if the EU cannot stop the gap (namely, does not adopt universally applicable provisions on national minorities) then it should either accept the conclusions of other European organizations' state reports or pressurize the flow of events through diplomatic communication with the candidate states.[7] Without doubt, none of the options would result in adequate solution because as long as correspondence with Copenhagen criteria (as political and not legal criteria) is only evaluated during the integration processes, the protection of national minorities can be studied only in context of security and not human right policy of the EU bodies.

The biggest problem is caused by starting point of the regulation, namely, that the Union usually equals traditional national minorities of the member states and immigrant population as one category. Because of this approach sometimes protection of national minorities appears as issue of foreign and security policy, sometimes as issue of internal affairs. To protect them or to protect the Union from them?! Or as *Judit Tóth* drew: "we can consider this from such aspect that the common European migration policy has been widened by reference on national minority rights because of prevention of new waves of immigrants and refugees in its territory".[8]

Today, it seems that the most adequate political, moral and legal basis for national minority protection has been found in the EU's antidiscrimination principle. Prohibition of discrimination can be reasonable to protect minority groups from discrimination on basis of national or ethnic membership – even though for a long time prohibition of discrimination was only defined in context of four freedoms, especially focusing on the prohibition of discrimination on basis of citizenship. The question is whether accentuation of equality can be effective for protection of something or somebody which essence lies in its distinctness from the national majority. According to some standpoints and I agree with them, prohibition of discrimination is not enough *per se*: it should be applicable together with some other mechanisms of national minority protection as supplementary principle. Still, prohibition of discrimination aims at preserving equality in equal circumstances, protection of minorities aims at emphasizing the right to be different and at

7 Tsilevich, Boris: *EU Enlargement and the Protection of National Minorities: Opportunities, Myths and Prospects,* p. 5. http://www.soros.org/sites/default/files/eu-minority-protection-20011001.pdf

8 Szajbély, Katalin – Tóth, Judit: Kisebbségvédelem az Európai Unióban [Protection of Minorities in the European Union] http://www.hhrf.org/kisebbsegkutatas/kk_2002_02/cikk.php?id=1134

preserving equality in different circumstances.[9] This theory also proves that such protection provided by antidiscrimination principle refers more to immigrants than to traditional minorities.

However, after adoption of the Lisbon Treaty, the approach to national minorities has considerably changed. In accordance with the Article 2 of the Treaty on EU „ *the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*."[10] We can see that the EU moves away from the concept of collective rights that run along the Copenhagen criteria and talks about rights of people belonging to minorities (or in other words about individual rights). But such changes of the prevailing approach and slight of collective rights is not surprising at all, having in mind the attitude of other international documents, especially the Framework Convention.[11] In this place I do not deal with problems of interpretation, namely, that minority groups can evolve on different bases as language, race, sexual orientation or gender, not only on basis of national membership.

The term '*belonging to national minorities*' is not clear either, especially because of legislative activity of the EU that has adopted a directive about racial and ethnic but not about national minorities. „*To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services*."[12]

The character of the text proves that in this context reference to ethnic origin is connected more to immigrants than to natives, autochthonous national communities in the EU – in other words, there is nothing about cultural or language rights, about preservation of national identity but about aspects of social integration. However, we cannot confuse two principles: prohibition of discrimination on basis of national origin and duty of all to promote equality notwithstanding ethnic origin. The only similarity between them is the opportunity to introduce affirmative actions in both cases. Although in the spring of 1999, the major tendency was totally different: the Commis-

9 Tshilevich: *op. cit.* 8. 1-3.

10 Consolidated version of the Treaty on European Union, Art. 2. *Official Journal of the EU* C115/13, 09/05/2008

11 Framework Convention for the Protection of National Minorities. Strasbourg, 1.02.1995. CETS No.: 157.

12 *Council Directive 2000/43/EC* of 29 June 2000, implementing the principle of equal treatment between people irrespective of racial or ethnic origin.

sion by order of the Council reviewed the candidate states' measures taken against racism because "refusal of racism, xenophobia and anti-Semitism is an elemental part of basic rights and protection of minorities is located within the borders of fights against racism and xenophobia."[13]

The fact that the mentioned Article 2 does not constitute new competences just determines basic principles, is also important. Of course, it can be expected that respect of these principles lays a legislative charge on national parliaments but finally it is only the Court of Justice's interpretation(s) of the concerned article that can show final direction of EU minority law's development (even though the Court very rarely issues decisions on basis of principles).[14] Anyway, concerning this possible tendency, two parallel court practices can evolve: *i)* one during the activity of the above-mentioned Court of Justice and the second by the European Court of Human Rights (ECHR) with seat in Strasbourg. The latter is more significant because of the EU, as after the adoption of the Lisbon Treaty, it is a legal person's new opportunity to ratify the European Convention on Human Rights. Accordingly, EU citizens can complain to the ECHR against EU institutions because of breach of any provision of the Convention. It means that they can even complain because of breach of provision on prohibition of discrimination, that unequivocally makes difference among various forms of discrimination, e.g. on basis of language, race, national or social origin and last but not least membership of national minority.[15] So, belonging to a national minority can be enough *per se* to commit discrimination by the EU institutions without any further reference to language, race, origin or ethnicity. Probably practice of ECHR will affect legal interpretation of the EU Court, especially concerning the antidiscrimination provision. Otherwise, issue of minority rights is not unknown before the Court of Justice. Just to mention one case: in the famous *Bickel-Franz* proceedings in 1998, the Court has concluded that *protection of minorities can be a legitimate and just aim of the member states*.[16] The question is when will the same statement be given on the Union and its bodies?

To sum it up, today there is no obligatory legal act on the EU-level that would directly correct the situation of national minorities in legal sense. „The EU cannot refer to its own legal development except of prohibition of discrimination and its commitment besides human rights including security

13 Szajbély-Tóth: *op. cit.* 8.

14 Juhász, Hajnalka: *A nyelvi jogok helyzete az Európai Unióban: korlátok és lehetőségek (Gyakorlati kihívások a nemzetpolitikában)* [Position of Language Rights in the European Union: Borders and Opportunities (Practical Challenges in National Policy)] Presentation on the Symposium „Language Rights, Use of Language in the Carpathian Basin", organized by the Research Institute of National Policy, Budapest, 8 June 2012.

15 See Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 14.

16 *See Bickel-Franz case 274/96*, [1998] ECJ I-7637 (24 November 1998).

corrective intervention of police and criminal law against racism, xenophobia and resultant prevention."[17] By becoming obligatory, the provisions of Charter of Fundamental Rights of the European Union must be applied by both the member states and the EU institutions,[18] so prohibition of discrimination on basis of *'membership of a national minority*' directly binds the member states.[19] What it exactly means in field of enforcement of national minority rights, is how much the real values can be preserved, I have tried to circumscribe it before.

II. (Non)-existing EU standards in national minority protection as prerequisites of the successful accession of Serbia to the EU

The previous part of this paper aimed at clarifying whether successful accession is conditioned by respect for national minority rights in candidate member states or not; but as we, without clear EU standards established control of the fulfillment of concerned requirements in field of national minority protection, it is nearly impossible to do in an adequate way. Still, the other criteria (e.g. economic) are handled by due diligence, the EU does not have any procedures to do the same with the minority issues.

Irrespective of the non-existing EU standards in its opinion on Serbia's application for membership of the EU, the European Commission spoke about Serbia's national minority policy on high terms, namely that it is, "overall, in line with European standards."[20] However, when the Commissioners were asked about the conditions they take into account at a candidate state during the supervision process of the Copenhagen criteria, only the ratification of the Framework Convention was mentioned. By their words that is the primary device of the criteria's practical realization and as such, it is enough *per se*. Even without an exact, written system of criteria, the Commission studies candidate states' preparedness for implementing the EU's pre-accession requirement under similar measures; this can be concluded by researching several reports and opinions of the Commission about states representing territory of eastward integration.[21] There is no uniform level of development

17 See Szajbély-Tóth: *op. cit.* 8.
18 Charter of Fundamental Rights of the European Union, Art. 51.
19 *Ibid.* Art. 21. (1).
20 *Commission Opinion on Serbia's application for membership of the European Union*. COM(2011) 668 final Brussels.
21 Hughes, James – Sasse, Gwendolyn: *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*. p. 20. http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2003/nr1/Focus1-2003_Hughes_Sasse.pdf, see also,
Agenda 2000 - Commission Opinion on Slovakia's Application for Membership of the European Union. DOC/97/20 Brussels, 1997.

a country has to reach: level of development of each concerned candidate state was compared to its own previous position.

