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POLITICAL TRANSFORMATION IN CENTRAL AND EASTERN EUROPE

TWENTY YEARS OF EXPERIENCE

JACEK WOJNICKI *

1.

Twenty years have passed since the beginning of the fundamental and thorough system transformations in Central Europe, Eastern Europe and the Balkan countries. After the initial euphoria, the difficulties of the transformation period came, while the road to democratic and market system became more and more difficult and filled with social sacrifice. At the beginning of the 1990s, the study of political science optimistically presumed that there is one model of post-communist transformation, and that the consolidation was a matter of time, a short period of time, as we thought. However, a closer look at the transformations in the discussed region of Europe verified this optimistic assumption. Today, we can say it without doubt that there is not any common transformation model in Central and Eastern Europe. The course of transformation depends on many notions of inner and outer nature. We should mention these aspects: possession (or the lack of possession) of tradition of own statehood, possession of democratic or authoritarian traditions; a degree to which there has been a relationship with Western civilization and a degree of civilization development.

In the borders of vast Central and Eastern Europe it seems relevant to single out three regions – the first one embraces Central Europe (Poland, Czech Republic, Slovakia, Hungary, supposedly, the area of the former GDR);[1] the second one encloses the Baltic countries (Lithuania, Latvia, Estonia) and the third one embraces the Balkans (Romania, Bulgaria, Yugoslavia and Albany).[2] The given distinction seems relevant because it gathers the most important aspects which differentiate countries of Central and Eastern Europe, namely: the lack of individual statehood in the years of 1940-1991 and the status of union republic within the Soviet Union, and quite a high degree of social-economic development (Baltic countries).[3] As *Ralf Dahrendorf* noticed: Every country in Central and Eastern Europe

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[1] A detailed analysis of the system transformations in the Central European countries, see *Demokracje Europy Środkowo-Wschodniej w perspektywie porównawczej*, [eds.: Antoszewski, A. – Herbut, R.). Wrocław, 1997.; *Państwa Wyszehradzkie. Systemy polityczne, gospodarka, współpraca* (ed.: Szczepaniak, M.). Poznań, 1996.; A. Wolff-Powęska, *Oswojona rewolucja.* Poznań, 1998.; Szczepaniak, M. – Zyborowicz, S.: *Przebudowa ustroju politycznego na Węgrzech i w Czechosłowacji.* Poznań 1995; Bankowicz, M.: *Systemy władzy państwowej Czechosłowacji I Czech.* Kraków, 1998.; Góralczyk, B.: *Węgry. Transformacja pokomunistyczna. 1990-2003.* Warszawa, 2003.; *Wewnętrzno-polityczne i międzynarodowe aspekty jedności Niemiec* (ed.: Wojtaszczyk, K. A.). Warszawa, 1991.

[2] Cf. Holmes, L.: *Post-Communism. An Introduction*, Durham 1997. 65. Swain, N.: *Eastern Europe since 1945.* Palgrave, 1998.

[3] A detailed analysis of system transformations in the Baltic countries, see Zieliński, J.: *Instytucjonalizacja przemian ustrojowych na Litwie, w Łotwie i w Estonii.* Warszawa, 2004.

has its own history and political culture. One of the joys of the year 1989 is a new discovery of these differences.[4]

On the other hand, Central European countries are characterized by a long tradition of individual statehood (with the exceptional position of Slovakia), a high degree of social-economic development, a democratic tradition reaching back to the Noble Republic in Poland, at the time of the Austro-Hungarian Empire and later First Republic (1918-1938) in the Czech Republic, while in Hungary, it can be traced back to the Austro-Hungarian Empire.[5] Certain setback in the functioning of the democratic system constitutes a common characteristic of the first and second group countries as the period of the 1920s brought about a breakage in the liberal and democratic institution, as well as in the wave of authoritarian regimes.[6]

An honourable exception among the discussed group of countries is Czechoslovakia, in which parliament systems survived the whole interwar period. As *Timothy Garton Ash* emphasizes,[7] the term 'Central Europe' (or Central and Eastern Europe) only played a useful role because it reminded American or British people that East Berlin, Prague or Budapest were in slightly different positions than Kiev or Vladivostok, and that Siberia did not stand and leg behind the Berlin Wall.[8] What is more, *Jan Przewłocki*[9] draws the attention to the fact that during the centuries, the term 'Central Europe1 has undergone great changes regarding its political perspective. After 1945, Europe was divided to West and East. In international politics, only after the dissolution of the Soviet Union and the whole block of communist states, there was a comeback to the term 'Central Europe' by relating it to the countries of the Visegrad Group: Poland, Czech Republic, Slovakia and Hungary.

2.

The term *'Central Europe'* (German: *Mitteleuropa*) was created at the beginning of the 20th century and was used in the practical political and economic life of Germany. January, 1904 can be set as the symbolic date when the Central European Association, which aimed at the economic integration of Germany and the Austro-Hungarian Empire (with exceptional enlarging to Switzerland and Benelux) under German command, was organized in Europe. On the other hand, in 1915 *Friedrich Neumann* published a political essay entitled *Mitteleuropa*, which presented the intention of creating a German sphere of influence in this part of

[4] Cf. Dahrendorf, R.: *Rozważania nad rewolucją w Europie*. Warszawa, 1991. 15.

[5] *Jerzy Tomaszewski* places former areas of Habsburg Monarchy in the Central Europe, while former territories of Ottoman Empire in South Eastern Europe (Romania, Bulgaria, Yugoslavia and Albany). See Tomaszewski, J.: *Europa Środkowa i Południowo-Wschodnia: cechy charakterystyczne i granice regionu,* „Ekonomia", z. 36, 1976. Stańczyk, J.: *Europa Środkowa- kryteria wyodrębnienia i cechy regionu*, „Studia Polityczne", No. 12, Warszawa, 2001. 197.

[6] Cf. *Dictatorships in East-Central Europe 1918-1939* (ed.: Żarnowski, J.). Wrocław-Warszawa-Kraków-Gdańsk-Łodź, 1983.

[7] Cf. Ash, T. G.: Pomimo i wbrew. Eseje o Europie Środkowej. London, 1990. 169.

[8] *Zbigniew Brzeziński* points the attention to the function of the term in defining the given European region in international relations by emphasizing that in the end of 1980s, when the Soviet Union found itself in a weaker position, the role of Eastern Europe countries became more and more important. These countries defined themselves as Central Europe to point the distance in relations to the Soviet Union. See Brzeziński, Z.: *Powrót do Europy Środkowej*, „Aneks", 1988. No. 49. 9.

[9] See Przewłocki, J.: *Wstęp*, [w:] *Europa Środkowa jako obszar interesów regionalnych* (ed.: Przewłocki, J.). Katowice, 1999. 7.

Europe.[10] After the German defeat in the First World War, the term Central Europe has gained a new meaning - it meant integration aims on behalf of newly created countries (Little Entente, Isthmus).[11]

Milan Kundera points out to another aspect of defining Central Europe.[12] According to Kundera, borders are not markers of "Central Europeanness" (as they are unauthentic, forced by invasions and won battles). These markers are constituted by common fundamental situations which more and more group the nations in the notional and changeable borders, inside which there is one unchangeable memory, the same experience and the common tradition. Following the same path, *George Urban* draws the attention to the fact that we can differentiate Central European mentality, which appears within the borders of the former Habsburg Empire and which encloses: Czechoslovakia, Hungary, Austria, a part of Poland (Galicia), a part of Yugoslavia (Slovenia and Croatia), as well as a part of Romania (Transylvania). This mentality possesses already the mentioned cultural background and historic identity, or even identity regarding the taste, lifestyle, literary style and poetic depiction. On the other hand, *Bronisław Geremek* emphasizes that Central European identity can be characterized as a clash of historic past of life on the suburbs of the West and an obsessive thinking about disconnecting with this civilization along with the current aim to fuse with the West, namely, with the communal European construction.[13]

3.

The third group of Central Eastern European countries consists of the Balkans.[14] In geographic terms – as *Mieczysław Tanty*[15] mentions – the given area encompasses the Balkan Peninsula with the joining islands of the Aegean, Ionian and Adriatic Sea. Turkish traits: Bosporus and Dardanelles create a border between the Balkans and Asia, while their Northern border constitutes of the rivers Sawa and a Southern part of Danube till the Black Sea, which is its Eastern boundary. Nevertheless, in the historic sense, the area of the Balkans unites Romania, Bulgaria, Greece, Albania and Yugoslavia (and the countries created after its dissolution) as well as Turkey. It is an area of generally weaker pace of social-economic development, of a shorter democratic tradition than in Central and Eastern Europe. Another common characteristic is a few centuries period of Ottoman Empire's rule, ended by the process of progressive superseding of Turkish power from the European continent (beginning from the second half of the 19th century (Romania, Bulgaria, Serbia) until the First World War (Albania, Macedonia).[16] As emphasised by Mieczysław Tanty,[17]

[10] See Halecki, O.: *Historia Europy. Jej granice i podziały*, Lublin, 2002. 121. In his paper written in the half of the 20th century, Polish historian shows the reason for individualisation of two Central European regions- The West, German part (Austria) and the East part- non-German one. See *ibid.* 128.

[11] See Podraza, A.: *Europa Środkowa. Zakres przestrzenny i historia regionu.* „Prace Komisji Środkowoeuropejskiej", Kraków, 1993. 23.

[12] See Kundera, M.: *Zachód porwany albo tragedia Europy Środkowej*, „Zeszyty Literackie", No. 1984.

[13] See Geremek, B.: *Tożsamość Europy Środkowej*, „Przegląd Polityczny", No. 26, 1994. 52.

[14] Tomasz Wituch points the attention to term „The Balkans" in contemporary European languages which define the term: i) as Bulgarian mountain passage, ii) to define the Peninsula and iii) to speak about European region which has a very specific historic, ethnic, political and cultural background. See Wituch, T.: *Bałkany –szkic definicji*, „Dzieje Najnowsze", No. 2, 1998. 135.

[15] Tanty, M.: Bałkany w XX wieku. Dzieje polityczne. Warszawa, 2003. 8

[16] Wituch, T.: *Bałkany w Europie XX wieku*, „Dzieje Najnowsze", No. 2, 1998.; Tanty: *Bałkany w XX wieku…,* 8.

the Turkish captivity significantly delayed the economic-social and cultural development of the Balkan nations. However, the degree of development in the each country was very different. The first nations to start the process of capitalism were the Greeks, then the Romans, the Serbs and the Bulgarians. The greatest underdevelopment was observed in the hilly Albania and Macedonia (at the beginning of the 20th century patriarchal relations still remained there).

Barbara Jelavich, an American historian of slavic ancestry draws the attention to a differentiation of historic roots of the Balkans.[18] The Balkan Peninsula placed at the junction of Europe, Africa and Asia, gathers parts of ancient Greek, Roman, Byzantine, Ottoman and Habsburg territories. During the centuries it has been influenced by various imperial tendencies and competing ideologies. In the different historic periods the Balkan territory had main political and cultural borders: between the Byzantine Empire and the Eastern Roman Empire; between Islam and Christianity, between Orthodox Church and Catholicism, while, after 1945 between two competitive political-army blocks (NATO and the Warsaw Pact).[19]

Božidar Jezernik, a Slovak ethnologist and anthropologist of culture hits the spot when he says that a popular image of the Balkans showed the region as „the European epicentre of storms" and „the Wild Europe".[20] As a result, the Balkans was depicted as the worse part of Europe. While the European countries were considered to be active, industrialized, developed and modern, the Balkan countries were described as passive, rural, underdeveloped, stuck in stagnation, with a tendency of despotism and being far from progression. The given notion is developed and thoroughly analysed by *Maria Todorova* who emphasizes that the term „balkanization" began to refer not only to comminuting divisions of greater political organisms, but it became a synonym of a return to tribal reality, underdevelopment and barbarity.[21] The Balkans was permanently defined as the „Other Europe". It has largely been regarded, also not multilaterally, that the region's inhabitants do not desire to accept the norms common for the civilized world.

Attila Ágh shows a differentiation of the Central Eastern European area and the relevance of distinction of Central Europe and the Balkans.[22] Central Europe is a region closer to Western Europe with regards to civilization (through cultural, religious tradition); at least because since the 16th century it has been treated as a semi-suburban part of the West. This fact was originated from the historic tradition, a fact of belonging to the Habsburg Monarchy. In Central Europe economic, social and political development progressed earlier than in the Balkans (industrialization took place in the first half of 19th century). The self-identification of the region, as Central Europe played a significant role in the process of peaceful and negotiable system transformations after 1989, was additionally reflected in the creation of regional organizations (Visegrad Group and CEFTA), which were important in the process of the European integration. However, the basic difference was that in Central Europe there is a process of *re-democratization* (the region had its democratic tradition and institutions before), while in the Balkans there is a process of *democratization* (generally, the first serious attempt to form democratic institutions).

[17] Tanty, M.: *Konflikty bałkańskie*. Warszawa, 1968. 8.
[18] See Jelavich, B.: Historia Bałkanów. Wiek XVIII i XIX, T.1, Kraków, 2005. 9.
[19] It should be mentioned that two countries, Albania (since 1961) and Yugoslavia (since 1948) constituted a buffer background as they did not belong to any of the mentioned blocks.
[20] Jezernik, B.: Dzika Europa. Balkany w oczach zachodnich podróżników. Kraków, 2007. VIII-IX
[21] Todorova, M.: *Bałkany wyobrażone*. Wołowiec, 2008. 19.
[22] Ágh, Attila: *The Politics of Central Europe*. London, 1998. 4.

4.

Generally, a few possible scenarios of political changes can be pointed out in Central and Eastern European countries. The first one is described as an escape forward or as a historic compromise.[23] It assumed the takeover of power by reform fractions, progressive liberalization of the political system at the end of the 1980s, half-legal functioning of independent groupings and opposition *protoparties*. A similar scenario took place in three countries of Central Europe: Poland, Hungary and Slovenia. In 1989, representatives of the communist government and of opposition met to discuss how to democratize the political system. The talks were of formal character in Poland (round table talks) and Hungary, while less formal in Slovenia (as republic of Yugoslavia). The following changes were of elite nature, the political contract was discussed on the level of the state-party leadership and the elite of opposition groupings (in Poland the main partner of the negotiations, NSZZ Solidarność was rather understood as social-political movement than a syndicalist camp). We should add that in Hungary there was a certain modification of the contract as a result of a referendum which took place on 26th November, 1989. It was then decided that presidential elections would happen only after the parliament elections. It is also interesting to observe that negotiations took place in a certain sequence - first Poland (February-April 1989), then Hungary (June-September 1989), and finally, Slovenia (as republic of Yugoslavia) (September 1989).

Judging from a certain perspective, certain points of the Polish contract (ex. contract elections) may seem a little radical in comparison with the Hungarian or the Slovenian decisions but we have to remember who began the sequence of events.

The second scenario took place in two other countries of Central Europe, namely, the German Democratic Republic and Czechoslovakia. These countries had to deal with conservative (or concrete) party leadership, which were much against any political democratic transformation of the contemporary social-political system. What is more, the two countries were the richest communist states which had largely stable economic situation at the end of the 1980s. One of the members of the Czech party leaders used to say that as long as there was sausage and beer, socialism in Czechoslovakia was secure. The opposition was less organized as independent activity was more repressed than in the first group of countries. Under the influence of events in Poland and Hungary a political revival happened first in GDR (September-October), and then in Czechoslovakia. The unwillingness of the party leaders to an open dialogue resulted in social discontent – Monday Demonstration in Dresden on 7th October, 1989 in Berlin, and the Velvet Revolution on 17th November, 1989 in Prague. Communist elites were not prepared for a scenario of radical political changes. As a result of explosion of social discontent, the political initiative was passed to the opposition which wasted no time to organize its own structures (OF in Czechoslovakia, VPN in Slovakia). However, in the GDR, the sequence of events was different as there transformation happened through the union with the second German country.[24]

[23] The author refers to the models proposed by *Jerzy Wiatr*, nevertheless somehow modified See Wiatr, J.: *Socjologia wielkiej przemiany*. Warszawa, 1999.; the same author: *Europa pokomunistyczna*. Warszawa, 2006.

[24] Serczyk, J.: *Podzielone Niemcy*. Toruń, 1994.; *Zjednoczenie Niemiec. Aspekty politologiczno-ekonomiczno-prawne* (eds.: Janicki, L. – Koszel, B. – Wilczyński, W.). Poznań, 1996.; Wolle, S.: *Wspaniały świat dyktatury*. Warszawa, 2003.; Jaskułowski, T.: *Pokojowa rewolucja w NRD w latach 1989-1990. Geneza-przebieg-efekty*.

On the other hand, in the Balkan countries the strength of communist groupings was much greater, the opposition was less organized, and the democratic tradition was less significant than in the countries of Central Europe. In general terms, we can distinguish a Balkan model of a controlled opening of the political system (Bulgaria, Romania, Albania, Serbia and other Yugoslavian republics with the exception of Croatia). The initiative of political changes appeared under the influence of events in Central Europe, while the course of political transformation remained under the control of the party. In Yugoslavia, we can observe a model of dissolution of the federal state, the reason for political changes was not democratization but the creation of individual state organisms. Romania, where the palace revolution caused by the communist elite took place, also belongs to this model of changes. Nevertheless, Croatia in the first part of the transformations reminded of a model of controlled opening, however, the national factor strongly influenced the political transformation, which was emphasized by the massive support of the programme of HDZ, a camp of *Franjo Tudjman*.[25]

5.

The crucial question asked by politicians and constitutionalists of the post-communist countries was whether to lay the fundaments of a new governmental system on parliamentary system or on strong presidential power. *Andrzej Antoszewski* wisely noticed that although, the theoretic discussion focused on advantages and disadvantages of the pure parliamentary system or presidential system, political controversy, in fact, focused on one aspect only - the position of the president against other decision groups – especially, against the government and the parliament.[26] In general, politicians and legislators could refer to three kinds of solution: the one ruling in stable democratic states (the Fifth French Republic, chancellor system of FRG); the one functioning in the post-communist period (the First Republic of Czechoslovakia, the Second Polish Republic, perhaps pre-war institutions of Romania or Hungary) and the one which had been worked out during the communist rule (the system of economic self-government in the case of Slovenian State Council; institution of a president in Romania and Yugoslavia; the works of parliamentary committees in Poland and Hungary).[27]

Historic experience in the case of the discussed countries could not have a decisive role. It is enough to say that only the Checks, Slovaks, Slovenians, Croatians and Hungarians could refer to the idea of parliamentary system of the Austro-Hungarian Empire. Parliamentary experiences of the other Yugoslavian republics were less advanced (ex. in Montenegro the parliament was organized in 1905, in Macedonia even later). Long traditions of parliamentary system were rooted in Poland. The political transformation was

Wroclaw, 2007.; Bankowicz, M.: *Zlikwidowane państwo*. Kraków, 2003.; Wolchik, S. L.: *Czechoslovakia in transition: Politics, Economics and Society*. London and New York, 1991.

[25] *Politics, power and the struggle* for democracy in South-East Europe (eds.: Dawisha, K. – Parrott, B.). Cambridge, 1997.; Roper, S.: *Romania: the unfinished revolution*. Amsterdam, 2000.; Klejn, Z.: *Bułgaria. Szkice do dziejów najnowszych*. Pultusk, 2005.

[26] See Antoszewski, A.: Forma rządu, Demokracje Europy Środkowo-Wschodniej w perspektywie porównawczej. Wroclaw, 1997. 58.

[27] Wyrzykowski, M.: *Recepcja w prawie publicznym – tendencje rozwojowe konstytucjonalizmu w Europie Środkowej i Wschodniej*, „Państwo i Prawo", No. 11. 1992.; Sokolewicz, W.: Demokracja, rządy prawa i konstytucyjność w postsocjalistycznym społeczeństwie Europy Wschodniej. In: *Zagadnienia prawa konstytucyjnego. Księga pamiątkowa ku czci Profesora Tadeusza Szymczaka*. Łódź, 1994.

set and conditioned through the economic breakdown, reviving national tensions. The dangers against new democratic institutions influenced politicians to seek a governmental model which would rely on a strong executive system.[28] What is more, deep traditions of an individual's[29] great power remained in the Balkan countries.

In general, the most commonly accepted model was a republican one, influences of royalists were not strong enough in any of the discussed post-communist countries. Balkan and Central European countries introduced a republican form of government. Among the newly created states from the Yugoslavian Federation, only the Republic of Macedonia reflected tendencies to introduce monarchy, so did Serbia, only to a much lesser degree. These tendencies were reflected in the claims to return to monarchy, made by some of the important political groupings (ex. SPO and SRS in Serbia).

Post-Yugoslavian republics introduced various political models. It was not common to refer to solutions offered by a federal system because of the belief that federal solutions were unreliable and because of the negative relation to a common state in some republics (especially Slovenia, Croatia). On the other hand, Albania, which did not have a long state or democratic tradition (the first four years before 1924), had to use foreign solutions by adjusting them to its inner reality.

At the beginning of the 1990s, legislators of the post-Yugoslavian states had to face the necessity of making the choice of governmental system which would be adequate to the political tradition and to the outer situation of the country creation (military conflict in Croatia, Bosnia and Herzegovina). We also have to mention dominative tendencies of the ruling elites (strong personalities such as S. Milosevic in Serbia).

Among the countries of Eastern Europe a parliamentary-cabinet model dominated, often modified by the institutions which enforced the executive power (constructive vote against government in Hungary and Slovenia). To weaken the position of the head of the state in comparison to parliament was chosen by the Czechs, Slovaks, Hungarians and Slovenians.[30] Modification, which took place in the case of Slovakia (since 1998) and Slovenia, was a direct election of the head of state. *Jerzy Wiatr*[31] emphasizes that the system of executive power in Slovenia relies on two rules: giving executive power to the government and giving the parliament the power to accept or deny the government.

6.

Generally speaking, we can distinguish parliamentary-cabinet republics (Bulgaria, Macedonia and Croatia since the year 2000) and the republics with an active presidential role (Romania, Croatia till the year 2000, Albany till 1997) among the Balkan states. The real position of the head of the state results from the constitutional practice and regulations of fundamental

[28] Cf., Lesage, M.: Le rôle du chef de l'État en période de transition. *Revue d'Etudes Comparatives Est-Ouest*, Vol. 23 1992) No. 4.

[29] See Jelavich, B.: *Historia Bałkanów, Wiek XX*, Kraków, 2005.; Tanty, M.: *Bałkany w XX wieku. Dzieje polityczne.* Warszawa, 2003.; Koseski, A.: *W bałkańskim tyglu.* Pułtusk, 2002.

[30] Zawadzka, B.: Zmiany systemu politycznego w ustawodawstwie państw Europy Środkowej i Wschodniej. Warszawa, 1992.; Zagadnienia konstytucjonalizmu krajów Europy Środkowoschodniej (ed.: Mołdawa, T.). Warszawa, 2003.; Skotnicki, K.: Systemy rządów parlamentarnych w wybranych państwach Europy Środkowej (Czechy, Słowacja, Węgry). Konstytucyjne systemy rządów (ed.: Domagała, M.). Warszawa, 1997.; Sokolewicz, W.: Nowa rola konstytucji w postsocjalistycznych państwach Europy. „Państwo i Prawo", No. 10, 2000.

[31] See J. Wiatr, Słowenia – przykład udanej transformacji. Warszawa, 1998. 19.

acts (Serbia in the time of S. Milosevic, similarly in the time of F. Tudjman's presidency in Croatia). The head of the state may play the role of a mediator in the political system, or it can be the main organ of the governmental power. It should strongly be emphasized that after the alternation of power in Croatia, which happened in 2000, there was a formal return to the parliamentary-cabinet system, completed by an adequate novelization of the Constitution. Also, the case of Bulgaria places the mentioned governmental system model in the group of parliamentary countries, rationalized in relation to a classic model.

The most significant difference in comparison with the classic parliamentary-cabinet model is a choice of president in a general election.[32] In the case of the already mentioned Balkan countries, there has been a concentration of decisive processes on the line of parliament-cabinet within the weak political activity of the head of the state. Similar political solutions were introduced in Macedonia. The president has a function of a mediator and he is the exponent of the nation's unity.[33] The powers of the head of the state are described in a manner which is characteristic of the parliamentary-cabinet system (lack of legislative power, inability to manage a referendum). In the case of the Slovenian president, she/he has no right to vote against a legislative act.[34]

In case of shaping the political scene, we can generally distinguish two scenarios. The first one characterizes the Central European countries, while the second one is closer to the Balkan countries. In the first model, political groupings started to form themselves at the end of the 1980s (Hungary, Slovenia) or just after the democratic break (the casus of Czechoslovakia and GDR). In the 1990 election post-communist camps and broad civil movements' coalitions (Czechoslovakia, Slovakia); or already formed political parties fought (Hungary, Slovenia and GDR). On the other hand, in the Balkan countries, rejection of the mono-party took some time (generally in 1990, in the case of Albania even in 1991). Only in the case of Bulgaria functioned the broad coalition of the political movements (the Union of Democratic Powers – SDS), while in Romania, coalition of democratic groupings (Democratic Convention of Romania – CDR) was formed only in the second phase of transformations (after 1992). In other countries there was a rivalry between political groups – in contrast with strong post-communist ones there were traditional (liberal, conservative, agrarian), national (Croatia Serbia, Montenegro, Bosnia, Macedonia) and ethnic (Croatia, Serbia, Bosnia, Macedonia) groups. In general, the first line of conflict in the political scene in Central Europe was a matter of the past. Additionally, there were national conflicts in the perspective of creating new state organisms[35] in the Balkan states.

[32] See Gebethner, S.: Modele systemów rządów a ich regulacja konstytucyjna, Demokratyczne modele ustrojowe w rozwiązaniach ustrojowych. Warszawa 1997. 91.; Szymanek, J.: Modele systemów rządów - wstęp do analizy porównawczej. „Studia Prawnicze", No. 3, 2005.

[33] A manner in which *Stipe Mesić* (Croatia) and *Kiro Gligorova* (Macedonia) served their presidency had a significant role. It was a conciliatory and not a confrontational style.

[34] In a Slovenian solution the right to vote against legislative acts belongs to the Country Council, the second chamber of the parliament, which represents local and trade self-governments and which is chosen in indirect elections.

[35] Antoszewski, A.: Partie polityczne Europy Środkowej i Wschodniej. Poznań-Wrocław, 2005.; Lewis, P. G.: Political parties in post-Communist Eastern Europe. London and New York, 2000.; New political parties of Eastern Europe and the Soviet Union (ed.: Szajkowski, B.). Harlow, Essex, 1991.; Party Formation in East-Central Europe (ed.: Wightman, G.). Edward Elgar, 1995., Politické strany ve střední a východní Evropé (eds.: Fiala, P. – Holzer, J. – Strmiska, M.). Brno, 2002.

7.

While discussing the matters of stabilization of party systems in this region of Europe we have to notice that diversification in the formation of a political scene has no fundamental influence on achieving consolidation of the party systems. In his list of the most stable party systems in 2006, *Andrzej Antoszewski* mentions: Albania, Romania (election of 1994) and Hungary (as an example of evolution towards a two-block balance). On the one hand, moderate multi-party system characterized the Czech Republic. On the other hand, Serbia, Croatia and Slovenia are the examples of fighting the domination of one group with a balanced multi-party system. Unbalanced system functioned in Bulgaria and Albania (till 2001), while non-stabilized ones existed in Poland and Romania (till 2004).[36] The factors taken into consideration in constructing the given-above structural scheme were: amount of parties, their size, their degree of representation, the degree of support for the anti-system groups and the durability of models for creation of cabinet coalitions.

The important factor which differentiates political scenes in the so-called 'Young Democracies' is new groups which gain positions in the legislative institutions, or sometimes create governments by winning parliamentary elections. In the first context we should mention Palikot's Movement (Poland (2011), Public Affairs – VV in The Check Republic (2010), Solidarity and Freedom – SaS in Slovakia (2010), Politics Can Be Better in Hungary – LMP (2010). The second case can be exemplified by Civilians for European Bulgaria – GERB (2009) and Positive Slovenia – PS (2011).

[36] Antoszewski, A.: Systemy partyjne Europy Środkowej i Wschodniej. Czechy, Polska, Ukraina. Partie i systemy partyjne. Stan i perspektywy (eds.: Kowalczyk, K. - Tomczak, Ł.). Toruń, 2007. 24.

ROLE OF THE HOLY CROWN DOCTRINE AND 'HISTORICAL CONSTITUTION' IN THE HUNGARIAN CONSTITUTIONALISM

KATALIN EGRESI *

The Kingdom of Hungary did not have a written constitution until 1945 but after the World War II radical changes took place in our constitutional history as in 1945 the form of the government became republic instead of kingdom, and then in 1946 a temporary „little constitution" was adopted. Unfortunately, this democratic framework did not last for long. In 1949, with the first written constitution, based on the Soviet example of 1936, Hungary became a country of some kind of dictatorship of the proletariat (people's republic, under the pressure of the Soviet Union and the Red Army). During this period citizens' rights only had ideological content. The 1949 Constitution received new content in 1989, thus, it can be regarded as the foundation of the democratic state setting, which, after the first free election in 1990 was rewrote by political forces in more than fifty instances.

Between 1990 and 2010, the necessity of the adoption of a formally new constitution was carried out from time to time and with varying intensity. Finally, the adoption of the new constitution was based on both political and legal reasons. Its legal justification was that the text of the Constitution did not establish a new political system and the constitutional preamble referred to the temporary situation. The political viewpoint regarding the necessity of the new constitution was the economic-moral and political crisis that began from the left-wing government. As it is well known, the new Hungarian Fundamental Law was accepted by two-third government majority in the Hungarian Parliament. In this changing situation constitutional theories dealing with the state behind the formal text of these constitutions shall be found to be interesting and influential.

1. Meanings of 'historical constitution' and the holy crown doctrine

For centuries the Hungarian constitutionalism was based on the spirit of 'historical constitution' which is organized around the so-called *Holy Crown doctrine*, which, from historical viewpoint, signified the composition of different organic laws as for example:

- *Organic Laws* of King Stephen I;
- *Aranybulla* (Golden Bull) – adopted by the noble-assembly in 1222; declared all nobles' rights and privileges against Hungarian Kings and feudal society;
- *Tripartitum*: written by nobleman *István Werbőczy* in 1514 in legal Latin language and is considered to be a summary of ancient Hungarian constitutional practice;
- *April Laws* of the Hungarian Revolution against the Habsburg Empire in 1848,
- *Law of the Compromise* between the Hungarian Nation and the Habsburg Monarchy in 1867.

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In parallel with these organic laws, the doctrine of the Holy Crown, connected to the spirit of the historical constitution, was slowly developed and had some special and traditional meanings:

- in the Middle Age the whole Hungarian Kingdom and the privileges of the noble,
- after the Compromise of 1867, the rights and duties of every citizen, the modern Hungarian Nation-State, and finally,
- after the World War I and the conclusion of peace at Trianon in 1920, the relation of the Nation to its territorial lost.

As for today's constitutional environment, with the adoption of the Hungarian Fundamental Law, this viewpoint reappears in the long National Avowal: „[W]e honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation."

It would only be proper to ask what can be signified as the intention of Constituting Power. Why do these historical achievements return in the text of the new constitution in the 19th century? First of all, it is necessary to analyze the Hungarian theories of the state during the birth of political ideologies in the 19th century, then its effects on the adoption or rejection in our constitutional law and the most important differences between the contemporary opinions of these theories.

2. Theories of State in the Second Period of the 19th Century

Modern theories can be divided into three periods.

2.1. First period (1867-1945)

From 1867 to 1945, based on the conservative idea of the state those works dominated which dealt with the Holy Crown doctrine and the importance of customary law deriving from the Middle Ages. Hungary, as part of the Habsburg Monarchy, in consequence of the Compromise did not have a written constitution in comparison to other European States for example France (different constitutional papers dated back to 1830 and 1848) or Italy (*Statuto Albertino* dated back to 1861); thus, the Hungarian constitutional situation was compared to the British one. In my opinion, these decades are highly important and essential in order to understand contemporary changes. Historicism and its German branch deriving from *F. C. von Savigny*, side by side with the *Hegelian* conservatism was the only legal school in the Hungarian political philosophy. Why? Positivism and legal positivism only influenced a strict circle of "progressionists". While with the political philosophy of Enlightenment and the French Revolution the first written European constitutions contained some principles such as popular sovereignty, separation of powers and protection of individual rights by various forms or mechanism of limited government which are the most important bases of a democratic political system and the European branches, the political liberal ideology influenced the political and legal theories of the 19th century; it looked as if the Hungarian constitutional and political situation stopped in the development. These outcomes can clearly be seen in the works of the first representatives of the „modern" Hungarian legal school, first of all *Imre Hajnik*, *Ákos Timon*, *Gyula Kautz*, *Ignácz Kuncz* and *Győző Concha*.

In his book entitled *Hungary from the Kings of the House of Arpad to the Consideration of Entailment and Feudal Europe* (published in 1867), *Imre Hajnik* founded the theory of legal continuity. What does it mean? The ordinate professor of public law saw a symbol in the

Holy Crown which could be interpreted as the community of Hungarian citizens. From the first centuries of the Hungarian constitutional history, the Holy Crown symbolized the free parts of the Hungarian Kingdom: the noble, delegates of free royal cities and the kings. Then, in another book entitled *The Universal History of European Law from the Beginning of the Middle Ages to the French Revolution* (published in 1898) via analyzing the history of the Holy Crown, Hajnik thought that the Holy Crown united the parts of the Hungarian society. As a result of that, Hajnik made distinction among the nation of nobles described in Tripartitum, the concept of modern nation based on the Revolution of 1848 and the (then) modern nation of the Compromise of 1867. The latter was a „constitutional", „sovereign" and „autonomous" nation-state connected to the *Holy Crown doctrine and the concept of organic stat*e. The Holy Crown as *the subject of state-power* is a *living organism* which represents the separation of powers. Its parts are members of the legislative and executive power: the King and the Hungarian nation/citizens included in the historical constitution. Members of the Hungarian Nation changed because at the Revolution of 1848 the nation was equal with the nobles, then, with Hungarian citizens.[1]

In the first edition (in 1895) of his book entitled *Politics* (Politika) *Győző Concha* created the scientific foundations of a conservative state's idea, which, in my opinion, is situated behind the concept of the National Avowal. Concha contrasted the schools of positivism (legal positivism) and social Darwinism and elaborated on the classification of social sciences. Following *Hegel*'s method, Concha considered that the state was the *syntheses* of the individual and the first "natural group", the family is based on love and the society is represented as the antithesis of the family. From this point of view, the *concept of state is submitted to the science of Politics*. „The State is the highest manifestation of morality and perfect liberty in which people can realize their personality."[2] People(s) do(es) not exist without the state, thus, personal and individual purposes are parts of the state's goals. It is crucial important to understand the large philosophical difference between the concept of Concha in contradiction to the program of Enlightenment. Based on the opinion of Concha: „…the idea of a person is expressed in his/her own spirituality, not in his/her biological and physical reality with many contrasting interests and needs… every individual has intellectual and sentimental purposes. In the imperium of purposes the ideas of good / justice / sanctity / beauty are situated in which humanity believes, thus, those are the motors of human activities."[3] In this motive the author submitted the material goods to the spiritual ones. „Human life begins when a man feels the intimacy and the irrationality of his spirit in oneself, and then proves to overcome his finite nature… Life remains a secret if it is unable to understand the infinite character of humanity, its large difference from the natural essence. The life of a man is an infinite fight against the finite existence for elevating his character over the finite nature."[4]

It can be seen that the anthropology of Concha contains typical conservative elements because instead of liberal values such as individual liberty, self-fulfillment in modern society which can be realized through the production and expropriation of material and cultural

[1] Mezey Barna: *Magyar alkotmánytörténet* [The Constitutional History of Hungary]. Osiris Kiadó, Budapest, 2003. 262-264.