It is noticeable that the Commission did not formulate its own definition of national minority. Studying other documents about countries of East/South Europe, the Commission touched upon numerous data of national minorities but the content of questionnaire given to former candidate states – nowadays including Serbia – proves that even today there is tendency of confusing the problems of immigrants and traditional, autochthonous ethnical groups from the Commission's side. Contrarily, national minorities fight for safekeeping their own identity, so, issues on political representation and cultural rights should be primary, especially, the conditions of establishment of minority political parties, their participation in elections and proportional representation in decision-making bodies.

Approximately 20% of Serbia's overall population belongs to national minority groups. Although, there is no enumeration of legally recognized national minorities in national laws (there is a wide determination of national minorities in accordance with provisions of the Framework Convention) every citizen of Serbia has right to declare its own national origin and membership of a national minority. It results in that some groups only with few members can get similar rights as greater (by population) national communities.

It is beyond dispute that guarantees provided by the *domestic legal system*, especially by the Constitution of Serbia are on the first place. Article 79 contains special provision on freedom of expressing national affiliation within separate chapter on human and minority rights concerning preservation of national, ethnic, cultural specialty, education and media on minority language, use of names of the mother tongue, different aspects of official use of minority languages, etc. It is a fact that the Constitution recognizes national councils of national minorities as significant, too. Along these provisions, the Commission can most correctly and easily control whether regulation of national minorities' status has domestic legal basis at all and in which quality they appear. However, at the same time, advanced state of minority regulation does not mean practical usefulness. Besides "pure" reading of laws, implementation of legislation needs to be studied, too, in order to diagnose active enforcement of law in this field. It means that adequate level

http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/slovakia/sk-op_en.pdf , Agenda 2000 - Commission Opinion on Slovenia's Application for Membership of the European Union. DOC/97/19, Brussels, 15.07.1997. http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/slovenia/sn-op_en.pdf, Commission Opinion on Hungary's Application for Membership of the European Union. DOC/97/13, Brussels, 15.07.1997. http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/hungary/hu-op_en.pdf , Agenda 2000 - Commission Opinion on Romania's Application for Membership of the European Union. DOC/97/18, Brussels, 15.07.1997. http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/romania/ro-op_en.pdf (29.07.2012.)

of employees' qualification in police, state administration or jurisdiction, transparent financial regime and state-aids should be stepped up in Serbia to realize real meaning of the constitutional provisions. Anyway, monitoring assisted by committees (who supervise execution of different *international conventions*) shows that everything works well in Serbia, which statements are of high relevance in the processes of EU integration. The problem is that usually convention duties are fulfilled only "on paper" and exhausted by adoption of acts implementing international norms into Serbian legal order. For example, the Commission highlighted such events that do not have practical effects at all, e.g. establishment of Council of the Republic of Serbia for National Minorities in 2002 with task of coordinating communication between national councils and state bodies was welcomed but it has only had two meetings to date when members adopted the Rules of Procedure and appointed the Secretary. The case is similar with the Government of the Republic of Serbia's Conclusion on measures to increase participation of members of national minorities that deal with problems of representation of national minorities among employees in public offices only futilely, without adoption of concrete measures.

However, there are imperfections in application of *intergovernmental agreements*, too. Serbia has concluded different agreements in matter of national minority rights with kin-states of minorities living in the territory of Serbia. These acts contain bilateral duties and rights of both parties but in practice Serbian law enforcement actors and entities do not take into consideration their provisions in case of adoption of new laws or implementation of existing ones. One practical example supports the validity of this statement: during the census of 2011, in Serbia, the National Council of Hungarian National Minority asked the Republican Institute of Statistics to employ such questioners in the field to find out that besides Serbian who knows one other language that is in official use in the territory of the municipality. Although this petition was in accordance with the minutes of sessions of intergovernmental body of Hungary and Serbia, there were no questionnaires on Hungarian language.

This issue also refers to the rules of *official use of language*. Comparing with other European states with numerous minorities in their population, Serbia's regulation in this matter is fairly detailed, liberal and progressive. Despite elaborated language rights provisions, there is no human, technical, financial capacity of the state to provide adequate basis for their implementation. Unfortunately, this problem is visible in other fields of monitoring but in the report defects are not emphatic and at first sight, the situation seems to be ideal. Such unfinished survey about problems is characteristic of other matters of the report. For example, the Commission has welcomed the constitution of *Ministry for Human and Minority Rights* but after half a year of its publication the concerned ministry has been abolished and faded into

another ministry. During writing of this paper even the newly formed ministry, called Ministry for Human and Minority Rights, Public Administration and Local Government was abrogated because of results of elections in the spring of 2012. Such institution alterations cannot be said about others, about the so-called *independent institutions* of Serbia, as ombudsman offices on three levels (State Ombudsman, Provincial Ombudsman of Vojvodina and local ombudsmen in municipalities) or the commissioner of equality. They function well and try to control public administration without broad political impact on their work.

Other quite important bodies of Serbia are *national councils of national minorities* established by Serbian law in 2009 to represent national communities in fields of education, culture, media and official use of language. Such forms of ethnic self-governance seem to correct lacks in Serbia's national minority policy because competence of participation in institution management and decision-making make these *sui generis* bodies good device of enforcement of minority rights. They were elected democratically by registered minority voters with the aim of making possible for members of national minorities to exercise granted right of self-government. However, experience shows that state bodies neglect role and legal power of councils in administrative procedure and in many cases realization of projects depend on political consensus and not on existence of legal basis. What is interesting is that during the public debate about law on national councils the opponents of the bill criticized consultative nature of these bodies and missed more considerable role in real decision-making; but today the practice clears that even these consultative competences are not respected and seem to be too much for some political forces.

Besides national councils, *autonomy of Vojvodina* was accentuated in the report as good sign that Serbia is capable of falling in line with both EU's and international standards. Both arrangements represent a kind of autonomy including territorial and personal autonomy models that is of high significance in EU policy supporting widespread decentralization. This fact is really interesting in light of EU norms that do not recognize existence of collective rights of national minorities – but without those it is hard to imagine success of any realizable ambition towards getting autonomy. Otherwise, some experts see a new dimension of national minority protection in the development of regionalism – that is in some ways connected to autonomy constructions. The Maastricht Treaty has required respect for national and regional diversity from the member states.[22] These two concepts are not mentioned incidentally in the same provision: usually, issues of national mi-

22 See Maastricht Treaty, Art. 128.

norities are resolved by cooperation of regions and state.[23] Most national minority groups live in cross-border areas, pretty well in neighbor of their kin-state (Roma people are exceptions from this phrase). Constitution of Regions of Europe, enhancement of cross-border cooperation can pacify those contrasts/conflicts that interstate diplomacy was not able to do in many cases. Otherwise, the report only deals with this question in marginal way, proving that such level of development of regionalism has not evolved yet.

To remain at Roma people, the Commission welcomes *Roma inclusion programs* that were intensified after adoption of the report because Roma strategy framework[24] was adopted during the Hungarian EU presidency. In Serbia the "Roma-case" is not as burning question as it is in the neighboring countries. The state does not provide such social welfare and benefits for this ethnic group that usually lives under ordinary standard of living that would show Serbia attractive enough to stay there. So, Serbia is only "used" for transition. But this point of the Commission's opinion finally proves that even though there aren't any exactly determined prerequisites in the field of protection of national minorities, the Commission deals with every issue that usually occur as problem in candidate (and later in member) states, namely, Roma people.

National policy of minority groups and functioning of their institutions are out of the report's closer content that is a big deficiency. Although, generally it can be concluded that usually lack of resources, unprofessional clerks and low level of social awareness characterize Serbia, the greatest worry is resulted by appearance of some signs of indirect assimilation. In accordance with dilemmas on prohibition of discrimination *contra* providing plus rights, Central European countries usually reach equality by programs helping integration (e.g. pupils being members of national minority groups must learn the state language because of easier emergence and promotion).[25] To discourage such tendencies, national minorities need their adequate political representation in main state bodies. In 2009, besides the mentioned Law on National Councils of National Minorities, the *Law on Political Parties* has been adopted in Serbia, too, that made registration of minority political parties with smaller number of signatures possible. Furthermore, this act has abolished the electoral threshold for political parties of national minorities in the statewide elections. Although, the changes concerning financing of parties can negatively affect effective functioning of political parties of national minorities, in general, maybe pressure from the EU side will slow

23 See Hughes-Sasse: *op. cit.* 21.

24 *EU Framework for National Roma Integration Strategies up to 2020*, COM(2011) 173 Final, Brussels, 2011.

25 Compare Hughes-Sasse: *op. cit.* 17.

eventual further amendments of the existing legal order towards restriction of rights and benefits granted to national minorities.

III. Conclusion

At first sight, pointless protection of national minority has taken a great leap forward by coming into force of the Lisbon Treaty. Although it has not dissolved the conflict between the old member states and pre-accession, expectations met by candidate states appearance of concept of national minority undoubtedly refers to recognition and demand for fast(er) resolution of the existing problems. This step is especially important in light of this field's previous EU policy that has suggested that enforcement of minority rights can be effective only through provisions on language rights – even though in most of the cases national and lingual identity overlap. However, the fact that the Charta of Fundamental Rights does not emphasize separately the principle of national diversity as it does with the cultural one, religious and lingual diversity cannot be at all neglected.[26]

Concerning Serbia's case, it can be concluded that even in the absence of clear EU standards and elaborated approach to national minorities, national legal background of minority rights is in line with European values; but none of well formulated legal provisions is enough without effective implementation, financial resources and real demand to succeed in its object.

26 Charter of Fundamental Rights of the European Union, Art. 22.

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In Search of Systemic Efficiency in the Transformation Period: Selected Remarks upon the Debate on the System of Governance in Poland since 1989

I. The short introduction to the core terms

Transformation in its narrow sense is often understood as democratization led by the pro-reform oriented political leaders of formerly undemocratic states. In its wider sense it equals with *transition* and concerns all endeavors oriented to the change of political regime from undemocratic towards democratic one.[1] Both notions refer to well-known examples of the Central and East European states as well some other outside Europe, e.g. in South America, to quote Brasil, Chile or Paraguay.[2] However, it should be underlined, that both terms are sometimes understood as significant changes, political, but even more of economic nature, which are not necessarily oriented on pro-democratic results. Thus the political power of a certain state – within its regional and also global position – matters more than its liberal-democratic image. It is definitely People's China in last twenty years as the most distinctive case here.[3] The post-soviet Central Asiatic states fit to the above pattern either.[4]

The notion *political system* in its institutionalized understanding includes several elements, to quote: state institutions (legislative, executive and judiciary), political parties, groups of interest et al. as well as interactions between them regulated by law, but also shaped by practical experience. It may

1 Linz, J. T. – Stepan, A.: *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe*. The Johns Hopkins University Press, Baltimore, 1996. passim.

2 Konarski, W.: Isolationism, Dependency and Clientelism as Traditional Features of the Paraguayan Foreign Policy. *Politeja*, Vol. 12 (2009) No. 2, 292-297.

3 Fenby, J.: *The Penguin History of Modern China. The Fall and Rise of a Great Power, 1850-2008*. Allen Lane, London, 2008. especially part no 6.

4 Bodio, T. – Mołdawa, T.: *Konstytucje państw Azji Centralnej: tradycje i współczesność* [Constitutions of the Central Asia States: Traditions and Contemporaneity]. Dom Wydawniczy Elipsa, Warszawa, 2007. passim.

be equal with the *system of government* (or *governance*), if to juxtapose it with practical functioning of a given state's institutions during the certain period in particular.

II. The initial phase of transformation

June 4th remains the anniversary of the first, known as partly free, parliamentary elections held in Poland not only after the second World War. In fact they were the first elections on partly limited scale since 1928, namely since the moment of the final instalment of the authoritarian system in the pre-war Polish state, known as the *Second Republic* (Druga Rzeczpospolita).[5] Their results gave the already existing slow erosion of the Communist party rule a considerable popular legitimation. The elections were possible because of the agreement made during the so-called *round-table negotiations* which lasted from the early February till the early April 1989.[6] This was a unique form of political contract made within the system known so far as *real socialism*. There were two partners to the negotiations. One of them, the so-called government side, was composed of the ruling at that time Communists, namely the Polish United Workers' Party (Polska Zjednoczona Partia Robotnicza, PZPR),[7] supported by its allies: the United People's Party (Zjednoczone Stronnictwo Ludowe, ZSL, farmers) and the Democratic Party (Stronnictwo Demokratyczne, SD, middle class, intelligentsia).[8] The other party consisted of democratic and anti-systemic opposition, i.e., an internally heterogeneous set of formally illegal political and trade union structures linked to the movement of political protest against the Communist rule, which came to be in August 1980 and which appeared together as the Independent Self-governing Trade Union "Solidarity" (Niezależny Samorządny Związek Zawodowy "Solidarność", NSZZ "Solidarity"). One of the main points agreed at the round table was to hold elections for the two houses of the Polish parliament, i.e., the Sejm (the lower house) consisting of 460 members and the Senate (the upper house, re-established after several decades), consisting of 100 senators. This was the actual beginning of the period of systemic transformation in Poland, initially in its political understanding (and later

5 Zieliński, H.: *Historia Polski, 1914-1939* [A History of Poland, 1914-1939]. Ossolineum, Wrocław et al., 1985. 198-199.

6 Skórzyński, J.: *Rewolucja okrągłego stołu* [A Revolution of the Round Table]. Wydawnictwo Znak, Kraków, 2009.

7 The abbreviations of the political parties' and other organizations' names appear here in Polish.

8 Grzybowski, M.: The Polish Party System in Transition. In: Berglund, S. – Grzybowski, M. – Dellenbrant, J. Å. – Bankowicz, M. (eds.): *East European Multi-Party Systems*. University of Helsinki Press, Helsinki, 1988 (Commentationes Scientiarum Socialium, no. 37).

also economic), which has been extensively analysed in the Polish specialist literature.[9] Its evolutionary character was expressed in the fact that the elections for the Sejm were to be only partly free and for the Senate, completely free. The *partly free* formula meant that 35% of all the seats in the Sejm were to be allocated as a result of free political game of all political forces and the remaining 65% were to be divided among the three formerly ruling political parties mentioned above. Such limitations did not concern the Senate, where the formula of *completely free* elections was in force.[10]

Despite such guarantees for the former rulers, they sustained utter defeat. The elections became a choice 'for' or 'against' the system of government identified with the hegemony of the Communist party. The Solidarity candidates gained all the seats within the 35% available for the Sejm and 99 seats in the Senate. As a result, 2 months later a government led by Prime Minister Tadeusz Mazowiecki, representing the democratic anti-Communist opposition, was formed. It was composed also of the representatives of the Communist party, but they were a minority.

III. The Polish Constitution of 1997 and the election system

The lasting but increasingly controversial in the course of time symbol of legal and systemic changes in the Polish transformation period was the Constitution adopted on April 2, 1997. The debate on it went on for several years and inspired numerous comments, both in the parliament and outside it.[11] As the document of written law of the highest rank, it sanctioned the parliamentary-cabinet system of government (with some modifications) which functioned in Poland since the beginning of the transformation.[12] The increasingly intensified critical discussion about its content has been carried out in 2007-2009 in particular by two main participants: the government and the head of the state.[13] After the elections held in autumn 2007 the gov-

9 See one of the latest, Błuszkowski J. (ed.): *Dylematy polskiej transformacji* [Dilemmas of Polish Transformation]. Dom Wydawniczy Elipsa, Warszawa, 2007.

10 Jednaka W.: Proces kształtowania się systemu partyjnego w Polsce po 1989 roku [A Process of the Polish Party System Shaping after 1989]. Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 1995 (*Acta Universitatis Vratislaviensis* no. 1761- Politologia XV). 74.

11 See Chruściak, R.: *Przygotowanie Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. – przebieg prac parlamentarnych* [A Preparatory Process of the Republic of Poland Constitution of April 2, 1997 – A Course of Parliamentary Works]. Dom Wydawniczy Elipsa, Warszawa, 1997.

12 See Sarnecki, P.: Przemiany kompetencyjne Sejmu i Senatu dokonane w konstytucji RP z 2 kwietnia 1997 [The Sejm and Senate Competence Changes as Accomplished in the Constitution of April 2, 1997]. In: Szmyt, A. (ed.): *Wybrane zagadnienia nowej konstytucji* [Selected Problems of the New Constitution] (ed.). Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk, 1998 (Gdańskie Studia Prawnicze, vol. 3). 107 and passim.

13 Compare: *15 lat polskiej konstytucji I Konserwatysta.com* [Fifteen Years of Polish Constitution

ernment was formed by the coalition of the centre-right Civic Platform (Platforma Obywatelska, PO, with post-Solidarity roots) and the Polish People's Party (Polskie Stronnictwo Ludowe, PSL) with rural roots, partly identified with the United People's Party, already mentioned ally of the ruling (before 1989) Communists. In autumn 2005, *Lech Kaczyński*, a representative of the conservative-national party called Law and Justice (Prawo i Sprawiedliwość, PiS), was elected President of the Polish Republic. PiS was also the ruling party in the years 2005-2007. Since 2007, this party has been the largest opposition group, which shall be discussed later on in this paper.