[2] Egresi Katalin: Concha Győző konzervatív állameszméje [The Conservative Theory of State for Concha Győző]. *Jog, Állam, Politika* Vol. I (2009) No. 1. 77-107.

[3] Egresi: *op. cit.* 82.

[4] Egresi: *op. cit.* 89.

goods or separation of society and state, Concha prefers spirituality and religious form of life. Concha confronted with the conception of *József Eötvös*,[5] who, in his book entitled „*The Dominant Ideas of the Nineteenth Century and Their Impact on State*", sustained individual liberty as supreme value of a person, consequently, provided the state with special functions in the modern society: a) purpose in oneself, b) manifestation of individual liberty, c) supreme power over the person and the society d) perfect morality in the community's life.[6]

Eötvös and Concha were two different personalities in the 19th century. According to József Eötvös, the state in its minimal sense is only an instrument of individual purposes. Analyzing the main – wrong and right - meanings of three modern ideologies such as a) liberty, b) equality and c) nationality, on the basis of his viewpoint Eötvös said that: „People are not born free but can become free."[7] How? In the modern society, which is free from different privileges, a man is capable of finding his happiness through self-fulfillment in civil life. In this sense the State's role is only to guarantee possibilities for self-realization in the form of equality before the law. The good State is in which:

- the constitution guarantees the individual liberty against the power of the State;
- separation of powers is guaranteed through different state organs;
- separation of civil society and political state is realized;
- equality is an instrument for the realization of personal liberty, thus, only recognizes equality before the law. [8]

Behind Concha's theory the state, in the sense of public law, possesses completely other elements. Political institutions are deriving from the spirit of people's folk (*Volksgeist*), hence, the constitution is the symbol of historical development. „Historical constitutions are everywhere the manifestations and institutionalizations of common historical experience with the fact that citizens accept and support political institutions that were being developed for centuries through public customs instead of radical changes of revolutions."[9] In this sense, this historicism as an ideology is capable of ensuring the constitutional continuity of a political community which is expressed in the Holy Crown doctrine.

When making the relationship between the nation and the state clear, Concha utilized Hegel's political philosophy and the method of *Gierke*, who regarded the state as a legal

[5] József Eötvös: 1813-1871 – born in Buda, member of Hungarian aristocracy, travelled much in Europe, where he got acquainted with representatives of liberal political philosophy (first of all *John Stuart Mill* and *Alexis de Tocqueville*). During the period of Reform Age (1825-1848), Eötvös played significant part in a discussion about the system of local autonomy in which Eötvös proposed to establish the modern and civil public administration, made the Hungarian Government responsible in front of the Parliament, proposed the centralization of administrative/local system in contradiction with the „municipalists" who wanted to protégé the independence of local counties against the Habsburg Empire. During the third period of revolution in 1848, he was the minister of religion and public education in the first independent Hungarian government. After the fall of the revolution and fight for freedom, Eötvös wrote his book of two volumes entitled "*The Dominant Ideas of the Nineteenth Century and Their Impact on State*" from 1851 to 1854 in exile. After the Compromise, Eötvös again assumed the direction of ministry of public education. See further, Schlett István: *Eötvös József* [József Eötvös], Gondolat Kiadó, Budapest, 1987.

[6] Egresi: *op. cit.* 90-92.

[7] Schlett: *op. cit.* 306.

[8] Cf. the special edition entitled Eötvös, József: *The Dominant Ideas of the Nineteenth Century and Their Impact on the State.* Columbia University Press, New York, 1996. Vol. 2. 127-129., 133-136. and 154-156.

[9] Egresi: *op. cit.* 94.

personality: „The first form of invisible personality and uniqueness will grow in *folk* which does not have conscience that is, pure will without conscience. The second form is the *nation* with conscience, in which the folk gives itself law because it is worthy of knowing its economic, social and legal needs. From the antithesis of folk and nation derives the STATE which manifests on the highest level, the only will in the form of sovereignty… Sovereignty and will are elemental parts of the State itself."[10]

After the World War I in a special constitutional situation based on Act 1 of 1920, Hungary was a Kingdom without a King. Referring to the theory of legal continuity, the political system did not give up the institution of the King because it confronted with the spirit and achievements of the 1918 Revolution − which was at the same time the short period of the first Hungarian Republic – and until creating order regarding the authority of Head of State, the Provisional National Assembly elected Regent with secret ballot. Its sphere of authority was from time to time extended by different governments so the executive power became much stronger than the legislative one. Behind the function of the authoritarian state we must mention an important discussion about the Holy Crown doctrine between two influential interwar-period professors. In his essay entitled „*History of Law and Constitution* (published in 1931), *Ferenc Eckhart* analyzed the Hungarian public law and the spirit of historical constitution and considered that the Hungarian noble-nation, together with the Polish and Czech constitutional developments, adopted the Frank-German norm. In this context Aranybulla as a document of Hungarian feudal public law was also the adoption a European norm. Eckhart criticized the Holy Crown doctrine, refuting its original essence. *Kálmán Molnár*, Eckhart's co-author of discussion emphasized the special character of the Hungarian constitutional development in the Holy Crown doctrine. In his essay, Molnár made it evident that the nature of law has „a transcendental center" that could not be described with positive norms of bills. From these meanings it emerges that the Holy Crown doctrine is not equal with the „territory of the Holy Crown" or the „goods of the Holy Crown". Distinguishing the formal text of bills from the scientific theories, summarizing that: „the doctrine of the Holy Crown is the synthesis composed from different dates of constitutional sources and their legal and historical interpretations. The Holy Crown is not only a collection of constitutional acts but it is a *scientific system, doctrine and theory*."[11]

It may be established that in the first period of the Hungarian constitutional theories the state was of organic essence with many conservative, historical and national meanings, while it repressed liberal values, simultaneously.

2.2. Second period (1945-1989)

Regarding the second period (1945-1989), the first written constitution was adopted in 1949; constitutional theories disappeared, in fact, public law lost its important role during the period of state-socialism. Concurrently, with the proclamation of the Hungarian

[10] Egresi: *op. cit.* 92.

[11] Kocsis István: *A Szent Korona-tan* [The Holy Crown Doctrine]. Püski Kiadó, Budapest, 1996. and Egresi Katalin: A köztársasági eszme és a szentkorona-tan a két világháború közötti magyar politikai gondolkodásban [The Idea of Republic and the Holy Crown Doctrine in the Hungarian Political Thought between the Two World Wars]. In: Feitl István (ed.): *A köztársaság a modernkori történelem fényében* [The Republic in the Light of Modern History]. Budapest, Napvilág Kiadó, 2007. 240-272.

People's Republic the historical constitution and Holy Crown doctrine stopped to exist in sense of public law.

2.3. Third period (post-1989 period)

In the third period starting from the fall of not democratic regime, during the transition (1989/90) discussions about the constitution and constitutional values were renewed. In Act 64 of 1990 and 83 of 1995, the Holy Crown was part of the national symbols of the Republic of Hungary without having public law meaning. Then in the Resolution of the Parliament (No. 119/1996) its appendix contained an important element about the Holy Crown. The text of the new constitution has to refer to the Holy Crown but not in connection with the meanings of the doctrine: „the Preamble shall shortly and excessively mention the subject of constitution-making, that is, the Parliament, the community of Hungarian citizens, historical traditions of Hungary – including the Holy Crown and the thousand years old legal continuity of Hungarian statehood, constitutional universal values such as liberty, equality, fraternity, human rights and their protection, and finally, respect of rule of law and popular sovereignty. The Holy Crown can be regarded as the memory of our constitutional history; however, it must not have meanings of public law. Republic as being the form of the state, and the democratic method of exercise of power are reconcilable with our constitutional symbols. The Holy Crown embodied the community of Hungarian citizens from these. This part of our symbols represents the fact that every person is part of the public power."[12] In my opinion this interpretation contains an important contrary. Although, it refers to the peoples (folk) when considering the power's subject, it regards the Holy Crown as symbol of the Hungarian (state-) community. With this viewpoint it oversteps the historical context in strict sense.

During the discussion of Act 1 of 2000, in remembering the foundation of the Hungarian state and the Holy Crown it represented an unbridgeable gap between the views of different political parties. The Hungarian Socialist Party did not maintain the adoption of the Holy Crown doctrine in sense of public law because with „Republic" being the form of the state and the written constitution of transformation in 1989 the constitutional situation was *not* reconcilable with this doctrine and the historical constitution. In this political sense the legal continuity between past and present does not exist, thus, the Holy Crown can exclusively be part of historical memory. On the contrary, the conservative political forces only considered the breach of legal continuity which means the possibility to return to the constitutional situation of the past.[13] This conservative viewpoint became stronger with the adoption of the Fundamental Law: „the Preamble also refers to the Hungarian Crown of Saint Stephen (977-1038), the king who founded the State… the theory of the Holy Crown has been a peculiar cornerstone of Hungarian public law. According to this, the nobility (the nation) was to be regarded as member of Crown as an expression of shared sovereignty. The Crown is *not merely an object, but subject of statehood.* As the interpretation of the Basic Law

[12] Egresi Katalin: A Szent Korona tan és a köztársaság eszméje a magyar politikai gondolkodásban – egy 1999-es törvényjavaslat jelentősége [The Holy Crown Doctrine and the Idea of Republic in Hungarian Political Thought – The Relevance of a Bill of 1999]. *Leviatán*, Vol. 3 (2005) No. 4. 34.

[13] Egresi: A Szent Korona tan és a köztársaság eszméje… 35.

should look to the historical constitution of Hungary, the theory of the Holy Crown – certainly under the republican constitutions – is not just of historical relevance."[14]

In my opinion it is necessary to quote Act XXXI of 1989, in which the Holy Crown was regarded as symbol of the Hungarian state as the arms of the Republic of Hungary. The constitutional principles of our constitutional situation were summarized in the Preamble i) multi-party system, ii) parliamentarian democracy and iii) market-economy with social meanings, which were also the rule of law. Following this, political elites agreed in a new content of that constitution which could be the foundation of the democratic state-setting. Now, the concept of the nation is based on a common culture, language and common fate. The Constituting Power took a leap *from the nation of noble to the nation of Hungarian citizens inside and outside of frontiers* with the aim of creating the concept of cultural nation. The common culture as a connective link between past and present is the heritage of conservative meanings of state.

3. Constitutional Values of Fundamental Law

The Hungarian Fundamental Law has a completely new structure compared to the previous constitution. The long *National Avowal* is followed by the *Foundation*. The next part is the chapter on *Freedom and Responsibility* containing provisions on fundamental rights, which is followed by the *Structure of the State*. The National Avowal is more than a preamble as it is a conventional element of the national constitution. It contains a festive declaration with many national and historical elements/values.[15] The first chapter of the Fundamental Law is called National Avowal and it refers back to the 19th century national hymns of the Hungarians, namely to *Himnusz* (Anthem) by *Ferenc Kölcsey* and to *Szózat* (Proclamation) by *Mihály Vörösmarty*. It is a combination of particular historical references and universal value-statements. The reference to Saint Stephen's reign is traditionally regarded as the founding moment of the Hungarian State.

The Constituting Power described Hungarian history as the acknowledgement of independence, spirit of national identity and social communities. After the historical recapitulation we find the catalogue of basic values. Then again historical references appear: non-democratic regimes and the national socialist-communist dictatorship. It re-establishes the constitutional continuity by connecting 19 March 1944 and 2 May 1990 as the two endpoints of a totalitarian constitution, overcoming national tradition. „Our Fundamental Law shall be the basis of our legal order: it shall be a contract among Hungarians of the past, the present and the future; a living framework which expresses the nation's will and the boundaries within which we want to live."[16]

In my opinion, that fact that the Fundamental Law adopted a conservative viewpoint in the National Avowal is a return to the historical past. Confronted with the Constitution of the Hungarian Republic, the Fundamental Law prefers human existence together with other values. In contradiction with the Constitution, which included an individual and a liberal

[14] Shanda Balázs: Nation and State. In: Lóránt Csink – Balázs Schanda – András Zs. Varga (eds.): *The Basic Law of Hungary. A First Commentary.* Chapter III. Clarus Press Ltd, Dublin. 2011.

[15] Smuk Péter: National values in the Hungarian Fundamental Law. In: Zivković, Milan (ed.): IV. *Medunarodni Naucni Skup Multikulturalnost i savremeno drustvo: Pravo, bezbednost: zbornik radova.* Pravne i poslovne akademske studije dr Lazar Vrkatic, Faculty of Law, Novi Sad, 2013. 359-376.

[16] Cf. the last paragraph of the National Avowal.

vision, the most apparent change is the salient circle of conservative values. In the National Avowal after historian values, the Constituting Power recognizes human values that are based on community vision: „we hold that human existence is based on human dignity. We hold that individual freedom can only be complete in cooperation with others. We hold that family and nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love. We hold that the strength of community and the honour of each person are based on labour, an achievement of the human mind. We hold that we have a general duty to help the vulnerable and the poor. We hold that the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty. We hold that democracy is only possible where the State serves its citizens and administers affairs in an equitable manner, without prejudice or abuse."[17]

Here, we find the list of the basic values, starting out from human dignity**.** As in the argumentative practice of the Hungarian Constitutional Court, human dignity is the base of human existence, but only individual freedom is connected to the human urge of *cooperation with others*. It draws the values of fidelity, faith, love, labour and the general duty to help the vulnerable and the poor. This viewpoint establishes social virtues and common goals supported by the state and its own values of well-being, safety, order, justice and liberty. Confronted with the experience of non-democratic regimes and the individual vision of fundamental rights, after the transition, the Fundamental Law prefers the category of society in the triangle of person-society-state.

However, certain changes may be observed in relation to human dignity. While the Constitution jointly regulated the right to life and human dignity, the Fundamental Law regulates the right to life after declaration of the sanctity of human dignity.[18] „This difference may result in a significant dogmatic change, as it is assumed that the monist doctrine of the relation between life and dignity will be transformed into a dualist one."[19] The National Avowal declares that human existence is based on human dignity, but just in a personal significance.

Furthermore, Fundamental Law mentions a number of communities that gain the sense of constitutional status: for example marriage, churches, political parties, associations, trade unions, Hungarian Academy of Sciences, Hungarian Academy of Arts and institutions of higher education.

In the chapter of Foundation the Constituting Power, the Fundamental Law defined the state as an independent and democratic one governed by the rule of law. Although, the form of state of the Republic is not an irrevocable clause in comparison to other nations' constitutions. The sovereignty of people appears through its elected representatives or in exceptional case, in a direct manner. Against the previous constitution, the Fundamental Law mentions the principle of separation of powers which is the base of functioning of the Hungarian State.

[17] Cf. the third paragraph of the National Avowal.

[18] Cf. Balogh Zsolt – Hajas Barnabás: Rights and Freedom. In: Lóránt Csink – Balázs Schanda – András Zs. Varga (eds.): *The Basic Law of Hungary. A First Commentary.* Chapter III. Clarus Press Ltd, Dublin. 2011.

[19] Cf. ibid.

4. Summary

Analyzing the text of Hungarian constitutions, which were born in different historical situations, it can be highlighted that these norms include some interesting motives. Behind the formal and legal documents different values and principles exist regarding the reflection of the mentality of a political community. Behind the Hungarian Fundamental Law the constitutional law returns to the spirit of historical and national values. This conservative ideology appears in the long National Avowal which is more than a preamble. It contains a festive declaration with many national and historical elements/values. The Constituting Power described Hungarian history where the independence with the spirit of national identity, and the acknowledgement of social communities were declared which is at some point different from the provisional constitution.

THE LIABILITY ISSUE
AND THE NOTION OF ENVIRONMENTAL DAMAGE

A STARTING POINT OF DEFINITION

GÁBOR KECSKÉS *

For the assessment of the damage regarding the statement of environmental liability of a state or civil entity, the relevant treaties shall characterize the notion of damage as an objective point of view and an element of causal relationship (the direct causal link between the damage and the conduct justified as wilful and intentional act or negligence) in order to set up this conjunctive criterion, thereupon the liability shall be based. However, this definition and clarification is relatively deficient as well as divergent within the scope of environmental regimes. The core and interlinked treaties of the environmental sectors or separate domains of environmental challenges (thus, binding documents with similar competence and aim) often contradict themselves regarding the notion of the damage.