The numerous ideas of reforming the system of government in Poland are interesting, but in fact have a symptomatic character. This is so both because of their authors and the time when these ideas are put forward. They appear cyclically and this strongly supports the hypothesis about their opportunistic character. A good example is provided by the repeated incentives to change the electoral system, which are usually toned down whenever the opinion polls show little support for their authors.[14] The postulate of changing the electoral system was put forward e.g. during the electoral campaign in autumn 2005 by the then largest opposition party, the Civic Platform (PO).[15] That party did not give it up (with some modifications) during the campaign of 2007, yet when it became necessary to form a coalition government with the PSL, which opposed the idea, it became abandoned.[16] However, it has been re-appearing for some months later on as a topic for discussion among politicians from the other parties.[17] It was fostered by Prime Minister *Donald Tusk*, but his arguments were only seemingly rational. Tusk used to be well known as the supporter of a majority electoral system for the lower chamber, namely Sejm realised in single-member constituencies (system of relative majority or first-past-the-post). The Prime Minister once argued that only in this way would it be possible to make the party system more effec-

I Conservatist.com]. http://konserwatysta.com/15-lat-polskiej-konstytucji/; Zapomniana rocznica konstytucji RP [A Forgotten Anniversary of the Republic of Poland Constitution]. http://www.azraelk.eu/2012/04/02/zapomniana-rocznica-konstytucji-rp/#more-5483.

14 Lazarowicz, R. – Przystawa, J. (eds.): *Otwarta księga. O jednomandatowe okręgi wyborcze* [An Open Book. Towards Single-Member Constituencies]. SPES, Wrocław, 1999. passim.

15 *Państwo dla Obywateli – plan rządzenia 2005-2009* [A State for Citizens – Plan for Governance, 2005-2009], chapter I.1: Propozycje zmian w konstytucji [Constitutional Amendments Proposals]. 26-27. panstwo_dla_obywateli.pdf
http://www.wybory.platforma.org/download/(gqWYZ57YrXailKWWZ0Xf32iiiqWVaIypo4HQW-52fll2frq-hVKbXZ1WkrWjXgtnXoZre0qrTgsrTj5zm1LrMjdSSnYfVlYHk)/pl/defaultopisy/3/6/1/panstwo_dla_obywateli.pdf.

16 Program PO. Polska zasługuje na cud gospodarczy [The Civic Platform Program. Poland Deserves to Become an Economic Miracle]. http://www.slaski.platforma.org/files/files/0/34940/program_wyborczy_po7ebook.pdf (2012.06.24).

17 See the radio interview with Andrzej Celiński, a left-wing politician – Polish Radio, channel 1 (14 March 2009, 8.00-9.00 a.m.).

tive: by changing its character and, as a further result, of the whole political system. According to the Prime Minister (and his circles) if such an electoral system were adopted the truly popular local leaders would be elected to the parliament. As a result, instead of the currently existing in Poland moderately multi-party system, a two-party system would be formed, which would considerably facilitate forming the government. However, on the other hand it should be stressed that such a system would not reflect the complexity of political divisions in the Polish society, what is constantly ignored by the ruling Civic Platform. Such a system would decrease the number of existing political parties hence the domination of Polish politics by two largest among them, namely PO and PiS would be the overwhelming one. The members of parliament would be practically selected among the representatives of especially those two parties over the non-party local leaders. This is proved already by the results of the Senate elections. Since 2011 they are conducted on the basis of an absolute majority system in 100 constituencies each with 1 seat. Representatives of two largest parties have constantly an overwhelming majority of more than 90 % of total number of seats in this chamber. The number of senators not affiliated to any party is minimal.[18]

At present the elections to the Sejm are conducted in 41 constituencies each with 7 to 19 seats. They are established according to the d'Hondt's method, which, combined with the existing election thresholds (5% for parties and voters' electoral committees and 8% for cross-national alliances of political parties), shows preference for the largest parties.[19]

As it has been said, the change of the voting system for the lower house into the majority one would lead to the change of the party system facilitating the government forming process. On the other one, however, the voters would follow the principle of choosing so-called 'lesser evil' (voting for the candidate who has greater chances of being elected instead of on the one who is politically closer to a given group of voters), which would have negative consequences. Namely, the fossilisation of the two-party system would not increase the subjective character of the voters, but rather eliminate the chances of choosing truly popular but not affiliated to any party local leaders. The voters would be unwilling to take part in the elections and this would

18 Compare *Election to the Senate. The Republic of Poland*.. http://wybory2007.pkw.gov.pl/SNT/PL/WYN/W/index.htm; *Elections to the Sejm and Senate. The Republic of Poland*. http://wybory2011.pkw.gov.pl/wsw/pl/000000.html#tabs-2.

19 Jarentowski, M. G.: Wielopoziomowe okręgi wyborcze w systemie proporcjonalnym [Multilevel Constituencies in the Proportional System], in: Błuszkowski, J. – Zaleśny, J. (eds.): *Wielowymiarowość systemów politycznych.Teoretyczne założenia i praktyczne uwarunkowania* [Multidimensionality of Political Systems. Theoretical Assumptions and Practical Determinants]. Dom Wydawniczy Elipsa, Warszawa, 2009. 74-75.

perpetuate the current tendency for low voter turnout, which at present is one of the lowest in Europe.[20]

It is worthwhile to mention here that more or less 45% of potential voters deliberately stay at home during the elections in Poland. They form a large group of people to be 'captured' by a skilful politician. Thus, in Poland there are social and statistical resources for significant, anti-systemic radical movement. However most of its potential supporters are apathetic and do not have a strong and charismatic leader at the moment. A certain tendency on the left-liberal side of the political spectrum was initiated recently by controversial *Janusz Palikot*'s Movement (Ruch Palikota, RP) which successfully exploited the left oriented electorate's disappointment with the Democratic Left Alliance (Sojusz Lewicy Demokratycznej, SLD.[21] There is not however anyone on the right-wing side of society having the same influence as Palikot has shown recently. A former PiS deputy leader and Minister of Justice, *Zbigniew Ziobro*, may have such a chance, but it is unpredictable now he may be able to repeat Palikot's phenomenon with his own movement called Solidarity Poland (Solidarna Polska, SP). There is not a chance for revitalization of the former League of Polish Families (Liga Polskich Rodzin, LPR), a far right-wing party of *Roman Giertych* who left politics four years ago. It is hard to say whether right-wing populism will gain an influential position in Polish circumstances and when. However such a tendency may be fostered by the possible deterioration of economic situation.

Interestingly, in the Polish public debate on the shape of the electoral system to the Sejm there are very few voices supporting the mixed systems existing, e.g., in Germany, or the modified proportional vote following the formula of Single Transferable Vote (STV) used e.g. in Australia, Ireland and Malta.[22] On the one hand, one may go as far as to assume the ignorance, especially among the politicians of the Civic Platform. On the other one, it may be claimed that they have dishonest intentions to win many segments of the

20 Compare Cześnik, M.: *Partycypacja wyborcza Polaków* [Electoral Participation of Poles]. Instytut Spraw Publicznych, Warszawa, 2009. 6.

21 *Poljaci žude za državnikom* [Poles Are Missing a Statesman]. http://www.matica.hr/Vijenac/vijenac473.nsf/AllWebDocs/Poljaci_zude_za_drzavnikom.

22 Compare: Bowler, S. – Grofman, B.: *Elections in Australia, Ireland and Malta under the Single Transferable Vote: Reflections on an Embedded Institution*. University of Michigan Press, Ann Arbor, 2000.; Garlicki, L.: *Ustrój polityczny Republiki Federalnej Niemiec* [The Government of the Federal Republic of Germany]. Krajowa Agencja Wydawnicza, Warszawa, 1985. 139-145; Konarski, W.: *System konstytucyjny Irlandii*, [The Constitutional System of Ireland]. Wydawnictwo Sejmowe, Warszawa, 2005. 43-45; Nohlen, D.: *Prawo wyborcze i system partyjny. O teorii systemów wyborczych* [Wahlerecht und Parteiensystem. Zur Theorie der Wahlsysteme – Election Law and Party System. On the Election Systems' Theory]. Wydawnictwo Naukowe Scholar, Warszawa, 2004. 316-345 and 351-360; Ross, J. F. S.: *The Irish Election System: What It Is and how It Works*. Pall Mall Press, London, 1959.

electorate by eliminating other participants of the political life by applying the majority electoral system.

IV. Character of the Polish party system and the special importance of the 2007 parliamentary elections

The model of the Polish party system, existing during the most part of the transformation period, may be defined as a *variable multi-party system*, oscillating between short-term two-block-party system in the 1997-2001 and, in the 2001-2005 and is at present, since 2007, one-party domination. For many years and from the point of view of the whole political system, its dysfunctional character consisted in its inability to reproduce itself in the form of 4-6 political parties, existing in the same organisational shape and under the same name during at least 2-3 terms of office.[23] Additionally in many years none of the ruling parties has been able to survive the confrontation with reality, i.e., was not able to rule for at least two terms of office in a row. One term of office was enough for the initially large ruling parties to lose their power: the right-wing Solidarity Electoral Action (Akcja Wyborcza Solidarność, AWS), which ruled in 1997-2001 and the post-Communist Democratic Left Alliance, which held the power in 2001-2005. The elections of October 22, 2007, which ended in a defeat of the ruling for the previous two years Law and Justice, have confirmed that regularity. However the precedence here appeared in the last parliamentary elections of October 9, 2011. The Civic Platform has been elected the largest party for the second time in row and once more formed the ruling coalition together with Polish People's Party.[24] The other feature of the Polish party system is the presence of a group of politicians frequently changing their party affiliation, which at the moment is not a socially approved phenomenon.

Thus, this is a changing in its quantity and personal composition and strongly ideologised party system, also with respect to its origin: suffice it to mention the important division into two historical camps: the post-Communists and the post-Solidarity. Curiously enough, during the term of office 2005-2007 an attempt was made by the former to do away with this division by creating an electoral alliance called Left and Democrats (Lewica i Demokraci, LiD) composed of the representatives of the two above-men-

23 Antoszewski, A. – Herbut R. – Sroka J.: System partyjny w Polsce [The Party System in Poland], in: Antoszewski, A. – Fiala, P. – Herbut, R. – Sroka, J. (eds.): *Partie i systemy partyjne Europy Środkowej* [Parties and Party Systems in the Central Europe]. Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2003. 133 and further.

24 *A Question of Leadership*. http://www.wbj.pl/article-56832-a-question-of-leadership.html?type=wbj (2013.05.18).

tioned historical camps, which, however, did not survive the test of time.[25] In the latter, in turn, the developing since 2005 antagonism between the now two strongest political parties originating from the Solidarity movement, i.e., the Law and Justice and Civic Platform, has become fossilised.

Already a few weeks before the voting day in October of 2007 the leaders of the two largest parties repeatedly claimed that these will be the most important elections after 1989.[26] The *rhetoric of the breakthrough* influenced the character of the electoral campaign, which may be defined as a sequence of actions and events based on the domination of symbolic arguments over the substantial ones. An important part was played in it by the symbolism reflecting the social reality in contrasting colours, e.g., by dividing Poland into Solidarity and liberal one and the Poles into oligarchs and outsiders, i.e., those who sustained losses during the period of transformation. At that background the Law and Justice very strongly negated the existing legal and systemic shape of the Polish state called the 3rd Polish Republic and suggested that it should undergo changes leading to the creation of the so-called 4th Polish Republic. The use of the latter name inspired doubt from the very beginning, especially as the postulates concerning the new system were imprecise. In fact, the greater stress was placed on the historical chronology of Polish statehood, presented by *Jarosław Kaczyński*, the Law and Justice leader. Suggesting the name of the 4th Republic, that politician recalled the period of the Polish-Lithuanian Commonwealth, existing until 1795, i.e., the 1st Republic of Poland, then the years 1918-1939, i.e., the 2nd Republic of Poland, omitted the limited sovereignty of the state which existed as the Polish People's Republic until 1989 and treated the period starting at the beginning of transformation till the elections of 2007 as the 3rd Republic of Poland. In fact this criticism, justified only by propaganda reasons, was not followed by concrete suggestions concerning the change of the system of government. For that reason the possible associations with the consecutive changes of the republican rule in France seemed to be exaggerated. The 4th French Republic differed considerably from the 5th, the political institutions were situated within the state in a different way and the internally unstable parliamentary system was replaced by a strong executive power called quasi- or semi-presidential rule.

As a result the attempts made by, e.g., the Polish People's Party (PSL), at reverting the debate to the substantial topic, were unsuccessful in confrontation with sensationalism aimed at destroying the reputation of the political opponents. The campaign of autumn 2007 had three main chronological

25 *Money.pl – Tag Lewica i Demokraci* [Money.pl – Tag Left and Democrats]. http://info.wyborcza.pl/temat/wyborcza/Lewica+i+Demokraci (2013.05.18).

26 Konarski, W.: *Polens Parteien nach der Wahl* [Polish Parties after Election]. In: *Liberal: Vierteljahreshefte für Politik und Kultur*, No. 4, Dezember 2007. 49 Jahrgang.

parts. It was begun by large billboards created by the Civic Platform (PO) and directed mainly against the Law and Justice (PiS) party. Then there were spots in the form of short films focusing mainly on negative campaigning, the aim of which was to suggest that the power in recent years was in the hands of oligarchy, especially during the 'liberal' rule, i.e., until 2005, (anti-left-wing and anti-Civic Platform) or criticising the political doctrinaire attitude or incompetence of the ruling in 2005-2007 Law and Justice party. Finally, there came the debates of the most important politicians from the main parties. The key debate was the televised contest between the leader of the PiS party and the then Prime Minister, *Jarosław Kaczyński* and the leader of the PO (then an opposition party), *Donald Tusk*, which ended with a clear victory of the latter. The campaign, as it has been said, was not based on substantial issues. It was dominated by an exchange of views concerning mainly the incompetence of the opponents and their inability to rule. In the last week of the campaign the ruling Law and Justice party undertook an unprecedented attempt at discrediting the Civic Platform by means of revealing by the Central Anticorruption Bureau (Centralne Biuro Antykorupcyjne, CBA) details suggesting that one of the members of parliament from that party accepted an offer of corruption in fact controlled by the CBA.[27] The above-presented features of that campaign allow claiming that the decisions taken by the majority of the voters at its end were inspired by: the Tusk's victory in the debate with Kaczyński and then the negative social reception of the ways the PiS party fought with the PO using the above-mentioned corruption scandal. These two events changed the image of the Civic Platform and especially of its leader, from a party leading a passive electoral campaign to an active and effective one, which was illustrated by its growing opinion poll ratings. It should be mentioned here that the latter were reviewed sometimes with growing scepticism.[28]

The stress on the pivotal character of the elections resulted in an unprecedented electoral mobilization in terms of the rhetoric used of the two main political parties. In general, the voters voted mainly *against* a party perceived as one appropriating the power and unwilling to accept the rule of its alternation. The Law and Justice party and especially J. Kaczyński, definitely an authoritarian personality, were considered to be like that.[29] In turn, the majority of those voting for the Civic Platform was guided not by their knowledge of the political position of that party but by the positive reception of the main symbol of that party, i.e., Donald Tusk, who was gaining increased

27 *Beata Sawicka uniewinniona* [Beata Sawicka Declared Unguilty]. http://www.polskieradio.pl/5/3/Artykul/833768,Beata-Sawicka-uniewinniona-Prokuratura-wniosla-o-uzasadnienie-wyroku (2013.05.18).

28 *Nie ufam sondażom* [I don't Trust Polls]. In: *Świat elit*, 2007/10 (63).

29 Compare with Christian Science Monitor, 29 August 2006 and *Super Express*, 31 January 2009.

social approval. The elections had again, reaching a scale similar to that of 1989, the character of a *plebiscite* and, more precisely, their result showed whom the voters did not want as the winner. This reasoning resulted in a greater than in previous confrontations voter turnout, which was more than 53,8%. It should not, however, be considered only from the Polish perspective. From that perspective the election results were optimistic as they were better by cca. 13% from those of 2005 and also because of the considerable turnout of very young people (50% of the people aged 18-19 took part) and of those who had just started their families and professional lives. However again, the scepticism in this sphere was confirmed four years later. In the next elections of October 9, 2011, the voter turnout was again smaller than in 2007 and reached slightly more than 48,9 %.[30] Thus in comparison to other European countries Poland still occupies one of the last places here.

I personally do not see any particular reason to believe that it is going to grow the more so that such a high level of vote abstention suggests that the democratic axiology has in a way *worn itself* in the recent more than twenty years. The degree of vote abstention reflects the general disaffection of the majority of the society with politics. This disaffection is surely the result of the systemic errors made during the transformation period. These include especially: *i)* the adopted model of privatisation, which alienated numerous social groups; *ii)* the inability to create the rule of law and the ineffectiveness of the courts of law; *iii)* the examples of helplessness of the state with respect to large-scale swindlers; *iv)* the progressive and not effectively regulated by the law conglomeration of the politics, business and mafia-like structures; e. the syndrome of *devouring by the Polish revolution of its initiators* (decomposition of the shipyards and partly miners' political role); *v)* oligarchic tendencies in the power performance and *vi)* still evident inverting the formula for the foreign policy expressed by the former President of Finland, *Urho Kaleva Kekkonen*, i.e., looking for friends (or at least reliable partners) far away and enemies close by. The above formula is still discussed in spite of controversies around its inventor.[31]

V. State of affairs

The opinions, often very critical, about results of the period of political transformation in Poland are clearly varied. On the one hand more or less real achievements of the recent two decades are perceived with exaggeration.