1. Damage as a Core Characteristic and Basis of Liability/Responsibility

The transcending spread of civil liability in binding treaty-based regimes and the quasi-judicial recognition of the concept on absolute/objective/strict liability of states are recognized to be a noticeable trend in scientific discourse, being backed up by genuine pivotal „environmental treaties" of a considerable number. Besides, referring to the latest developments in the domain of international law, the liability (and for the sake of solidity, state responsibility) concept has been accepted and characterized by the International Law Commission (hereinafter: ILC) in a non-binding way.

In the framework of public international law, the theoretical concept of transboundary environmental damage has been exclusively emerged in physical way but partly qualified in legal literature. The later element refers to the prerequisite of existing notions containing transboundary (trans-frontier with an old phrase) effects, transboundary harm and damage, transboundary pollution, environmental and hazardous harm and legal consequence of an activity being included to a binding treaty-based regime. However, the ramification in regulating the environmental sectors promoted the creation of divergent regimes based upon firstly on specific notions (e.g. the definition of environmental damage, etc.), which had been regarded to be essential for the authentic application of the given regime.

The exact substance of 'transboundary' incorporates the damage caused to another tate or the damage emerging in the areas of global commons (*res communis omnium usus*, common concern and common heritage – in considerably analogical and synonymous meaning). These two directions have of some importance when a claim against the polluter (whether it is a state or a civil entity) has been brought in order to compensate the harm caused by the

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origin entity, wherever it has taken effects in a strictly geographical view (*state* and/or *global commons*).

2. Defining "Damage" within the Liability Regimes – Prerequisite of the Further Liability Issues

The author is utterly convinced that inquiring the issue of the environmental damage in general point of view and the concluding results to be stated would promote and clarify some substantive aspects of the legal field of international environmental law and the linking field of liability law.

2.1. The Concept of Liability for Injurious Consequences

From a highly abstract point of view and potential international legislation purposes, liability shall be adjudicated for damages caused to another entity (state, person or global commons) irrespective of the fault of the liable part. Within the domain of public international law, it should be noted that the interrelationship between the acts of the liable or potential liable entity and the caused damage emerging in the territory of another state (whether it has detrimental effects either on the side of the state, or on the side of civil or legal persons) shall be proved in the form of causal relation by means of the binding rules of public international law, consequently only the proven occurrence of damage may trigger the liability.

Furthermore, the term 'liability' shall be applied in cases where damage or loss had been incurred as a result of an activity having been conducted neither in breach of an international obligation, nor in breach of the so-called due diligence obligations (lawful acts involving risks and transboundary damage). As opposed to the doctrinal concept of (state) responsibility based upon unlawful and faulty acts prohibited by international law, the facts of international liability of a state or other entities shall be induced by both lawful and unlawful but injurious acts or omissions.[1] The concept of state responsibility, which is left aside from our scientific, liability-orientated consideration, is not yet accepted in a form of a treaty; however, the ILC adopted its Draft Articles in 2001[2], without binding force on states but with several roots traced back to a huge number of generally accepted rules of customary international law.[3]

Turning back to the aspects of liability issues, the increasing numbers of rules of liability for acts not prohibited by international law are irrespective of whether the activity was faulty or lawful; consequently, they emphasize the harm, rather than the conduct in this rudimentary phase of institualization.

[1] On the two-side-of-the-coin differentiation, see Boyle, Alan: State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction? *International and Comparative Law Quarterly*, Vol. 39 (1990) No. 1, 1-26.

[2] Cf. Draft Articles on Responsibility of States for Internationally Wrongful Acts. *Yearbook of the International Law Commission, 2001,* vol. II (Part Two) 25-30.

[3] On its theoretical characteristics, parameters and practical history, see in detail, Crawford, James: *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries.* Cambridge University Press, Cambridge, 2002. 1-60.

Following a recommendation by the United Nations General Assembly in Resolution 3071 (XXVIII) of 30 November 1973, the ILC had a legal duty for compiling a separate and summarized study on the topic „International liability for injurious consequences arising out of the performance of other activities"; this working title remained unchanged through the following five years. By 1978, the differentia specifica phrase had consequently arisen, because the requirement of injurious consequences of act was constant, but the term 'international liability' had been determined as a result of an act not prohibited by international law, instead of the term 'performance of other activities'.

After 1978, the topic International liability for injurious consequences arising out of acts not prohibited by international law left unchanged. As a result of the prolonged codification work, the ILC adopted the text of Draft Articles on Prevention of Transboundary Harm from Hazardous Activities in 2001[4] and submitted to the United Nations General Assembly. After three years, the ILC adopted the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities,[5] dealing with the other aspect of the subject in question, pointing out the harm arising out of hazardous activities as a differentiation factor which was a fundamental shift relating to the existing symbiosis of that time. Neither the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, nor the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities have a self-executing binding character, but several embedded and inherent rules of these articles and principles shall be considered as a manifestation of the existence and recognition of customary international law.

2.2. Damage as an Essential Element of the Liability Regimes

In the initial phase of the protection of environment, long time before the creation and institualization of the term 'international environmental law' at the *1972 United Nations Conference on the Human Environment*,[6] the conception had been explicitly narrow; besides, this limited domain had exclusively focused on the "bilateral consequences" of transboundary injury, as opposed to the idea of the environment as an international common good to be preserved by all the states.[7]

After 1972, the scope of international environmental law has been rapidly extended; the process was duplex:

- firstly, the concept of the global and human environment forged ahead, consequently, the regulation mechanisms of globally focused and environmental integrity-issued treaties have prevailed; and

[4] Cf., Yearbook of the International Law Commission, 2001, vol. II (Part Two) 145-148.

[5] On its text and commentaries, see, *Yearbook of the International Law Commission, 2006,* vol. II (Part Two) 116-182.

[6] The United Nations Conference on the Human Environment was held at Stockholm. The 'milestone' world conference "considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment", as it is illustrated in the Preamble of Stockholm Declaration.

[7] Cf. Viñuales, Jorge: The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment. *Fordham International Law Journal*, Vol. 32 (2008) No. 2, 237.

- secondly, the purposes of creation of (intergovernmental and non-governmental) organizations, conventions, measures and other ways of settlement relating to environment have been advanced.

In consequence of the aforementioned changes, the notion of 'transboundary', 'damage', 'pollution', 'harm' and 'liability' had been taken into the consideration of the international community and the international policymakers, as well.[8] The definition of 'environment' had been proclaimed by the non-binding Declaration of the Stockholm Conference on the Human Environment; as the Principle 2 states, by all actors of the international community (states, first or foremost) must safeguard „the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems" as the open-ended, accurate meaning and the most precisely definition of the environment.

The real paradigm-change has been due to the Principle 21 of the non-binding Stockholm Declaration which reads as follows, „States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." The present principle proclaimed shall be traced back to the funding treaty of the United Nations with its „priority principle" (see, Article 103 of the U. N. Charter), making it possible to be applied on the level of inter-state relations.[9]

For a long while, most of the significant international legal instruments did not tend to distinguish between damages to the environment and the traditional forms of damages (for example, damage to person or property). Many of the earlier treaties and national legal regimes only consider damage in terms of human property and human health and exclude environmental damage. The reasons were several. According to *Bowman* and *Boyle*,

- on the one hand, the exact notion of environmental damage is still missing from the general rules of international law,
- on the other hand, the legal system of international law does not state objectives for assessing damages,[10] and thus, the assessment of damages should be determined via *ad hoc* methods.[11]

[8] The terms "harm", "damage" and "injury" are occasionally used as synonyms, although "damage" is mainly used in the context of property being harmed, and "injury" correspondingly in case of personal harm. Furthermore, „harm" is used as the broader term including damage to the environment *per se*. The term „damages" means a monetary quantification of harm, the monetary award for damage, injury or loss. See, Larsson, Louise-Marie: *The Law of Environmental Damage. Liability and Reparation.* Kluwer Law International, The Hague, 1999. 34.

[9] Cf. Principle 22 of the *Stockholm Declaration.*

[10] Cf. Bowman, Michael – Boyle, Alan: *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation.* Oxford University Press, Oxford, 2002. 26. *Xue* restricts four elements of the discussion relating to transboundary damage, such as (1) the physical relationship between the activity concerned and the damage caused, (2) human causation, (3) a certain threshold of severity that calls for legal action, (4) transboundary movement of the harmful effects. See in details, Xue, Hanqin: *Transboundary Damage in International Law.* Cambridge University Press, Cambridge, 2003. 4-10. While, *Schachter* laid down the classification of the conjunctive parts of the damage in legal literature. Invoking Schachter's thoughts, transboundary environmental harm must result of a human activity, that is occurred due to a physical consequence of the human activity, which have transboundary effects and is significant and substantial. See Schachter, Oscar: *International Law in Theory and Practice.* Martinus Nijhoff, Dordrecht, 1991. 366-368.

As for the assessment, Larsson points that environmental damage per se entails pure ecological damage only, while two kinds of environmental damage can be identified; first, pure ecological damage, sometimes referred to as environmental impairment, and secondly, property damage with an ecological dimension.[12]

As for the ecological damage, the Lugano Convention (Council of Europe Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment – not yet in force) contains a regime for strict liability that in principle covers all types of damages caused by dangerous activities, irrespective of the identification of the damage (traditional and/or ecological with transboundary effects). Regarding that the most European states' environmental liability regimes (it is worth mentioning that this convention was adopted under the aegis of the Council of Europe) do not cover damage to biodiversity and the concept of ecological damage, the Convention seems to be a model mechanism and instrument to urge the European states for accepting these newly constituted forms of damage.

Bearing in mind the numerous treaties and other documents being adopted or proclaimed in the field of international environmental law with special regard to the definition of damage, the universal notion is still missing, but several sector-specific definitions still exist. The most comprehensive notions of damage that combine the elements of the sector-specific notions reads as follows: „any injurious effect concerning the environment, including human health and safety, flora, fauna, soil and water, climate, landscape, historical monuments or other physical structures or the interaction among these factors, effects on cultural heritage or socio-economic conditions resulting from alterations to those factors." Similarly to this „optimal" definition, the *Convention on Environmental Impact Assessment in a Transboundary Context*[13] contains a paragraph, under the name of 'impact',[14] that is considered being the synonym of damage because the word 'impact' is regularly used for injurious results of activities.

Highlighting the White Paper on *Environmental Liability* of the European Commission[15] and some relevant directives, the scope of environmental damage in the European law includes three categories with proper rules and peculiarity in accordance with the sectors in

[11] Larsson focuses on three categories according to the different scope of potential damage. Firstly, the *global issues* concentrate on deforestation, desertification, and other global-concerned priorities, secondly, *regional environment* focuses on transboundary pollution, static units of ecological species, problems of migratory birds, and lastly, *local level* incorporates the problems arising from industrial risks, waste management. Consequently, the three levels demand different concepts of environment and damage in the concerned issues by means of their peculiar factors. As the so-called *sector-specific definitions* have been excluded from the regulation, Larsson only enumerates the effects *exemplificative* that could cause damages. Cf. Larsson: *op. cit.* 122-124.

[12] Cf. with Larsson: *op. cit.* 122.

[13] Also known as *Espoo Convention*, adopted in 1991.

[14] Article 1 reads as follows: (vii) „Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors; (viii) "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.

[15] *White Paper on Environmental Liability*. COM(2000) 66, 9 February 2000. Presented by the European Commission.

which the damage could be occurred.[16] The sectors are the 'protected species and natural habitat' with more cited directives dealing with detailed aspects of the sector; the 'water damage' sector which incorporates any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC; and finally the 'land damage' sector which concerns any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction. Moreover, the White Paper covers the 'damage to biodiversity' that could be justified as the synopsis of the above-mentioned three categories [i) protected species and natural habitat; ii) water damage; iii) land damage].

The ILC's Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities in its Principle 2, point c) states a general, abstract notion of transboundary damage, not aiming to define the exact concept of the dual phrase, instead the text specializes the meaning of the 'transboundary', while the notion of damage [Principle 2, point a)[17]] left unchanged and should be applied in accordance with the general rules and definitions.

If the traditional damage directly (loss of life or personal injury, damage to property, etc.) deriving from an economic interest in any use of the environment, or incurred as a result of impairment of the environment, and the costs of measures of reinstatement of the impaired environment,[18] the definition shall be influenced by environmental characteristics. By the appearance of instruments in the field of transboundary pollution, the notion of pollution with transboundary effects has been exponentially emerged, instead of the method integrating the concept of pollution to the concept of damage.[19] In line with the argumentation of *Springer*, pollution could be defined under a range of approaches, as any alteration of the existing environment; as the right of territorial sovereign; as damage; as interference with other uses of the environment; or as exceeding the assimilative capacity of the environment.[20]

In sum, witnessing the transcending and developing theory of international environmental law, the damage or pollution occurred in the territory of other state shall be regularly assigned to individuals or companies from their activities the polluter materials and techniques had been released; thus, the justification of civil liability had been put forward as

[16] Cf. *Directive 2004/35* of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Article 2.

[17] It reads as follows: „damage" means significant damage caused to persons, property or the environment; and includes: (i) loss of life or personal injury; (ii) loss of, or damage to, property, including property which forms part of the cultural heritage; (iii) loss or damage by impairment of the environment; (iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; (v) the costs of reasonable response measures.

[18] Cf. Article 2, point 2 c) of *Basel Liability Protocol* (Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal) and Article 2, point 2. of *Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters* to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents.

[19] On the difficult issues of the regulation of transboundary pollution, cf. Merrill, Thomas: Golden Rules for Transboundary Pollution. *Duke Law Journal*, Vol. 46 (1997) No. 5, 937-938.

[20] Cf. Springer, Allen: Towards a Meaningful Concept of Pollution in International Law. *International and Comparative Law Quarterly*, Vol. 26 (1977) Issue 3, 531.

an increasing and extending issue in the procedure of the courts.[21] It is generally accepted that if the states intend to use areas and pursue activities under their jurisdiction or control in a way that may cause significant and serious trans-frontier or transboundary environmental damage, they will be held liable and must pay compensation to the affected state(s) – as the original consideration on state liability required thereupon.

The relatively high amount of damages and inevitable participation of the private sector in activities of one-time public duties yielded the recognition that private sector will not be able to compensate the possible amount of damage, pollution or harm. According to the ILC, the conduct of organs of the state, the conduct of persons or entities exercising elements of governmental authority, the conduct of organs placed at the disposal of a state by another state, the conduct directed or controlled by a state, the conduct carried out in the absence or default of the official authorities, the conduct acknowledged and adopted by a state as its own *shall be considered as an act of that state under international law*, aiming to transform the exclusively civil liability concept into the partial application and residual background of state liability.

3. Conclusions

The codification and development of the elements of the law on transboundary harm has advanced significantly since *1992 Rio Declaration on Environment and Development*, in the work of the ILC and in the jurisprudence of the International Court of Justice (regarding several cases with environmental aspects which had been or are in the docket of the Court).

A general or widely accepted consensus as to a notion of environmental damage within international law is still missing. The relevance of sector-specific definitions should be eliminated for the sake of universal concept of damage included into a multilateral treaty. On the one hand, due to the decreased consideration of states, it would probably cause the reduction of international lawmaking process. Yet, on the other hand, universal notion of damage would prevail over the fragmentation of compensation and liability regimes. The positions of states point out that the concept of sector-specific definition is overwhelmingly supported due to its character based upon case-to-case or treaty-to-treaty consideration focusing special interests; after this level, the process ended in cooperative and joint text reflecting the mutual agreement of states. Furthermore, the *Institute of International Law* supported the concept that the international environmental legal regimes should define the issue-related notion of damage, considering the special rules and requirements of the field concerned.[22]

Moreover, beyond the international sphere, the mostly non-binding classification, definition and valuation of environmental damage and consequently the classification of liability concepts are based upon the legal regimes being applied in accordance with the legal systems or legal cultures. The common law-based Anglo-Saxon states (including some Commonwealth, one-time colonial states) use the concept of environmental damage that is more influenced by the practice of the courts, while the notion of environmental damages

[21] On the channelling of liability (arisen as a result of a private activity, but compensated by the State or States), see Boyle, Alan: Globalising Environmental Liability: The Interplay of National and International Law. *Journal of Environmental Law*, Vol. 17 (2005) No. 1, 6-8.

[22] Cf. Article 19 of *Responsibility and Liability under International Law for Environmental Damage*. Resolution of the Institute of International Law. Session of Strasbourg, 1997.

in civil and statutory law-based states[23] is closely connected to the clarified and binding rules (without judicial precedents). The geographical, natural and hydrological factors, the state of development, the density of population and the characters of the states concerning natural affairs, experiences of disasters, political system significantly influence and determine the national laws in the field of environmental law and liability-regimes. Regarding the fact that the international relations of the states are basically formed according to their interests, the creation of international treaties is the result of the consensual ability of the states which presupposes the consent appeared between developed and developing, coastal and landlocked, civil law-based and common law-based states, etc.

Last but not least, the distinguished role of international judicial fora and scientific bodies should not be neglected; however, regarding the special characters of international law, the judicial fora have different competence comparing with the national judicial bodies. The concept of international law does not recognise the precedents of international courts (*stare decisis doctrine* of the common law), but, as we have seen the International Court of Justice declarations concerning the notion of environment,[24] the scientific definitions, concepts and judicial reasoning are able to conduce the initiatives to define universal, wide-ranging concept of environmental damage within the field of, particularly, international (environmental) law.