30 *Elections 2011 to the Sejm and Senate. The Republic of Poland.* http://wybory2011.pkw.gov.pl/wyn/pl/000000.html#tabs-1.

31 Gorbunov, A.: *Was Urho Kekkonen a KGB Agent?* http://stuff.mit.edu/afs/net/user/tytso/usenet/americast/mosnews/71.

The most frequent words-myths usually stress that Poland is a state ruled by law and already has two important classes: the *middle class* and the *political class*, that the existing form of the free market is the result of the only possible variant of privatisation and that a given politician or his party are working for Poland, not for themselves, etc. However, it seems quite clear that in the majority of cases the politicians diagnosing the situation in Poland follow a misguided loyalty to the, metaphorically speaking, school of political thinking which is close to them. This is the Polish parliamentary opposition, both the left- and right-wing: they often give way to unreasonable criticism, use dubious rhetorical devices and are often quite carefree when proposing motions of non-confidence. The weakening sense of responsibility of the Polish members of parliament is also reflected in the empty chamber of the Sejm even during important debates such as the one concerning the reform of the health care system. All that brings to mind a basic, or even banal, question concerning both the party in power and the opposition, about, respectively, the reason of keeping the power and fighting for it. Surprisingly enough it has never been posed by any journalist, even though it would be very interesting to learn what the arguments of these groups of politicians are. Since the low voting turnout indicates that the attributes of democracy became unimportant for the voters, making the politicians answer the question: *what for do, they really need the power*, seems to be more and more justified. This is so due to the basic fact that the Polish political spectrum suffers from ideological degeneration in which the large part of the left has lost its social sensitiveness and became an oligarchy-business network and the conservative right represents a mixture of social and fundamentalist ideas.

Following this train of thought one should admit that the unquestioned value of the years of the Polish transformation has been the very opportunity of exchanging the views on the issues important for Poland, although, paradoxically, there not always has been a suitable place to conduct it. On the other hand, these debates only apparently influence the reality. For example, the debate on ethics in business does not improve the former. Also the insistence that Poland is a state ruled by law has resulted in the production of new laws but not their implementation or increased respect for them among the members of the political class. As a result, the sporadically re-appearing debate on the need for improving the political culture does not have any tangible effects. Despite that the reflections on the need of reforming the Polish system of government are important. They refer to the elements which, if functioning effectively, may improve the attitude of the citizens to the state and shape the external image of Poland. At the same time they stimulate the debate on improving the practice of the Polish parliamentary system.

That system is, namely, frequently criticised. As a result, besides the low voting turnout mentioned above, there formed a group of people, loftily called the *political class*, characterised with a Byzantine attitude to politics.

I consider this term mainly as a stratifying category not as a definition of the high competences of its members.[32] Adapting for the Polish realities the opinion expressed in 2003 by the former President of Germany, *Richard von Weizsäcker*, who used the expression of the *rule of political mediocrity*, one may say that also Poland has suffered from that syndrome.[33] And most probably after the next elections this will not belong to the past either. It was irritating to listen earlier to the rhetoric of both the left-wing politicians, to mention the former Prime Ministers, such as *Józef Oleksy* or *Leszek Miller* and watch the thirst for power evident in the behaviour of the right-wing politicians, such as *Jan Rokita*, *Jarosław Kaczyński* or *Roman Giertych*. One may say, the elites are just like their society. However, it is also true that the attitudes of the latter may be shaped by the political visionaries who are able to overcome their obsessions. Megalomania and narcissism evident in the world of Polish politics show the mediocrity and not sagacity among the contemporary Polish politicians. In other words, the society created politicians guided by their own interests, or *mundane performers*, or simply, *party activists* and not politicians dealing with ideas, having the sense of their mission and willing to be submitted to the judgments of the public opinion.[34] The main aim of the former is their re-election.[35] This is to be achieved also by means of attacking the direct political opponents. One can mention here first the ruthless criticism of the Prime Minister of the centre-right government of 1997-2001, *Jerzy Buzek*, by *Leszek Miller*, the then leader of the left-wing parliamentary opposition, but also similar attacks by *Jarosław Kaczyński*, the leader of the Law and Justice party, against the left-wing President *Aleksander Kwaśniewski* in 2001-2005. This tendency is continued in a form of very strong critical expressions against the current Prime Minister *Donald Tusk* and other members of government, which are demonstrated by *Jarosław Kaczyński* (and his followers). This criticism is so intensive in regard to the tragic death of 96 Polish officials – including President *Lech Kaczyński* and his wife – in the air crash by Smolensk on 10 April 2010.[36] The PiS leader blames partly the current Prime Minister and his collaborators for the crash.

This form of wooing the voters has, however, unfavourable effects. Due to it the society's political passiveness is growing, which results in creating mediocre politicians who just want to survive their term of office without any disturbances and not to initiate pivotal actions. I presume, for that reason

32 See Higley, J.: *Elite Theory in Political Sociology*. http://theoriesofsocialchange.files.wordpress.com/2010/02/higley_elite_theory_ipsa_2008.pdf.

33 See *Die Zeit*, 27 February 2003.

34 See the opinion of Guy Sorman in *Rzeczpospolita*, 26-27 May 2012.

35 *Siedem grzechów poolityków* [Seven Sins of Politicians]. http://www.gazetakrakowska.pl/artykul/545521,siedem-grzechow-politykow,id,t.html#czytaj_dalej.

36 *Gazeta Olsztyńska*, 10 April 2012.

Prime Minister Tusk's ideas about the change of the voting system may still gain approval, although, as I have said above, he is hiding his true intentions.

VI. The conceptual inspirations for systemic reforms

Besides the idea of changing the voting system, mentioned above, the postulate of strengthening the role of the head of state considered as a particularly important element of the executive power remained another frequent topic of the public debate in recent years. It was put forward at the background of the more than two-year-long dispute between the former President *Lech Kaczyński* and the Prime Minister *Donald Tusk*. Its basic context was the foreign policy and the question who of these two persons has legally guaranteed higher competences.

The provisions of the Polish Constitution and the opinions of the specialists in the constitution law leave no doubt in this respect. In the Polish modified parliamentary-cabinet system of governance the foreign policy is implemented on the day-to-day basis mainly by the cabinet and the Prime Minister. According to the Polish constitutional law the President has no powers actively to conduct such policy; he cooperates with the Prime Minister and appropriate minister (Art. 133 of the Polish Constitution).[37] However, so far the Presidents of Poland, starting with *Lech Wałęsa*, elected in 1990, assumed the right to more active involvement in this respect. They derived this unjustified belief, among other things, from the fact that the head of state is chosen in direct elections. Hence, *Lech Wałęsa* included the Ministry of Foreign Affairs in so-called President's ministries, that is, ones *de nomine* submitted to his control. *Aleksander Kwaśniewski* actively took part in the foreign policy, however, unlike *Lech Wałęsa*, he had natural skills for promoting himself as a co-creator of the Polish foreign policy and did not get into conflicts with the then governments, even if they were ideologically alien to him, like the government of 1997-2001. The President's *Lech Kaczyński* intentions were oriented on following the Kwaśniewski's example, although he has never said so explicitly. However, his personality was very different from that of *Kwaśniewski* (and his political background was definitely weaker) and, I presume, he has not been able to equal his predecessor in that matter.

And this was the base of the conflict between President *Kaczyński* and Prime Minister *Tusk*, which has lasted until the tragic death of the first one. These were the two politicians' mutual negative emotions, which were additionally fuelled by the people from their close circles. It had negative con-

37 Kierończyk, P.: *Regulacja instytucji prezydenta w nowej Konstytucji RP* [The Regulation of the President's Institution in the New Constitution of the Republic of Poland], in: Szmyt (ed.): *op.cit.* 187.

sequences concerning the image of the Polish foreign policy. The repeated disputes concerned the decisions which of the politicians might to represent Poland at the European Union summits. Thus the opinions often expressed by the collaborators of the two politicians (and sometimes by them themselves) that the blame should be placed on the imprecise regulations in the Constitution which thus should be changed, are untrue. Those who voice such views reveal a lack of knowledge of the Polish constitutional law and also unwillingness to acknowledge that the negative emotions of the two politicians stimulated the disputes mostly.[38] The public was shocked by the fierceness of the arguments between those two. For the Polish citizens, it was strange, because they both came from the Solidarity movement, from the same political family, so to speak. And they could not sustain one another. The competition between conservative *Lech Kaczynski* and liberal *Donald Tusk* personified in fact conservative and liberal Poland.

In connection with these disputes the term of *cohabitation* is sometimes mentioned. It is a French political term and it can be implemented – in its pure political understanding – in the French semi-presidential case in particular.[39] It goes back to the system of the 5th French Republic and, I presume should not be misunderstood as a global term, at least not in the narrower political science meaning. It was first used after *Charles de Gaulle* came to power in order to illustrate the situation in which the President in the office represented another political option than the Prime Minister. It appeared in the context of a concrete system of government based on the strong position of the head of the state resulting from the Constitution. This term has been quite groundlessly transferred to the Polish reality in order to explain the reason for bad relations between the President and the Prime Minister. In fact, the situation in which the head of the state and the Prime Minister differ in their political views and their party affiliation is a daily routine in many European countries which does not give grounds to mutual animosity. And it certainly cannot be called cohabitation in its literal sense; it may be only treated as an overused colloquialism. The latter interpretation appears in Poland indeed.[40] Today, we do not have a cohabitation as it is perceived in the colloquial mode, as President *Bronislaw Komorowski* and Prime Minister *Tusk* are from the same party. Nevertheless, *Komorowski* shows he wants

38 *Prof. Konarski: spór prezydent-premier to spór charakterów* [Prof. Konarski: a Quarrel between President and Prime Minister Is a Quarrel of Characters].
http://www.money.pl/archiwum/wiadomosci_agencyjne/pap/artykul/prof;konarski;spor;prezydent-premier;to;spor;charakterow,87,0,377175.html.

39 Compare Elgie, R. – McMenamin I.: *Explaining the Onset of Cohabitation Under Semi-Presidentialism*. In: *Working Papers in International Studies*, 2010/12. passim.

40 See Buniewicz, N.: *Polish Presidential Election: The Perfect Storm*. http://www.cepa.org/ced/view.aspx?record_id=249.

to be more active in everyday politics. It is not unreasonable to speculate he might be interested in forming his own faction within his own (Tusk's) ruling Civic Platform.[41]

Besides the hypothesis of the emotional causes of the above mentioned fierce dispute between the President and the Prime Minister, in the Polish political discourse there occasionally appear suggestions concerning modification of the relations between the state authorities. They often postulate strengthening the agendas of the executive power. And so it is proposed to depart from the parliamentary-cabinet system in favour of the system of government closer to the American presidential system or the semi-presidential system existing now in France. And it is probably only the traditional Polish "Russophobia" which prevents using the President of modern Russia as a possible point of reference. It should be stressed here, that despite the Poles' antipathy to *Vladimir Putin* it is hard to negate the feasibility of maintaining a strong presidential power in the torn by internal conflicts Russia. On the other hand, however, maintaining such a system of government for a prolonged time often leads to the departure from the democratic values and practices. In the recent almost twenty years both *Boris Yeltsin* and also *Putin* succumbed to such a temptation.[42] Interestingly, the strong position of the President in Finland in the Twentieth century is completely disregarded as model for possible adoption in Polish circumstances. It seems that this special system of government, which for many years has been a synthesis of parliamentary-cabinet system – based on the liberal traditions and of constitutionally strong rank of the head of state – remains a good idea to be adopted in Poland. However, the absence of Finland in the current debate in Poland shows the scarcity of knowledge of its initiators about the Finnish system of government in its shape until the end of the Twentieth Century.[43]

Not getting into an extensive analysis of the systems of government in the United States of America, France or Finland until recently, one should mention here only their main features together with the historical and political contexts in which they were established.

It seems that the increasing rank of the President in the American system of government is not suitable to consider as a model possible to implement in the Polish conditions. This rank is the result of more than a two hundred year long tradition shaped in a specific political culture and within the boundaries of the constitutional law which rejected the parliamentary model

41 *Rzeczpospolita*, 13 June 2012.

42 Skrzypek, A.: *Druga smuta. Zarys dziejów Rosji, 1985-2004* [The Second Time of Troubles. An Outline of the History of Russia, 1985-2004]. Oficyna Wydawnicza ASPRA-JR, Warszawa, 2004. 119-129, 149-159 and passim.

43 *Constitution of Finland*. http://web.eduskunta.fi/Resource.phx/parliament/relatedinformation/constitution.htx.

as unwanted because typical of a former colonial metropolis. Guaranteeing autonomy to the respective types of power and, more broadly, the possibility for mutual blocking of their activities (and not their cooperation as it occurs in the European parliamentary tradition), the specific way of electing the head of the state, making the President the head of the state administration (instead of the Prime Minister, who simply does not exist) and also the President's right to the veto (including pocket veto as well): these features do not co-occur in any European state.[44] Due to the legal and political traditions existing in Europe they would be difficult to adopt in the Old World.

An attempt at combining selected features from America with some principles of the parliamentary-cabinet system is reflected by the system of government of modern France, i.e., still under the name of the 5th French Republic. The main position of the President has been legitimised, thus giving him the status of the highest exponent of the nation's will, stabiliser of the whole state and initiator of actions leading to its successful development. According to the Constitution he leads the sessions of the Council of Ministers, even though the function of the Prime Minister with the status of the leader of the government, but not its head, has been retained in France. The position of the French President is supported by his personal rights: to nominate the Prime Minister and to dissolve the National Assembly or even to decide whether projects of laws should be voted upon in a cross-national referendum. According to the Constitution, the French President has the right to shape the foreign policy. [45]

The last mentioned right has been a part of the duties of the Finnish President for many years either. In this system the head of the state did not have such power as in France. Despite that his traditionally demonstrated competencies combined with the features of the parliamentary-cabinet system have made the Finnish model of government unique and, what is more, effective for many years.[46] It should not be forgotten that it was fostered by the fact that the President is chosen for 6 years in general, but indirect, elections conducted for several ten years by the selected in this way electoral college. For more than twenty years, these elections have been general and direct. The

44 Compare *An Outline of American Government*. United States Information Agency, Washington D.C., 1990. 56-59; Osiński, J.: Prezydent Stanów Zjednoczonych Ameryki [President of the United States of America], in: Osiński, J. (ed.): *Prezydent w państwach współczesnych* [President in Contemporary States]. Oficyna Wydawnicza Szkoły Głównej Handlowej, Warszawa, 2000.

45 Compare Bokszczanin, I.: *Prezydent V Republiki Francuskiej* [President of the Fifth French Republic], in: Osiński (ed.): op. cit.; Stembrowicz, J.: *Systemy polityczne wybranych państw kapitalistycznych.* Francja [Political Systems of Selected Capitalistic States. France]. Wydawnictwo Uniwersytetu Warszawskiego, Warszawa, 1977. 78-91 and passim.

46 Compare Ciemniewski, K.: *Zasady ustroju politycznego Finlandii* [The Rules of the Government of Finland]. Bydgoskie Towarzystwo Naukowe, Bydgoszcz, 1971. 124-178; Osiński J.: Prezydent Republiki Finlandii [President of the Republic of Finland], in: Osiński (ed.): op. cit.

traditions of the active President's position go back to the time when Finland gained its independence and when the republican form of the state was ultimately adopted. Granting the President the position of a stabiliser of the whole political system resulted from the difficult experiences that country had in that period, namely the war between the Whites and Reds in 1918. For the former this was the war of independence; the latter called it a civil war.[47] It also caused instability of the then party system, which resulted in political and economic crises. The President's role understood in this way was more strengthened after the 2nd World War. It was stimulated by Finland's negative experiences of the war itself and its geopolitical location close to the Soviet Union. What is particularly stressed, however, when analysing the post-war period in the history of that state is the leading role played by two presidents. They were, consecutively, a conservative, *Juho Kusti Paasikivi* (in office: 1946-1956) and an agrarian, *Urho Kaleva Kekkonen* (in office: 1956-1981).[48] The dynamic presidential style they created, combined with defining the foreign policy by implementing the conception of active neutrality, confirmed the high rank of these two political personalities in the *cold war epoque*. It also imposed on their successors the obligation to maintain this effective tradition, but they were not as much successful as their predecessors and after the collapse of the Soviet Union not obliged to continue this sort of foreign policy either.

VII. The personal inspirations for systemic reforms

The postulates of strengthening the executive power in Poland appear mostly with reference to the head of state position. The politicians who put it forward represent the Polish right-wing spectrum in particular. They were, for example, *Roman Giertych*, *Lech Kaczyński* and *Jan Rokita*. Interestingly and surprisingly a proposal put forward already on November 21, 2009 by Prime Minister *Donald Tusk* referred rather to the strengthening of Prime Minister constitutional position and not a President.[49] It is also worth to remind here that in the recent two decades discussions on the justifiability of changing the system of government in Poland were also held in the academic *milieu*, especially among lawyers and political scientists. Such topics were often

47 Compare Jutikkala, E. – Pirinen, K.: *A History of Finland*. William Heinemann Ltd., London, 1979. 216 and further; Kirby, D. G.: *Finland in the Twentieth Century. A History and an Interpretation*. C. Hurst & Company, London, 1979. 40 and further.