[23] As *Bowman* stated, the cause of environmental protection is arguably better served by statutory initiatives than by judge-made law. See Bowman, Michael: The Definition and Evaluation of Environmental Harm: An Overview. In: Bowman, Michael – Boyle, Alan (eds.): *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation.* Oxford University Press, Oxford, 2002. 10.

[24] Cf., Para. 29 of the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice and Para. 53 of the Judgment of *Case Concerning the Gabčikovo-Nagymaros Project* (Hungary/Slovakia).

IN SEARCH OF RIGHTS TO POLITICAL PARTICIPATION

THE EMERGING VOICE OF NATIONAL MINORITIES IN BIH IN LIGHT OF EU INTEGRATION

MAJA SAVIĆ-BOJANIĆ *

In the immediate aftermath of the Cold War, few issues in Europe have been as contentious as minority rights. As minority discontent grew across countries of Central and Eastern Europe (CEE), so did the interest of the European Union (EU), which, in the case of these states gave much attention to minority rights and worked on insuring state compliance with human rights legislation. Nevertheless, things did not go in the same direction in the Western Balkans, which, unlike the states of CEE, underwent a much more turbulent and violent political period at the dawn of the 1990s. The latter is, most certainly, the biggest culprit for such diverse paths of these two socially and historically related regions, but the fact that the issue of national minority rights in post-conflict societies of the Western Balkans has not been high, both on the internal and EU political agendas, cannot be solely justified by the absence of democratically consolidated institutions which would govern these issues. Nowhere is this trend more obvious than in Bosnia and Herzegovina (BiH), a small state in the heart of the Balkan Peninsula, which, unlike its neighbors, underwent the longest and bloodiest conflicts of all, but also failed the most when it came to democratization efforts and socio-political inclusion of its national minorities.

Thus, this paper will comprehensively investigate the current impact of EU conditionality in BiH when it comes to a specific minority right – that of political participation – and argue that despite political unwillingness to move forward on the case, the EU conditionality policies are too unstructured and limited to adequately move the discussion towards a more favorable direction. However, in order to understand the complex network of these relations and examine the casualties of the issue, first of all, one must take a look at the institutional and legal foundations of BiH.

1. Dayton Peace Accords: the Birth of Constitutional Discrimination

From 1945 to 1992, BiH was a part of Yugoslavia,[1] a multinational state with a federal constitution. Throughout history, BiH was referred to as „Yugoslavia in miniature”. This was mainly due to its demographic structure, which, according to the data from the last census held in 1991 was the following: Muslims comprised 43.7%, Serbs 31.45%, Croats

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[1] From November 29, 1945 until April 7, 1963 Yugoslavia was called Federal People's Republic of Yugoslavia (FNRJ) when it changed its name to Socialist Federal Republic of Yugoslavia (SFRJ)

17.3%, while 5.5% of the population considered themselves „Yugoslavs”.[2] Yugoslavs were mostly (although, not exclusively) members of other *nations* and *nationalities* (according to the terminology used in SFRJ's Constitution), but were also entitled to be equal under the Constitution.

Following the events that occurred from 1991 until 1992 in Slovenia and Croatia respectively, the independence of BiH, and subsequently its international recognition resulted, as indicated above, in the bloodiest and longest conflict of the former Yugoslavia[3]. The mixed ethnic picture only exacerbated the situation, which was finally settled in December 1995, when the Dayton Peace Accords were signed. The Agreement not only ended the conflict, but also laid down the institutional basis for the political and economic revival of the country. Despite the geographical divisions of two sub-state units,[4] BiH remained a multi-ethnic state with three dominant ethnic groups in place just as before the war, and seventeen national minority groups. However, things are far from the pre-war state-of-art, and the sources of the current debate lie precisely in the Dayton Constitution.

Ironically, the eighteenth anniversary of the Dayton Peace Accords and consequently, the Dayton Constitution is celebrated this year. This year will also celebrate eighteen years of peace, pseudo-democratic institutions, feeble economy and the omnipresent ethnic divisions, which, or so it seems, are growing larger each and every day. But, could any of these factors, except, of course, peace be truly commemorated if one considers that we are talking about a potential EU member state here? Is there really a reason to celebrate those eighteen years of Dayton-created peace, since the former one failed to create a fully functional BiH? The answers to these questions are probably overly intricate and subjective, moreover, because peace accords have received a variety of remarks. The pro-Daytonists argue that much has indeed been achieved, but confess that there remains a significant amount of reforms to yet be introduced. On the other hand, the con-Dayton groups are rather critical towards the agreement and argue that it created a quasi-state, one imbedded in the principles of (ethnic) majority prevalence.

And indeed, when looking at Dayton Constitution, one cannot do anything else but notice that it overemphasizes ethnicity. Firstly, the constitutional system is based on the principle of ethnic constituency or the principle of „constituent peoples”, which implies that each „constituent group” has equal rights to govern the state. Thus, the Constitution does not deal with the term „citizen”, but instead it divides citizens of BiH into three „constituent groups” – Bosniaks,[5] Serbs and Croats. The Constitution also mentions a non-constituent group of people, plainly called „Others”. It is exactly in this paradox that the peril lies - while Bosniaks, Serbs and Croats are dominant and (homogenous) ethnic groups in BiH, „others” represent a discriminated and excluded heterogeneous constitutional category, including BiH citizens who belong to one of the seventeen national minorities,

[2] Woelk, Jens: *Federalism and Consociationalism as Tools for State Reconstruction? The Case of Bosnia and Herzegovina.* Federalism, Subnational Constitutions and Minority Rights (eds.: Tarr, Alan - Williams, Robert - Marko, Josef). Praeger Publishers – Westport, CT, 2004. 177.

[3] Previous conflicts occurred first in Slovenia (1991), and then in Croatia (1991-1992), to be followed by BiH. Conflicts in Kosovo and Macedonia occurred much later in the 1990s.

[4] Federation of BiH – FBiH (51% of the territory) and Republic of Srpska – RS (49%).

[5] Not to be confused with the term „Bosnian”, which could be used (if legally applied) for all people living in BiH. Bosniak is a citizen of BiH. Although a large percentage of Bosniaks are Muslims, one should not fall victim to mere generalization as there are many other explanations why people in BiH choose to identify themselves with this ethnic group.

but also citizens who refuse to strictly identify with one of the ethnic groups.[6] Nowhere is this constitutional inconsistency more obvious than in the case of political participation of national minorities, where such constitutionally legal mechanisms of exclusion have taken many forms on all levels, from state to municipal level politics. To further elaborate, it is essential to note that such an ethnically exclusionist constitutional arrangement „…prevents, *inter alia*, persons belonging to minorities from being elected to the three-member Bosnian Presidency and delegated to the upper chamber of the Bosnian Parliament."[7] And while this case stands as a clear-cut example of discrimination, the fact that we are examining the issue of participation in the political life of a single state brings us to yet another discriminatory practice which relates to the right of national minorities to participate in all spheres of political and public affairs, as prescribed in recent international legal instruments. Thus, in the context of political participation of national minorities in BiH, one must also examine the legal side of the issue. This is essential in order to fully comprehend the impact of European Union integration policies in BiH, and the pressure and conditional efforts that result from the discriminatory practices.

2. How BiH Became an International Outlaw: *Sejdić-Finci* vs. *Bosnia and Herzegovina* case

In the last decade, several new international minority rights instruments have been introduced, all with the aim of recognizing and reaffirming the legal support for identity and status issues of national minorities within state constitutional and political systems. A particularly essential right which surfaced in these new documents is the explicit reference to the right of minorities in political participation, more precisely, the right to decide in public „matters affecting them".[8] Thus, the focus is on collective political participation.[9] Furthermore, the Framework Convention for the Protection of National Minorities (FCNM) interprets this right as rather „strong" and „started implementing it in unqualified terms, translating the minority cultural identity directly into the political plane".[10] Many other international legal provisions, such as the International Covenant on Civil and Political Rights (ICCPR) and its Article 25, deal with issues of equal rights regarding participation in the political life of the country, but to examine each of these documents in

[6] Since this study deals with minority rights to political participation, the reminder of the paper will assume the usage of the term „Others" solely in relation to national minorities.

[7] Hodžić, Edin: Political Participation of National Minorities in Local Governance in Bosnia and Herzegovina: State of the Art, Prospects and Ways Forward. Analitika, Sarajevo, 2011. 5.

[8] Article 2(3) of the UN Declaration on Minorities (1992); Article 15 of the Framework Convention for the Protection of National Minorities (FCNM).

[9] It is important to note that the use of the term „political participation" is rather ambiguous in this sense, as none of these documents considers the broader aspects of the term. In the language of political science, effective political participation is a much more comprehensive term, and as such refers to, among other things, participation (usually through membership) in non-state and semi-state bodies (chambers of commerce, labor and trade unions, boards of public broadcasting, etc.), political party membership and rights to form national minority parties, right to vote and right to be voted for, right to be elected and participation in various forms of consultations. Political participation also includes participation in the executive and judicial branches of the government, as well as in public administration.

[10] Hodžić: *ibid.* 6.

detail would be a paper by itself. Thus, before moving to this specific issue in BiH, let us first mention that on the European level, the focus is on broad political participation, and not solely on „matters affecting them" (minorities) as it is the case with FCNM or ICCPR. This means that national minorities have the right to political participation according to the general direction in which their country is moving (usually through co-decision making).

Moving away from the legal norms and examining political participation from the point of view of democratic development, one can make a general conclusion that in states with overemphasized ethnic mobility and ethnic nationalism, minorities run the risk of being excluded from the political system. Being a state where ethnicity overpowers nationality and where ethnic nationalism looms large, BiH is certainly a country where the above mentioned legal documents play only a minor role. This is not to say that BiH has no laws, whatsoever, that deal with minority protection. Quite the contrary, the 2003 BiH Law on Minorities stipulates that persons belonging to minorities „*have the right to be represented in state institutions and public service at all levels in accordance with their share in population based on the last census*".[11] Furthermore, the 2001 Election Law (enacted in 2004) also deals with the issue of political participation of national minorities on local levels. More precisely, the law established the „3% threshold principle", which guarantees that, according to the 1991 population census, at least one seat is to be reserved for members of national minorities in those municipalities in which minorities constitute up to 3% of the population. The law also confirms that at least two seats are to be allocated to national minority representatives in municipalities in which they comprise more than 3% of the population. Furthermore, in 2008, an amendment to the Election Law introduced a different and more general provision that seems less favorable to minorities. According to the amended law, at least one seat is to be reserved for national minority members where they make up more than 3% of the population. However, this solution does not make the situation worse, but simply establishes a threshold beyond which the representation of minorities cannot be ignored.

Thus, if put simply, the laws on political participation of national minorities on local level in BiH do exist, and are fairly inclusive, but the problem is that they are not implemented. The non-implementation of these laws has several dimensions. Firstly, and as mentioned above, the 2001 Election Law came into force three years later, but much after the deadline for the registration of candidates for the 2004 local elections. Therefore, the 3% threshold relating to political participation of national minorities could not be implemented, and resulted in „non-participation". Secondly, the 2008 Amendments to the Election Law were not respected in all municipalities[12] – a clear breach of the legal obligations prescribed in the Election Law.

On the other hand, if examining the applicability of the Election Law in general (state level) elections, the discriminatory principles of the Dayton Constitution surface to the top. In short, what this means is that the tripartite presidency of BiH[13] consists of *only* three constituent groups. Article 8 Para. 1 of the Election Law, which specifies the election rules

[11] Hodžić: *ibid.* 6.

[12] Although there are very few municipalities in BiH that satisfy this numerical threshold, even in those municipalities where minorities do constitute more than 3% of the population, seats for minorities were not reserved.

[13] The head of the state in BiH is not a single person. The presidency consists of three directly elected representatives from each constituent group. According to Article 8 Para. 1 of the Election Law, in FBiH the electoral body can vote for either one Bosniak candidate or one Croat candidate. Voters cannot vote for both candidates. In the RS, voters can vote for one – Serb –candidate.

for the BiH Presidency, does not even refer to national minorities („Others"). Furthermore, when it comes to elections of the House of Peoples of BiH Parliament, subheading B, Article 9 Para. 12 states that: „The House of Peoples of BiH Parliamentary Assembly has 15 representatives, of which two-thirds are from FBiH (five Croats and five Bosniaks) and one-third from RS (five Serbs)".[14] Again, this article does not refer to „Others", thus, excluding national minorities from participating in elections for higher offices. But, the Election Law of BiH is not the only source of discrimination of the national minority groups that live in BiH. Under BiH's constitution, only ethnic Bosniaks, Serbs and Croats can be elected members of the Presidency of BiH or the Parliament (Articles IV and V of BiH Constitution).[15] Thus, one can only conclude that the state of BiH severely impedes the right to political participation of its national minorities.

This *status quo* remained for years. The attempts of national minority members to participate in the political life of BiH were scarce and unheard until December 2009, almost exactly fourteen years after the signing of the Dayton Peace Accords, when Jakob Finci (a Jew) and Dervo Sejdić (a Roma) claimed that BiH Constitution was discriminatory on the basis of race, religion and association with a national minority.[16] Both plaintiffs made reference to Protocol 12 of the European Convention on Human Rights (ECHR), which BiH signed on 1 April, 2005. Initially, these were to separate cases, which were then merged into one by the European Court of Human Rights. It is interesting to note that neither Sejdić nor Finci claimed their rights before the signing of ECHR on the part of BiH, as they both believed that no legal basis existed for their complaints prior to this period.[17] The second (mutual) motive behind their complaint was the failure of the so called „April Package"[18] of constitutional reforms from 2006, which were not adopted due to the fact that only two pro voices were missing.

Thus, in December 2009, the Grand Chamber of the European Court for Human Rights ruled that BiH was guilty of violating Protocol 12 and Article 14 of the ECHR due to ethnic discrimination ingrained in its constitution. Following this ruling, BiH's ruling politicians showed some initial efforts to implement the decision. The pressure was growing on the part of the Council of Europe (CoE), which called for immediate implementation of the Court's decision, so that national minorities can stand for high office positions in the general elections that were to take place in October 2010. The efforts behind CoE's pressures resulted in the adoption of an action plan and a formation of a working group (within BiH's Council of Ministers), but the plan was short-lived. Numerous working group meetings did not result in any constitutional amendments by October 2010, despite severe

[14] Centralna izborna komisija BiH: *Izborni Zakon BiH* [Election Law of BiH]. http:// http://www.izbori.ba/Documents/documents/ZAKONI/POIZpw19032013-1-bos.pdf (time of download: 26 March 2013).

[15] Steiner, Christian - Ademović, Nedim: *Ustav Bosne i Hercegovine – Komentar* [The Constitution of Bosnia and Herzegovina – Commentary]. Konrad Adenauer Foundation, Sarajevo, 2010. 563-591.

[16] Dervo Sejdić was unable to stand as a candidate for the presidency, while Jakob Finci was not allowed to present a candidacy for the House of Peoples of the parliamentary assembly.

[17] Hodžić, Edin – Stojanović, Nenad: Novi – stari ustavni inžinjering? Izazovi i implikacije presude evropskog suda za ljudska prava u predmetu Sejdić i Finci protiv BiH [New-Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights Ruling in the Case "Sejdić and Finci vs. BiH]. Analitika, Sarajevo, 2011. 26.

[18] The April Package included a whole set of new constitutional reforms. It was expected that the package be adopted in April 2006.

international pressure and concrete proposals made by various actors. The major hindrances were the ruling ethnic parties, which, throughout the process, interchangeably obstructed any substantial proposals for the implementation of the Court's decision.

Three years later the political stalemate still persisted. A lengthy chronology of events related to this case only demonstrates that the procedural labyrinth in BiH is too bureaucratic and non-transparent. Furthermore, the fact that BiH has been on the European list of "outlaws" for too long, does not change the situation when it comes to political willingness to resolve this issue. Secondly, and as strange as it may seem, the likeliness that any form of sticks will be applied against BiH for not implementing the Court's decision is zero to none. What is certain is that the government's inactivity regarding this issue will result in BiH's slower advancement towards its EU membership. In light of this, it is essential to note that the critiques and threats from the international community towards BiH's ruling parties were much more stringent in the initial period after the ruling. As soon as the working group failed to bring any concrete results, the international community, notably the EU, was not as „loud" in their pressures on BiH's government as before. Thus, two open queries still remain – what does the failure to implement the Court's ruling and advance minority rights to political participation on part of BiH really mean when it comes to its European path, and is EU pressure in this case limited only to its advisory role?

3. Current Approach to the Issue of Political Participation of National Minorities in BiH and the Role of Civil Society

In theory, the search for rights to political participation of minorities signifies a paradigm shift, where there is a move from a discourse of protection to that of empowerment of minorities. Thus, when examining the constitutional provisions of BiH when it comes to this issue, one can conclude that this paradigm shift has not yet occurred.

The ruling of the ECHR in the case of *Sejdić-Finci vs. BiH* was the first judgment in the history of this Court that questioned the constitutionality of an ECHR member state. Despite the initial steps that were taken on part of BiH towards the implementation of the Court's ruling, and the fact that the Election Law does envision (at least on a local level) to some degree of participation for national minorities, they still do not have a meaningful option to politically participate in the state level. From the point of view of EU integration this means that minority issues in BiH (including their right to political participation) are still treated as part of the „approach to vulnerable groups" and mainly, in the context of social inclusion. Hodžić rightfully argues that:

„The political participation of minorities is still understood by many relevant actors as related to the ethics of care and protection, financial needs and budgetary considerations, and not as a matter of co-decision making in sectors of particular relevance to minorities and in broader aspects of political life. In such a perspective, political participation of minorities is seen mostly as an ad hoc problem-solving mechanism rather than continuous dialogue that would enable persons belonging to minorities to voice their concerns and positions in decision-making and at the same time also inform the general directions of development of a society."[19]

[19] Hodžić: *ibid.* 48.

Thus, when minorities are consulted, the consultation process is *ad hoc* and confined to several issues, but mainly financial allocations to different minority organizations. This also means that less organized minority groups (those without formal associations) are excluded from this process. This brings us to an important argument – the importance of the civil society, notably, associations of minority groups and NGOs.

Minority leaders and NGOs, at least in CEE states, have helped bringing domestic and international attention to minority issues. Yet in BiH, it seems that minority organizations have not fully realized this. When seen from the perspective of national minority associations on local level, the system of their political participation looks like a system of lobbying and pushing for action through personal connections,[20] rather than an institutionalized mechanism of political participation through dialogue and co-decision making.[21] Thus, unlike in most EU member-states, the sources of minority demands are very few, and when combined with discriminatory constitutional provisions, it is to no wonder that minority rights are often secondary or even ignored. What minority groups need to acknowledge is the fact that only a strong and vibrant minority civil society will help them move closer to their rights. Moreover, the more pressure they put on state level actors, the more likely is that the EU will take a firmer stance on the issue. It cannot be expected that only two men will change the situation in relations to minority rights to political participation in BiH. Any potential disagreements over the ECHR's ruling among the seventeen national minority groups in BiH, and the current lack of a concrete and unified approach to this joint issue (or better a collective voice), will only make it more difficult in terms of their demands to domestic actors and the EU.

4. EU Transformative Power in the Case of Minority Rights to Political Participation in BiH – Does it really Work?

The protection of human rights, including minority rights has been high on the priority list for each European state aspiring to join the European Union family. In fact, minority rights have been identified as one of the core prerequisites for EU membership by its numerous treaties, but also external policy documents, including the Maastricht Treaty, the Amsterdam Treaty and most recently the Lisbon Treaty, the Common Foreign and Security Policy (CFSP) and the Copenhagen Criteria (human rights aspect and political aspect). Furthermore, the EU expects its future members to join the CoE and to comply with its conventions on human rights and minorities, since pan-European organization can help aligning the laws and institutions of its members „into conformity with European norms".[22] The CoE's 1949 Statute states that every member „must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" (Art. 3).[23] Moreover, the ECHR and the FCNM (which came into force in 1998), represent the CoE's two primary legal texts, which must be honored by all its member states. The latter is also one of the first legally binding multilateral agreements

[20] Hodžić: *ibid.* 48.

[21] Co-decision making is seen as the best model of political participation on minority groups, as the scope of decision includes all those aspects which have a general relevance to the entire society, issues which are partially minority relevant and issues that are only minority relevant.

[22] Cf. *The Council of Europe and Human Rights.* Council of Europe, Strasbourg, 1991. 31.

[23] Ibid.

on minority rights, and its main concern is to promote equality and create internal conditions which would help protecting and preserving minority cultures and identities.

But despite the plethora of legal provisions, minority discontent still remains a potential threat to democratic consolidation across Europe, which is a primary reason for considerable EU involvement with regards to this issue in all potential candidates and candidate states of the Western Balkans. What is more, over the past decade, the EU has used membership criteria to impose conditional measures, so as to ensure compliance with the above mentioned human rights agreements and regulations. Yet, this ostensible dominance of the EU in the internal politics of the region has come under scrutiny in BiH, where the conditions of EU membership seem to have little impact when it comes to resolving the issue of national minority rights to political participation. But, why does the „magnetic pull" of the EU fail to result in acceptable reforms in BiH? Has the EU lost its power to transform, the power that it applied so successfully in CEE states just a decade ago, or is BiH a lost cause? The answers to these queries could be examined through many angles, but this work will only outline four dimensions which influence the successfulness of EU conditionality in BiH, notably, in light of minority rights to political participation.

5. What does the EU Fail to Acknowledge in BiH?

It is not arguable that the reform process in BiH is frozen. It is also a fact that one of the many reasons for BiH being trapped in the „blind alley" lies precisely in its discriminatory constitutional provisions and practices. But, what is worrisome is that, for the first time in its accession history, the EU has not succeeded in dealing with several challenges that are presented to it. The fact that the European Union has not been as firm as it could have been on the issue of discrimination of national minorities in BiH, notably, in light of their right to political participation, has its roots in four distinct approaches applied by the EU towards the dead-end situation in this country.

Although, one cannot ignore the impact of domestic politics in BiH and the current political stalemate, it can be argued that the EU has not taken considerable measures when it comes to aligning its accession measures and instruments to the peculiarities of an ethnically divided post-conflict state. The frozen conflict in BiH, where the three predominant ethnic groups do not fail to use every opportunity to attract attention to their „ethnic cause" has brought the EU to a situation in which it realized (too late) that it must face „three different cost-benefit calculations concerning EU membership".24 While all three ethnic groups, at least in theory, accept the notions of EU integration, they are not willing to sacrifice their share of power just for the sake of the EU membership. Thus, national minorities have slim chances of gaining their right to political participation (at least on the state level). If implemented, the likely outcome of the Sejdić-Finci case will be the following: at least one of the three ethnic groups will not be satisfied, thus, potential application of the decision will be blocked. Any agreement with the EU on part of one ethnic group is viewed as a „conspiracy case" by another one. Thus, EU is often viewed as a „cheating player", the one that can suddenly side with the other party.

[24] Cf. Tzifakis, Nikolaos: Bosnia's slow Europeanisation. *Perspectives on European Politics and Society*, Vol. 13 (2012) No. 2, 131-148.

Secondly, BiH's politicians are aware of the fact that EU has gone beyond its acquis communautaire when it comes to constitutional reform issues, so many ask „why do we even need to politically include minorities when the EU does not have the power to change our Constitution?" The perceived partiality described above and the low level of conditionality of EU policies in BiH only question and even ridicule its role in BiH. Thus, it can be concluded that the EU can only have an advisory role and not an enforcer one, in the case of political participation of national minorities in BiH (and the implementation of the ECHR's decision in case of Sejdić-Finci vs. BiH).

Furthermore, the EU has failed to play a credible role when it comes to imposing accession requirements. As mentioned above, Brussels often finds itself in a position to demand major changes from BiH (mostly those outside of its constitutional framework), and is faced with hardheaded players (BiH's politicians). Knowing that the reward for instant compliance is not immediate EU membership, BiH's leaders have very little incentive to agree. What is more, many of the EU players in BiH, including the High Representative and EU Special Representative (HR/EUSR), the European Commission (EC) and individual EU member-states, send different signals when it comes to compliance with certain reforms, and creation of a situation in which BiH's politicians feel like they can pick and choose when, where and how to comply. Thus, in the case of inclusion of BiH's national minorities into the political life of the country, the state's politicians seem to avoid any fast decisions. This is to no wonder, since the interest to preserve ethnic power on all levels certainly remains much more important than weak conditionality and non-uniform approach of EU actors in the case of national minorities' rights to political participation.

Lastly, the fact that the EU is divided on what is important and what is not in the case of BiH's reforms is something that BiH's politicians have greatly used in their favor. Considering that BiH has been under heavy influence of the international community in the immediate aftermath of the war[25], and that the international players have often adopted key reforms instead of BiH's political elites, has created a situation in which the international community could eventually be blamed for all failures. Once the role of the former one has decreased and the ruling parties were given greater accountability over the reform process, they quickly learned that the EU was much divided over the issue of importance of individual reform processes. This is not to defend BiH's politicians, but such mixed signals from the EU only create confusion and an atmosphere in which this supranational actor is not taken seriously.

Thus, if the EU wants to take part more seriously in the implementation of the Sejdić-Finci case, and ultimately act as an enforcer in the process of constitutional reforms in BiH, it must first create a single common position. In other words, the EU and all of its umbrella actors need to be either more stringent in their approach or accept that they are viewed only as an advisor (an ignored one, nonetheless) in this case. This is not to say that the EU should create more conditionality policies and apply them with more sticks and carrots, but to learn how to make BiH's elites more compliant with what has already been demanded. Lastly, the EU must realize and acknowledge to its Bosnian counterparts, that the implementation of the ECHR's decision in the case of Sejdić and Finci vs. BiH does not suggest that the constitutional crisis in this country will be permanently resolved. What is more, the EU should make it clear that this is just the first step towards more intricate and pressing demands of the newly emerging national minority voices in BiH.

[25] The HR/EUSR ruled BiH almost as an international protectorate up until 2006.

6. A Few Concluding Remarks

The issue of political participation of national minorities in BiH came as a blow to the country's already shattered and deeply divided political scene. It is not arguable whether or not will the newly emerged collective voice of BiH's national minorities change the direction in which both BiH's governing elites and the international community will go. Although, we might be currently looking into two opposing paths, this new dimension on BiH's political agenda and an old issue for the EU, will certainly result in two outcomes: the EU will acknowledge the failure of its negotiable conditionality and hopefully replace it with a more stringent approach to accession requirements, while BiH will not be able to ignore future minority demands, as it will result in more instability and threaten democratic sustainment. In light of this, national minorities in BiH must come out of the silence and start using their government's EU membership discourse (and objectives) as a tool to attain greater rights.

Lastly, with all this in place, it will be hard for BiH to ignore the implementation of the Sejdić-Finci case's ruling. This will create a favorable situation for the EU to correct its integration approach in BiH. Thus, the EU should stop being satisfied with just *any* progress or any verbal agreement concerning the implementation of the decision. If the EU succeeds in bringing about this new approach, BiH's politicians will find themselves having to trade personal (ethnic) interests for the sake of EU integration, just as Serbia did on numerous occasions. This, in fact, could be a good thing.

THE EUROPEAN UNION AND RUSSIA:

HISTORY OF THE RELATIONSHIP AND COOPERATION PROSPECTS

MARINA LAZAREVA *

1. History of the relationship – key documents on EU–Russia cooperation

As it is well known, the roots of the European Communities (EC) can be traced back to the 1950s. At that time, Russia was a part of the Soviet Union. The USSR did not have direct trade relations with the Communities because it was exclusively oriented towards the Council for Mutual Economic Assistance – an international economic organization of the socialist bloc. The situation only changed when Mikhail Gorbachev came to power in the Soviet Union and started "perestroika".[1]

The very first Act of the Communities with regards to our country was the Regulation of the EU Commission in July 1968, concerning the rules of delivery of milk and milk products into the USSR.

In 1987 (before any official relations between the USSR and the EU were established) the EU Court heard a claim from the Soviet association called „Tekhnointorg" against decisions of the European Commission and the Council, which imposed antidumping limitations on the import of Soviet fridges into the EC territory. It is very symbolic that during the „cold war" there was a hearing of the claim on Soviet fridges. The Court overruled the claim because among other things, the Soviet could not provide full details about the production conditions of the fridges as they were made at military factories.

Legally, the history of the relations between the USSR and the European Communities began in 1988 when the Parties made a Statement on establishing an official relationship between the Council for Mutual Economic Assistance and the European Economic Community. The Statement expressed the Parties' mutual desire to develop cooperation in areas of their competence and common interests. Unfortunately, these two organizations failed to take any serious joint actions because of the collapse of the USSR and the above-mentioned Council.

Next year (in 1989), the USSR and the European Communities signed an Agreement on Trade, Commercial and Economic Cooperation. In fact, it was the first treaty between the Soviet Union as a state and the European Communities.

The Soviet Union collapsed in 1991. Then, the Communities published a Statement on the future status of Russia and other former Soviet Republics. The Statement acknowledged Russia as a successor of the Soviet Union. The Communities made a decision to conclude

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[1] Cf. *Право Европейского Союза* [The European Union Law] (ed. Kashkin, S.U.). Moscow, 2009. p.985.

an agreement on partnership and cooperation with each of the former Soviet Republics. The first Agreement on Partnership and Cooperation was an Agreement with Russia.

From the start, the policy of the Communities towards former Soviet Republics differed from the policy towards the countries of Eastern and Central Europe due to their possible membership in the European Communities. To help Central European countries (especially Poland and Hungary), the Communities set up a PHARE program, to help the USSR and Mongolia – a TACIS program.

One of the reasons for making the Partnership and Cooperation Agreement was the signing of the so-called *European agreements* of Hungary, Poland and Czechoslovakia with the European Communities in December 1991. These were agreements of association aimed at preparing these countries to join the European integration as full-fledged members. As the Russian experts took these agreements of association as its basis, the Partnership and Cooperation Agreement took over many features from them. Thus, Russians tried as much as possible to go along with the processes happening in the Communities and countries nominated for joining the organization. However, the Partnership and Cooperation Agreement did not intend to make Russia a member of the Communities, but it included a provision on the creation of a future free market zone between Russia and the EC, and later among countries which agreed on the participation of Russia in the common European area.

This Agreement on Partnership and Cooperation was adopted in 1994 and came into force in 1997. One of the reasons for such a long ratification time was a chapter on Political Dialogue included in the Agreement. That is why all member-countries had to ratify the Agreement together with the European Parliament and the Russian Parliament (Duma). The point is that this Agreement belongs to the so-called mixed international agreements concluded jointly by the Communities and the member-countries.

This Agreement was concluded for ten years and it is still effective, because it has been automatically prolonged every year. The Agreement is quite large containing over one hundred articles, several protocols, etc. The texts of all the Agreements on Cooperation with former Soviet Republics are almost completely identical, which means that they are „standard". Despite of that, they had a great significance in the development of relations with the European Communities.[2]

In the Agreement the priority is given to the establishment of close economic relations. In fact, this Agreement resembles the Rome Treaty of the European Community. It also regulates the movement of goods, people, services, capitals and some kind of common policies. But of course, the extent of integration between the EU and Russia is lesser than it is between the member states of the EU. Russia and the EU granted the status of the highest preferential treatment to each other.

It is necessary to say that until recently Russia considered the EU exclusively as an economic partner and not as a political partner, because in the foreign policy EU makes decisions via complex procedures, and powers of European institutions are rather limited. But, the EU underwent a certain evolution and now Russia is interested in making relations with the EU in all areas. Actually, in 2003, at the summit in St. Petersburg the Parties agreed to build 4 common areas with each other: 1) economic area; 2) foreign policy and security; 3) domestic security, justice, democracy and human rights; 4) science, culture, technology

[2] *Россия и Европейский Союз: документы и материалы* [Russia and the European Union: Documents and Materials] (ed. Kashkin, S.U.). Moscow, 2003. p.22.

and education. Within each area, there are dozens of projects, thus, the cooperation is expanding. Now, the cooperation is developing even beyond the framework of this document. Nowadays, there are 63 bilateral and multilateral agreements between the EU and Russia (based on the Agreement of 1994 and beyond it). There is also near-border co-operation (Northern dimension and co-operation in the Baltic Sea area including Kaliningrad region, co-operation in the area of the Black Sea). But there is still much to do.

The most famous Russian case of the EU Court was the case of Igor Simutenkov, a football player from the Russian Federation who played for the Spanish Club „Deportivo". The Court prejudicially interpreted the provisions of the 1994 Agreement on request of the Spanish court. The Court drew a conclusion on a direct action of the Agreement norms in the EU law order. This had a great impact on the defense of rights of Russian citizens and legal entities at the territory of the EU.

1.1. Stages of the EU–Russia Relations

The study would like to make some *general comments* in relation to Russia and the EU. First of all, it is worth highlighting that relations of Russia and the EU have developed and are still developing with ups and downs. It is possible to distinguish several stages:

1. *Romantic Stage*. It can be dated back to the first term of the Presidency of Boris Eltsin (1991-1996). It was the time of great expectations from both Parties and big words about prospects for cooperation. Unfortunately, these words were not put into practice. The West expected that the Soviet Union, later Russia would manage relatively fast to build a market economy and democratic western-type institutes. Russia, in turn, expected to get a massive assistance from the West compared to the post-war American „Marshal Program". The Russian Government even expressed a desire to join the EC, later EU. Andrey Kozyrev, a young politician was appointed as head of the Foreign Affairs Ministry. They adopted a policy aimed at a close relationship with western democratic countries. It was 1994 when the Partnership and Cooperation Agreement was concluded.

2. *Critical Stage*. But rather soon it became clear that the Parties overestimated the potential of their relations. The second stage can be called critical and can be dated back to the second term of President Boris Eltsin (1996-1999). The West was shocked by the extremely slow and conflicting development of Russian reforms, by a contrast of proclaimed values and actual actions of the Russian government. The West reacted especially negatively to the armed operations in Chechnya, associated with numerous violations of human rights. Russia, in turn, saw the difference between the profusion of words the West said to support the new Russia and the scope of actual help. Russia was enraged that the EU and the NATO treated the post-communist countries located in Central and Eastern Europe and the former Soviet Republics differently. Russia was also displeased with a highly discriminatory trade and economic policy of the EU towards Russian goods. Andrey Kozyrev, Minister of Foreign Affairs, was replaced by an ex-leader of the Foreign Intelligence Service, called Evgeny Primakov. The concept that Russia lost the Cold War against the West became popular. Prerogative was given not to close relations with the West, but to create a multi-pole world order. National interests of Russia and an idea of „a strong state" became more important than democratic values.