48 See Korhonen, K. (ed.): *Urho Kekkonen. A Statesman for Peace*. William Heinemann Ltd., London, 1975. passim.

49 *Polacy nie chcą silnej władzy* [Poles Don't Want a Strong Power]. http://www.wprost.pl/ar/180359/Polacy-nie-chca-silnej-wladzy/.

dwelt on during the annual sessions held by the chairs of the constitutional law in Poland.[50]

At this point we come to the juxtaposition of the earlier diagnosis of the situation in Poland with the ideas of the politicians who from time to time call for its improvement. Observation of these European countries which made an attempt at strengthening the executive power either through the President or the Prime Minister leads us to an important conclusion. The prospects of success of such an experiment were not the outcome of the mere change of suitable legal regulations. In each case the *spiritus movens* was usually a concrete politician who had worked for his social prestige for many years and as a result gained the approval of the majority of the citizens to carry out the reforms. No matter what Giertych's, Kaczyński's, Rokita's or Tusk's intentions were, this seems to be the greatest weakness of their ideas. In modern Poland it is difficult to find politicians of stature similar to such Presidents as de *Gaulle*, *Paasikivi*, *Kekkonen* or *Vaclav Havel*. The first leader of the Solidarity movement, *Lech Wałęsa*, is no longer a prophet in his own country, although he has remained a symbol of the Polish transformation for the foreign observers.

Looking at other examples from abroad, one may also mention the unquestioned rank of *Kemal Atatürk* who effectively modernised the structures of the Turkish state after the 1st World War.[51] Among the Prime Ministers who enjoyed a similar charisma (although are also criticised now) it is worth to mention the German chancellor, *Konrad Adenauer* and from the later times, *Willy Brandt* or *Helmut Kohl*, Italian Prime Minister, *Alcide de Gasperi*,[52] the long term Prime Minister (and then twice the President) of Ireland, *Eamon de Valera*,[53] the former Prime Ministers of Great Britain: *Margaret Thatcher* and *Tony Blair*, or even the two Prime Ministers of Greece, *Konstantinos Karamanlis*[54] and *Andreas Papandreou*.[55]

50 Compare Gebethner, S. – Chruściak, R. (eds.): *Demokratyczne modele ustrojowe w rozwiązaniach konstytucyjnych* [Democratic Models of Governance in the Constitutional Solutions]. Dom Wydawniczy Elipsa, Warszawa, 1997. passim; Witkowski, Z. (ed.): *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* [The Coming into Force of the New Constitution of the Republic of Poland]. Towarzystwo Naukowe Organizacji i Kierownictwa, Toruń, 1998. passim.

51 Balfour, J. P. D. (Baron Kinross): *Atatürk: A Biography of Mustafa Kemal, Father of Modern Turkey*. William Morrow, New York 1965.

52 Compare De Maio, T.: *Alcide De Gasperi e Konrad Adenauer. Tra il superamento del passato e il processo di integrazione europea, 1945-1954* [Alcide de Gasperi and Konrad Adenauer. Between Overcoming the Past and the European Integration Process, 1945-1954]. G. Giappichelli Editore, Torino, 2004.; Craveri, P.: De Gasperi. Il Mulino, Bologna, 2006.

53 Compare Coogan, T. P.: *De Valera: Long Fellow, Long Shadow*. Arrow Books, London et al., 1995.; Ferriter, D.: *Judging Dev. A Reassessment of the Life and Legacy of Eamon de Valera*. Royal Irish Academy, Dublin, 2007.

54 *Konstantinos Karamanlis*. http://www.britannica.com/EBchecked/topic/312125/Konstantinos-Karamanlis.

55 *Andreas Papandreou*. http://www.britannica.com/EBchecked/topic/441874/Andreas-Papandreou.

In contemporary Poland it would be hard to find a potential performer of such a mission, regardless of the fact that, e.g., *de Gaulle* was often remembered as narcissistic or egocentric politician and also as manipulating the provisions of the Constitution.[56] Despite that almost no one denies the influence of these and other, mentioned earlier, politicians, on shaping in their countries an effective model of government, I personally believe that at present there are only three persons with real charisma on the global scale. They are: *i)* the symbol of peaceful resistance against the military junta in Burma (Myanmar), *Aung San Suu Kyi*; *ii)* the symbol of fight against Apartheid in the Republic of South Africa and then its first non-white President, *Nelson Mandela* and *iii)* the Tibetan leader, *Dalai Lama*. On the one hand, we need someone similar for Poland, but on the other one we do not like anyone too long. *Pope John Paul II* is still existing popularity is an exception which confirms the above rule.

VIII. Conclusion

There has arisen an important dilemma. Should we, in the existing atmosphere of criticism of political leadership and of the state structures in Poland, focus on improving them, not changing the current system of government? If so then it would be necessary to ascribe the notion of the *rule of law* a rank possible to verify in practice instead of using it as a spell to charm the imperfect reality. This would greatly increase the psychical comfort of the majority of the citizens who would feel that the state respects the laws it has created. Or perhaps an experiment should be made in order to improve the quality of the government by a constitutional strengthening the President (or at least the Prime Minister) and then consistent observing these changes? This is a very serious dilemma exactly because of the doubts as to who should carry it out. At the moment there are no candidates for the part of the visionary politician *having the approval of the large majority of the society* [underlined by the author] who could improve significantly the state effectiveness and prestige. I do not think it might be the current President, *Bronisław Komorowski* (despite his popularity as it is shown in current – late spring 2013 – polls), but neither the Prime Minister, *Donald Tusk*.[57] I do not see such potential in *Jarosław Kaczyński* either, in spite of his current political activeness.

56 Compare Bielecki, R.: *Co to jest Gaullizm?* [Gaullisme – What Is It?]. Wiedza Powszechna, Warszawa, 1978. 125-135 and passim; Gerhard, J.: Charles de Gaulle. *Książka i Wiedza*, Vol. 2 (1972) 186-190.
57 See *pl.wolności polityka [pl.Freedom Politics].* http://www.kubekpolityczny.plwolnosci.pl/a/1529/Slaby-Tusk-ciagnie-Platforme-w-dol.

It has to be acknowledged that the idea of changing the system of government put forward by *Jan Rokita* in January 2005 (then from Civic Platform) aiming at the radical strengthening the Prime Minister's position seemed then very inspiring cognitively, of course, on condition that Rokita's main intention was to lay the foundations for a truly effective model of government, perhaps bringing Poland closer to the German chancellor's system and not only to create greater support for his then party in the coming parliamentary elections. This idea also showed Rokita's intentions and ambitions as the *in spe* Prime Minister, whom he did not become and ultimately withdrew from political activeness in 2007.[58]

Thus the aspiring Polish (and not only) both former and present politicians should heed the immortal dictum of *John Emerich Edward Dalberg Acton*, better known as *Lord Acton*: "[a]ll power tends to corrupt and absolute power corrupts absolutely."[59] This motto should be adopted especially by those participants in Polish politics who call for extraordinary steps in the process of changing the government thus ignoring and/or undermining democratic procedures.[60] The impatience in politics has been frequently a sign of overwhelming ambitions and a lack of individual modesty. It is unfortunately forgotten by many those who aspire for power.

58 *Politycy o decyzjach Nelly i Jana Rokity* [Politicians on Decisions of Nelly and Jan Rokita]. http://www.money.pl/archiwum/wiadomosci_agencyjne/iar/artykul/politycy;o;decyzjach;nelly;i;jana;rokity,111,0,265583.html.

59 *Power* (Excerpted from *How to Argue and Win Every Time* by Gerry Spence). http://www.mainemediaresources.com/mpl_bookquotes.htm.

60 Compare *Tusk: nie zgodzę się na propozycje związkowców* [Tusk: I Don't Agree with the Proposals of Trade Unions]. http://www.polskieradio.pl/42/259/Artykul/830662,Tusk-nie-zgodze-sie-na-propozycje-zwiazkowcow; *Związkowcy po expose: Tusk to kłamca…*, [Trade Unions after expose: Tusk Is a Liar…,]. http://www.wzz.org.pl/posty/zwiazkowcy-po-expose:-tusk-to-klamca,-po-to-partia-obciachu.-trzeba-budowac-ruch-spolecznego-oporu-przeciwko-nim.