In this period it can be seen that some positive actions of the West in relation to Russia had been taken, for example, a more significant role of Russia in G-7 and the admission of

Russia to the Council of Europe. At this time, Russia received a considerable credit from the International Monetary Fund (IMF). But actually, the EU was motivated by tactical considerations. The West wanted to support Eltsin and his group at the parliamentary and presidential elections in 1995-1996 against the Communist Party, which was very popular.

3. *Pragmatic Stage*. The third, current stage can be called pragmatic. It began with election of Vladimir Putin as President of the Russian Federation in 2000. This period is characterized by a political and economic stabilization and we can say by considerable degree of continuity in the foreign policy, mild nationalism and pragmatism.

1.2. Common EU–Russia Interests

Under the Agreement of 1994, the new relations of Russia and the EU are called 'partnership'. It was intended that the term „partnership" would mean a closer relationship than traditional cooperation. Otherwise, the words „Partnership and Cooperation" in the name of the Agreement seemed illogical. The Agreement does not give any definition of partnership but names its most important elements. These are political and economic freedoms; democratic principles and human rights. But Russian leaders interpret the word „partnership" in a narrower, more pragmatic way, leaving it to Russia to solve the issue of values. As you know, 80% of the Russian territory lies in Asia, where European values are less popular. There are the following trends in the Russian public opinion:

„A European trend" is supported by people who consider Russia mainly as a European country and share western liberal and democratic values. This group mostly consists of young, highly educated people.

„A Eurasian trend" is supported by people who believe that Russia must have its own individual way of development and they share original Russian cultural values, which are different from Western European values. The second trend became more popular during the long and difficult market reforms, especially, among elderly people.

„A Slavic trend" unites those who believe in a union of the peoples of Russia, Ukraine and Belarus. They lived together within the Soviet Union.

Some European experts recommend the EU to concentrate on common interests with Russia and not on common values. Instead of pretending that Russia shares its values and hopes, the EU should openly admit that there are deep differences between them.

Nevertheless, despite all the problems in the Russian – European relations, there are some uniting aspects (common interests). These are the followings.

Economic co-operation. Economic relations are truly needed for the parties. For Russia, the EU is the main trading partner dominating in Russian foreign trade (52%), the main foreign investor of the Russian economy (75%). For the EU, after the USA and China, Russia is one of the key partners in trade (8%), dominating in the area of raw materials and power supply to the EU (77% of total imports are from Russia).

Stability and safety in the region. Human rights situation, threat of economic crises, terrorism, migration, crime, and environment are common threats for the region. It is underlined by long borders.

Long historical and cultural ties.

2. Problems and Prospects

2.1. New Basic Agreement

The Partnership and Cooperation Agreement is outdated now, for example, it does not include the membership of Russia in the European Council, participation in the European convention on human rights and basic freedoms. In 2002, Russia was granted the status of a market economy country. In 2012, Russia joined the World Trade Organization (WTO). Now, there is a discussion of not just partnership but a strategic partnership between the EU and Russia.

Talks on the new agreement are going very slowly. They started them in 2008. The new agreement shall keep the experience accumulated by the Partnership and Cooperation Agreement and shall shift the relations to a new level. Some Russian scientists believe that the parties made haste starting talks on the new agreement. Maybe it is better to choose the „Swiss" variant and develop sector integration (within the same common areas).[3]

2.2. Visa-Free Regime

One of the most important issues in the dialogue between our country and the EU is establishing a visa-free regime for crossing shared borders. After the expansion of the EU in 2004, the length of the shared border became over 2000 kilometres. This issue is discussed at each summit of Russia and the EU.

In 2006, Russia and the EU signed an Agreement (it entered into force in 2007) to simplify visa regime and an Agreement on re-admission (re-admission is a consent of the government to accept back to its territory those citizens who are liable for deportation from another country). The Re-admission agreement has been one of the obligatory conditions putting forward by the EU for a long time. Getting visa for certain categories of citizens was made easier (government officials, businessmen, science and culture experts, reporters, sportsmen, teachers, students and close relatives of people who live in Russia or in the EU countries).

Nowadays, Russia is offering to cancel visas with the EU countries altogether. The first step as Russia sees it is to cancel visas for holders of duty passports, that is, government officials. The EU refuses it as in Russia duty passports are not always issued in strict compliance with the law, while government officials are most often the main violators of human rights. The EU believes that the main part in strengthening ties between nations is played by students, scientists, reporters, non-profit organizations and businessmen, and not government officials and deputies. That is why the EU declares that it is important to grant advantages to common people, while the government officials are not the priority category to make their visa regime simpler and easier.

Cancellation of the visa regime suggests close interaction of special services and law-enforcement agencies, and constant sharing of information databases on citizens and criminals. Such actions require a high level of trust between the parties, but the EU is not ready to share its information of this kind with Russia, yet.

[3] Cf. further Kalinichenko, Paul: *Европейский Союз: право и отношения с Россией* [European Union: Law and relations with Russia]. Moscow, 2012. p.100.

The principle fear of the EU is uncontrolled migration leading to dumping and lower quality of services, meanwhile, the fear of the „Russian mafia" is ungrounded – because visas have never been problems for organized crime. Some Russian experts think that the aim of the EU is to get economic and trade concessions from Russia, and the „technical" problems identified by the Europeans are actually political ones. The EU primarily wants to give visa-free entry to the „Eastern partnership" countries.

The approximate date for the introduction of a visa-free regime is fixed by Moscow and Brussels for 2014 – the time of the Winter Olympics in Russia. Now, the EU is ready to sign an improved agreement on a simpler visa regime.

2.3. Power Supply Industry

The focus of the power supply talks is the same as many years before. The acceleration of these talks can be traced back to the *third energy package* of the EU. This document was approved in the EU in 2009. It includes acts aimed at limiting rights of ownership and management of power supply, and transportation by vertically integrated companies. Separating transport nets from the power generation, the European Commission hopes to enhance competition, create conditions for new players to enter the market and cut prices for power. This is disapproved by Russia, as well as the fact that the energy package bills have retroactive force.

The Russian Federation wants to have exceptions for Gazprom with regards to requirements stated in the third energy package. Gazprom is the largest power supply company in Russia. It is engaged in development, processing and sales of gas, oil and heat power. It has the richest reserves of natural gas. It has the world's largest gas transportation system. The company supplies gas to 30 foreign countries. It is one of the largest oil manufacturers. Over the course of last year, Gazprom took the first place among all other companies in the world regarding the size of net profit.

Now, the European Commission carries out an anti-monopoly investigation against Gazprom connected with the application of the third energy package provisions to the contracts with a number of West European countries. A formal pretext to start the investigation was a claim of Lithuania to the EU regarding that Gazprom „abuses its dominating power at the market".

Russian leaders believe that current EU rules violate Article 34 of the Partnership and Cooperation Agreement, which provides that the parties „shall not make economic activity worse in each other's territory". Moreover, Moscow thinks that some provisions of the third energy package are in conflict with WTO rules. Moscow tries to explain that it carries out activity to diversify power supplies to the West. For this purpose, there are two routes of „Northern flow" and the „Southern flow" project. It is expected that the „road map" Russia – the European Union in the area of power supply will be agreed upon by March 2013.

2.4. Human Rights

Human Rights Watch called the year 2012 the worst year in line of human rights in Russia. Human rights are traditionally acute issues in the talks between the Russian Federation and the EU. The EU is sure that the Russian power applies pressure on its citizens. The human rights organization, the Human Rights Watch made an official request to the EU to discuss this issue at the last summit. This is a non-government organization, which monitors how human rights are observed in over 70 countries around the globe. Its headquarters are located in the USA, but it declares that it takes no financial support from any government organization and exists from private donations. It speaks up about attempts of the Russian authorities to suppress freedom of speech and association, activity of non-governmental organizations.

Russia, in turn, also started to launch claims about human rights in the West. Thus, in December, the Russian Ministry of Internal Affairs published a report on human rights of national and religious minorities in the EU countries. It is about violation of Russian-speaking people in the Baltic States, the so-called non-citizens, about cases of racism and xenophobia, CIA secret prisons and tortures carried out in them, as well as about hardships of Gypsies and some other categories of refugees in the EU.

2.5. Commonwealth of Independent States (CIS)

Finally, a big role is played by the so-called „a Great Power Syndrome", typically for Russia as a very large state. Here, one Russian politician can be quoted, who said „Great Powers do not dissolve in integration unions, but they create them around themselves".4 That is the factor of CIS. Almost immediately after the USSR collapsed in December 1991, all the former Soviet Republics (except the Baltic States) formed a new interstate union, international organization, the CIS. One of the main goals of CIS was to preserve business ties that were left from the Soviet period. But for a long time such cooperation did not have any results, as all the member-countries experienced hard economic crisis. And to add, the national economies did not complement each other, but competed with each other. Thus, many agreements remained mostly just on paper as 'paper law'.

From the very start, the Baltic States did not join the CIS. Ukraine and Turkmenistan did not sign the CIS Regulations, thus, legally they are not CIS members. Later Turkmenistan declared that it would take part in the CIS as „an associated member". Georgia joined the CIS in 1993, but in August 2008 after an armed conflict with Russia, Georgia declared to leave the Commonwealth.

The Partnership and Cooperation Agreement says that Parties want to encourage the process of regional cooperation between the former Soviet Republics. But Russia watches the development of relations between other CIS countries and the EU closely because it considers them a sphere of its own interests. In each annual speech, the Russian President declares that Russia has priority relations with the CIS members, but in reality, CIS is very ineffective. For a long time, the policy of Gazprom was a uniting factor because it supplied gas and other fuels to CIS members at considerably lower prices. However, over the last years Russia has significantly increased the prices and CIS countries lost some of their interest.

Some time ago, the USA was active in this area. With their support a political association called GUUAM was set up and it consisted of Georgia, Ukraine, Uzbekistan and Moldova (their main goal was to make life harder for Russia). But for now, this group has lost its strength.

[4] Ivan. D. Ivanov on Russia in Europe: „our country is not in need of affiliation with the EU. This would entail loss of its unique Euro-Asian specifics, the role of the center of attraction of the re-integration of the CIS, independence in foreign economic and defense policies, and complete restructuring (once more) of all Russian statehood based on the requirements of the European Union. Finally, great powers (and it is too soon to abandon calling ourselves such) do not dissolve in integration unions – they create them around themselves." See Covremennaya Evropa, Institut Ebropi, 2001.

2.6. „Eastern Partnership"

Now, the EU is active in this area through the „good neighborhood policy". This project of the EU is aimed at bringing the EU closer to these 6 former USSR countries (Armenia, Azerbaijan, Belorussia, Georgia, Moldova and Ukraine), while Russia refused to participate in this project. In 2010, Armenia, Georgia, Moldova and Ukraine signed a Memorandum with the EU on an agreement of association. Belorussia does not share the European policy of good neighborhood; moreover, the standard agreement on partnership and co-operation with Belorussia has not come in force at all. Perhaps, it is better for Belorussia to develop traditional commercial relations with the EU.

The persistent reluctance to „let" Russia in Europe led to the creation of the Eurasia integration zone. The Union state of Russia and Belorussia was established. Customs Union started to operate in 2010 between Russia, Belorussia and Kazakhstan. Kyrgyzstan prepares to join it. The common economic area began its activity in 2012, again among Russia, Belorussia and Kazakhstan.

The same countries started to create the Eurasia economic union. In 2011, President Putin specified the idea to set up the Eurasia economic union on the basis of the Customs Union and the Common economic area of Russia, Belorussia and Kazakhstan in detail, noting that it will neither be a new USSR, nor will replace the Commonwealth of Independent States. He returned to this idea in 2012 declaring that this project has more grounds for success than the EU because the potential participants have the common language environment, infrastructure and similar economic pattern. The Agreement on the set up of the Eurasia economic union is expected to come in force by 2015. Anyway, the most important role in these relations for the Russian and its neighbors' political and defense aspects is played by economic ties.

HUMAN RIGHTS PERSPECTIVES, PROGRAMS AND POLICIES

TIBOR LENGYEL *

1. Context of the Problem

Visions and perspectives like that of human rights have and allow for an interdisciplinary interpretation angle and approach for analysis. Since this paper cannot cover the whole rapidly expanding range of human rights themes and subjects, it will attempt to give an analytical tool, a methodology to those interested in this field and are open to connect the discipline of law with larger policy ramification to explain successes or failures, but also problems around the institutionalization processes of human rights.

It will attempt to cast some light on and offer a comprehensive framework for the better understanding of conflicts and anomalies that surround the area of universal, international and common human rights. This will be shown through a multilevel policy process analysis about the implementation of these human rights in modern and postmodern western culture, primarily focusing on the EU, the United States, international institutional bodies and the role they play. A multilevel analysis of the implementation of policy processes is the methodological tool to provide a tentative model for the disciplines of legal, policy, social science and international relations. This study will pursue that aim from a number of different viewpoints, angles of interpretation or simply called perspectives.

Whereas Hungary has often drawn international critic during the recent years in the area of human rights – mainly since its new constitution, its Fundamental Law and accompanying legislations to implement them are in place – it has not been alone in this. There are also other countries, societal groups and strata across our western culture that struggle to gain answers and explain the reasons for social debates, conflicts and mutual misunderstandings relating to human rights.

So is Germany, where members of government offices and tens of thousands of private citizens struggle with the effects of secret U.S. surveillance and its human rights consequences (not only the diplomatic ones). At the same time, in the same country, national media is getting over the scandal of paedophile practices of high seated political party functionaries – that took place during the 1980's – with great ease in an election year. It is England where public safety is contrasted or even played out against the human rights of terrorists,[1] and parliamentary and public debate is introduced about cancelling out (abrogating) the Human Rights Act of 1998, or even leaving the European Human Rights Court`s jurisdiction all together. It is in quiet and prosperous Austria where referenced

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[1] http://www.rt.com [news/un-internet-privacy -resolution-353/] (17 December 2013). http://www.gatestoneinstitute.org [4056/human-rights-public-safety] (27 November 2013). http://www.globalgovernancewatch.org [spotlight_on_sovereignty/recent.asp?id=857&css=print] (8 March 2012). http://www.publicserviceeurope.com [article/2434/britain_should-have-six-month-trialseparation-from-eu] (19 September 2013).

academic critic of the practice of an Asian religious community causes criminal punishment for a politically and socially active practicing lawyer.[2] The sentence was based on anti-discrimination legislation and on a subparagraph of the anti-terrorism law, namely on *religious defamation, hate speech* and *incitement* for potential violence. So far, the public has been familiar with such lines of argumentation „only" in the context of „islamophobia" and gender mainstreaming,[3] but not in the context of rational critic of an Asian religious community's practice. Where else can and will a criminal law's subparagraph lead through the expansion of legal categories like tolerance, defamation, hate speech and incitement?

Stepping beyond the positive law perceptions of our days and the corresponding legal processes, on the one hand and without attempting to answer the question about the nature of universal human rights at large (the Universal Declaration of Human Rights did not do it either), this paper attempts to shed more light on what sort of dynamics is behind the conceptual expansion and more importantly, the institutionalization of human rights, nationally, internationally, and globally. In doing that, this paper proceeds in an interdisciplinary fashion where one will become aware of the axiomatic relevance of other disciplines in societal and institutional processes for human rights implementation. It is not difficult to put forth the thesis, that the functional and structural properties of our themes are interrelated in a multidimensional way. Functions in human rights debates will be perceived in this paper as an inevitably dynamic ethical, social and political bifurcation of all public and democratic participants who, while addressing human rights, are also simultaneous creators of societal consent and ethos. In doing so, they inevitably include and subscribe to larger (even transcendental) visions and apply consciously or unconsciously held presuppositions (axioms, or arbitrary givens) that frame everything else that has something to do with their temporary and future community life. Structures (institutions), although, by their nature are less dynamic than functions, expressing the same (but long term) willingness and commitment to better one's and others' life according to principles and "helpful rules", that somewhere in inner consciousness they call and/or accept as good for every human being. This paper will start with postulating three somewhat arbitrarily selected but relevant and hopefully helpful starting points or angles that present themselves as non-negligible in the analysis of the manifestations of functions and structures in human, societal and international relations. They will be connected to the human rights' problematic fields. The first one is the *institutional – ideological* dimension, namely, the philosophical view on the nature of the change in human institutions.[4] The second one is the *geopolitical – international* or *power political* dimension. This one deals with competition, harmony and diplomacy between nations. In doing so, it weighs and evaluates power relationships between participants differently; according to economic, military, demographic, geographic, and other dimensions. For example at the moment, China has different power advantages and different proportions than the EU or the USA. The third one is the *sociological* angle; this is the *phenomenological*, empirical dimension. On its basis, the gathering of data for quantification or qualification can be a fruitful branch of knowledge that if applied honestly recognizing all its limits in its potential to explain, is a helpful reality based angle of analysis. In a certain sense, of course, everyone – including the observer – remains a part of social

[2] http://www.kreuz-net.at [index.php?id=315] (17 November 2013).

[3] *Terrorismuspräventionsgesetz* [The Austrian Terrorism Prevention Law of 2010]. 119/ME XXIV. §283 (1).

[4] Grass, David: Multiculturalism in World History. *Foreign Policy Research Institute,* Vol. 5 (September 1999) No. 8.

reality. In this viewpoint, however, what is being studied and researched is dependent on the perspectives of those who order or finance the targeted research. Moreover, the quantified and qualified data usually offers itself for further and different interpretations. Highlighted and elevated subject matters of the past decades were being connected to human rights, one example being the so called „health rights". The health mandates of national governments were under fire from supra-national (like the EU) or sub-national nongovernmental groups (NGOs).[5] Other times, the perception – coming partly from abroad – that it is necessary to regulate women's social and health situation, for example in the Ukraine was monitored by non-governmental agencies. It reveals that gathered facts are not randomly arising and tells about the basic assumptions (presuppositions, axioms) of the researchers, politicians or NGO activists. They select the phenomena for quantificational research and usually interpret it with their preconceived bias in place.[6] Therefore, also the sociological viewpoint can never promise full objectivity, this being in direct contrast with what current tendencies in the legal and policy sciences are attempting to use it for. We live in an era, where, since the second half of the 19th century, the assumptions of materialism, relativism, progressivism and scientism had come to dominate the majority of the academia as well as the academic domains. The solutions to the gained data, as a rule, are usually argued and called for an increase for more centrist social control and regulations with the aim of more economic or social or health justice, in other words, for more equality.[7] In short, the results of research are also impacted *a priori* by the philosophical/ideological premises of the authors. And this is a tendency across the disciplines including law/public policy and the fields of human rights. Furthermore, other dimensions, namely the actual levels and/or stages of affirmation, application and implementation in the policy process add to the complexity of the human rights debate. What the author calls the *six P's Model*, helps readers to illustrate the actual stages/levels in the implementation process of the human rights agenda. The „*six P's*" in this model of policy implementation process are the *perspectives, principles, programs, policies, processes and practices*. This is how a legal, political, social, economical subject matter (human rights suppose to be touching all of these dimensions) will reach general public and society at large. Before further elaboration on the *six P's policy process model*, it is useful and recommendable to make a couple of further generalizations (thereby introducing secondary assumptions/axioms) that further help to appreciate the role of it as an explanation model for policy analysis relative to implementation, institutionalization and conflicts around human rights themes. In this scrutiny, illustrations

[5] http://www.globalgovernancewatch.org [spotlight_on_sovereignty/recent.asp?id=124&css=print] (28 April 2010).

[6] http://www.globalgovernancewatch.org [spotlight_on_sovereignty/recent.asp?id=123&css=print] (28 April 2010). See also http://www.turtlebayandbeyond.org [2011/turtle-bay-un/warning-cedaw-may-cause-severe-schizoprh...] (11 November 2011) and http://www.turtlebayandbeyond.org [2012/human-rights/governments...] (12 September 2012).

[7] Council on Foreign Relations (CFR): The Global Human Rights Regime. *Issue Brief*, Publ. 5 July 2012. 31. http://www.cfr.org [human-rights/globalhuman-rights-regime/p27450] (16 November 2012). elly, James P.: International Law Limitation on Democratic Entrepreneurship. *Conference Presentation*, *Common Sense Society Summer Leadership Academy*, Budapest, Hungary 29 July 2012. Cf. further, Bolton, John: The Theory Behind the EU Is Simply Wrong, *Ottawa Citizen*, 15 October 2012, http://www.ottawacitizen.com [touch/story.html?id=7392382] (20 October 2012). Fonte, John: Global Governance vs. the Liberal Democratic Nation-State: What Is the Best Regime? Encounter at 10: The Power of Ideas. *The 2008 Bradley Symposium*, 4 June 2008.

from a *phenomenological-sociological* viewpoint will be emphasized, later followed by the *institutional-ideological* and *geopolitical-international* perspectives.

2. The Phenomena of Institutionalization: Before and After of the Public Debate

First, there is a watershed difference relative to any subject matter as to whether its institutionalization is in the process of being embedded *de facto* into everyone's everyday life. If this is the case it is not merely a topic for academic, media driven or democratic debate on institutions, international relations for the public in search for a better ethos. Rather, such embedding would mean its arrival at legal, military, regulatory and police power dimensions and who would really want this. Prior to that, the democratic public avenues were still open and intact for influencing the process but afterwards, this is largely not the case anymore. The daily effects of institutionalization are experienced and perceived by the public, far too often, differently from the elites in the power centres. Hence, democratically speaking, the line between the two stages, this is to say *before* or *after* institutionalization of *protective* (legal) and *promoting* (administrative) new mechanisms, cannot be viewed indifferently and left to its own dynamics. That is to say, the implementation of policy process that is predominantly guided by the „few" and their supposedly special knowledge got detached from the consent and ethos of the "many". The stakes are too high for our culture and civilization and this fact plays a crucial role regarding the effects of human rights for the majorities or sub-cultural minorities in modern democracies. This is simply the sociological reality, although, there remains an interrelationship between the subsequent early stages – perspective, principles, and programs of intended institutionalization (debated more or less in public or arguably even secretly[8]) – and the legally increasingly binding phases of policy, process and practice. One can rather easily picture a good example of that with the help of the *six P's policy implementation model* relative to the introduction of the Human Rights Act in the United Kingdom and that what it became in the next 14 years. As indicated above, the change of its interpretation relative to its substance or even the potential abrogation of it is rising on the horizon.[9] Therefore, with regard to the socio-political and legal dimensions of policymaking, from a democratic process point of view, it is not negligible to distinguish between the different stages of implementation, especially when so-called *new instruments* are introduced into society. Even in their target group or environment, they often have unforeseen consequences, not to mention the unintended effects with all the other non-target groups or strata of society – this in the short term as well as in the long run. This is why in our case, the process of implementing human rights through some sort of institutionalization, cannot be left only to the political elites, but it will not do justice to the public at large either, if only selected NGO groups consent or speak

[8] http://www.bild.de [politik/ausland/europaesche-parlament/csu-politiker-protest-sex-bericht-33776266.bild.html] (17 December 2013).

[9] Pinto-Duschinsky, Michael: *Bringing Rights Back Home. Making human rights compatible with parliamentary democracy in the UK.* http://www.policyexchange.org.uk (10 June 2012). Justice Lady Arden: Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe. The Annual Sir Thomas More Lecture, 10 November 2009. http://www.guardian.co.uk [law/2011/dec/14/lord-irvine-human-rights-law/print] (18 January 2012).

„scientific truth" and wisdom from a single issue movement´s perspective.[10] Not to mention that also the civil society NGOs can be exploited by other elites ideologically or opportunistically. NGOs might well present themselves as democratic, but can only represent a special segment or interest of the multifaceted society in which other groups might not have their single issue or scientific representation. At the institutional table, around which big business and big NGO's lobby big supranational governments and international organizations, have a place – others with their legitimate empirically or historically argued concerns do not.[11] If the „single issue" movements or the „new science's evolving interpretations" purport to be holistic in their impact and they claim for the need of institutionalized application of their „findings", this will not make them less but rather more dangerous, democratically speaking. At the same time, they would weaken or even contradict their own justifications for existing as non-governmental entities because they increasingly demand governmental implementation of their conclusions without the democratic process.[12] Many participants at this conference come from nations that from their recent history remember well at the single issue movements of the 20th century, whether it is the proletariat or the Arian movements, or it is reductionist or holistic in the application of their findings. The scientific argumentations of those days – scientific materialism or Eugenics – that went hand in hand with the movements – justified the recreation of society in a social engineering fashion at the prize of enormous cruelty but nevertheless, „scientifically".[13] Additional elements from the sociological (societal-empirical) point of view help to make an easy transition to the institutional ideological viewpoint that will be subsequently elaborated in more details.

The human rights umbrella attempts to cover or purports to include ever increasing number of life functions and their protections.[14] In any meaningful sense, they need an institutionalized network of structures that connect and interlink them. The introduced or to be introduced mechanisms/instruments for *monitoring, reporting, evaluating, recommend, regulating, sanctioning*[15] etc. in the implementation (understand institutionalization) process appear to (or at times even surprise) the observers and participants of the debate — at the different levels, nationally, regionally or „sub-culturally". On these levels namely additional distinctions are present and further differentiations needed to take place in the „six P's"

[10] CFR: *op. cit.* 9. See further, Steinberg, Gerald: *Freedom of Expression. UN Human Rights Council.* http://www.stonegateinstitute.org [2851/freedom-of-expression-unhuman-rights-council]. Bhagwati, Jagdish: *Verteidigung der Globalisierung* [In Defense of Globalisation]. Pantheon , München, 2008. 74-78., 90-93. and 174-178.

[11] Cf. in detail, Bhagwati: *ibid.*

[12] UN Adopts Roadmap for International Environmental Governance http://www.globalgovernancewatch.org [spotlight_on_sovereignty/recent.asp?id=144&css=print] (28 April 2010). Kern, Soeren: *EU Proposal to Monitor "Intolerant" Citizens.* http://gatestoneinstitute.org [4036/eu-intolerant-citizens] (27 November 2013).

[13] Tuomala, Jeffrey C.: Nuremberg and the Crime of Abortion, *University of Toledo Law Review,* Vol. 42 (Winter 2011). Neuhaus, John Richard: The Return of Eugenics, 1-28. In: Neuhaus, John Richard (ed.): *Guaranteeing the Good Life: Medicine & the Return of Eugenics.* Eerdmans Publ., Michigan, 1990.

[14] CFR: *op. cit.*; *Human rights and international law undermined by "a la carte" application, warns UN Expert,*http://www.ohchr.org [EN/NewsEvents/Pages/Display/News.aspx?NewsID=12719&LangID=E] (3 December 2012).

[15] CFR: op. cit. 22-24. See further, U.S. Citizens Are Plugged Into the Matrix of Human Rights Governance,http://www.globalgovernancewatch.org [spotlight_on_sovereignty/recent.asp?id=141&css=print] (28 April 2010).

policy process – *perspectives, principles, programs, policies, processes* and *practices*. When one talks about the pre-suppositional/philosophical phase of the process which gives shape to a particular vision of society, it is worth mentioning that it is a *perspective*. Something of a clear line like *Willy Brandt*'s „North and South" (UN Development Report) epitomized such during the 1980's.[16] Brandt delineated a teleological (but materialistic) vision of a common heritage of mankind. In an empirically sounding language, he articulated a vision for a commonly owned peaceful globe. He „scientifically" backed up this vision and called for a solution – which was to be *global institutionalization*, flowing from the materialistic definitions of interconnectedness and interdependence. Surprisingly few new elements are in his theory on the perspectives, principles and program levels relative to equality, freedom and brotherhood as we knew these concepts since *Rousseau*, *Hegel* and the revolutionary classics. The theory simply rolled the centrism and the redemptive role of the state further from nationalism, socialism, national socialism and international socialism. By means of instrumentalizing, the so-called *common problems* and *needs*, our *common humanity* had to be saved *not through classical cooperative efforts based on interrelatedness and inter-nationally interlinking mutual interest*, but from the perspective of *socialistic interdependence and interconnectedness*. The latter was materialistically defined based on some sort of determinism – labour, environmental and oppression theories of the *periphery* and sub-societal groups – applied for a „Spaceship Earth" *common home*, in an impersonal material universe. Of course, it was written by an international socialist; hence, reductionist by definition, through its very materialistically defined listing of „common needs," as were also other key „independent commissioners" in international organizations of the 20th century. *Olof Palme, Gro Harlem Brundtland, Sean MacBride* who authored subsequent UN Commission Reports to the same effects, were cut up in the same stream of collectivistic approach to life, hence, the designation „Commonism"[17] for their updated and global collectivistic ideology is succinctly well justified. The trend to absolutize the economic, social and multicultural rights proceeding functionally under the vocabulary of *common needs* and *common problems* is nothing new. During the subsequent stages in implementing this perspective of the world and its future „salvation" *on the principles and programs levels*, this old/new ideology of „*Commonism*" began to be institutionalized gaining shape and structure in common Principles (through the 1995 Commission on Global Governance) and common Program throughout the 1990's leading up to the New Millennium Declaration as its Program and Manifesto. This further propelled the implementation of the „new" perspective on the policy levels from the next decade onward founding new agencies, financial potentials, offices, projects and staffs in the realms of environment, health, military and human rights. They were based on international documents and resolutions like the 2004 UN report on „perceived new threats" or the adaptation of the „Responsibility to Protect" doctrine but were quickly expanded from classical humanitarian and human rights categories to functionally argued social and environmental needs (health, women, environmental refugees, unaccompanied children refugees, etc.). Subsequently, one arrived and has to deal

[16] Brandt, Willy: North-South: A Program For Survival, Report of the Independent Commission on International Development Issues. The MIT Press, Cambridge, Massachusetts, 1980.

[17] The author has not met a better definition than the one the Dutch-Canadian International Relations Professor described as "Commonism" in his groundbreaking study of the post *Iron Curtain* ideological/institutional global trends in the early 1990s. See: Bom, Philip C.: The Coming Century of *Commonism*. Policy Press, Washington D.C., 1992.

with these issues at the level of policies, processes, and practices and not merely at the perspectives, principles and programs levels. We see gradual institutionalization epitomized in the institution of the new UN Human Rights Council,[18] and through other attempts to control national polity through global environmental governance processes.[19] The distinction of the former stages of perspectives, principles and programs and later stages (policies, processes and practices) make a big difference and have a great significance *from a democratic point of view* for the content and expansion of human rights. The top down, distanced, indirect and *globally egalitarian* nature of the program is collectivistic. Instead of the classically democratic manner of introducing new mechanisms (by means of democratic debate closer to the people), the all inclusive (health, wealth, sex, security, environment, communication and finance) way of implementing it, is not without complications and controversies. Its proportionally increasing potential for abuse is as much a democratic as a scientific concern, as well. The everyday dilemma will often presents itself that when one thinks that s/he is talking about public policies, others still expound on the levels of the principles and perspectives. When some talk about the (legislative, judicial) processes to bring about new administrative mechanisms, others already talk about the practice – results, feedback or the desire to correct the process in the first place. The analogical request of relating the subject matter to the right level seems like a banal point to even bring up. At the same time, however, the media barrage, with regard to the practice or failure of human rights policy applications depicted in the evening news (i.e., on the failure of multicultural policies, refugee tragedies or sex trade) pressures politicians to urgent actions for the „problem". Similarly with regard to economic problems, the nondemocratic at times even secretive natured policy negotiations and decisions of the elites (i.e. in the Council of the EU about the creation of financial institutions beyond the European Central Bank), obscure the real issues – the creation and purpose of unaccountable new institutions that undertake wealth distribution through unlimited credit supply.[20] As a result, the public is confused, frustrated or largely left in the dark.[21] The legal theory behind such phenomena is especially questionable. Signed treaties or agreements complemented and accompanied by „new" interpretations beyond the ones earlier agreed upon content and subject matters by the politicians and their narrow circle of experts to make the earlier not concretized programs operational, blurs the indications of what level of implementation of policies the daily debate is aimed at and how the public could orient itself or react democratically. The applied public procedure is unable to offer a clear *cause and effect* explanation and justification for the new regulating mechanisms. And exactly this is the critical problem in selling the

[18] UNGA: President on Draft Resolution on the Human Rights Council (A/60/L.48), 15 March 2006. avel, Václav: A Table for Tyrants. *New York Times*, 10 May 2009. http://www.nytimes.com [2009/05/11/opinion/11havel.html?_r=1&partner=rss&emc=rss] (19 May 2009). *The U.N. Human Rights Commission: Can It Be Rescued?* American Enterprise Institute (AEI), http://www.aei.org [events/filter.,evntID.785/summary.asp] (9 October 2004).

[19] http://www.un.org [apps/news/printnews.asp?nid=41160] (17 February 2012) and see http://www.un.org [apps/news/story.asp?NewsID=42401&Cr=devel...] (12 September 2012), as well.

[20] http://www.imf.org [external/pubs/ft/survey/so/2011/NEW120911A.htm] (19 December 2011) and http://www.money.cnn.com [2011/10/25/news/international/europe_crisis_talks/index.htm?cnn=yes&hpt=i] (26 October 2011).

[21] *Die kleine Slowakei wird zur Gefahr für die gesamte EU-Rettung* [The Small Slovakia Will Be A Danger For the Saving Package Whole EU]. *OÖ Nachrichten*, 3 October 2011. 6.

Martino, Peter: *The Gigantic Eurozone Ponzi Scheme.* http://www.hudson-ny.org [2509/eurozone-ponzi-scheme] (27 October 2011).

inflated human rights concepts to a constitutionally speaking still democratically operating public. This theme is recognized but only partially addressed by global law, global governance and human rights experts as well as by the broader academia.[22]

Viewing the campaign program of a president or party, and later viewing a connected policy before and after reinterpretation, adaptation or adjustment by experts, one already deals with a new subject matter, without the democratic consent about it.[23] The enormous new expansions of competences through the newly created *European Stabilisation Mechanism* (ESM) or *European Financial Stability Facility* (EFSF) credit monopolies are good examples of this „spill over" functionalism – instead of maintaining competences within the constitutionally or treaty authorized role for the European Central Bank (ECB).[24] In other realms one can recognize that – be it rights of immigrants, social or gender minorities, environmental refugees, religious fundamentalists, or terrorists – all these are regularly presented in the face of the democratic public in the name of stabilizing and improving the human social dimensions of the weak and exploited. Here again, it is a very crucial need to differentiate between the corresponding stages in the public debate and levels of implementation in the public policy process. Perspectives are not yet policies, principles are not legislative or judicial processes to bring about administrative results, and this is properly so. Principles are not the realization and the bringing about for example equality or multiculturalism. To achieve such results – at any prize or at any means at the expanse of the democratic procedure – is not legally justified, because the underlying principles are different from the common and current constitutional ethos of the governed. This fact remains often hidden from the public's sight first. Party or government programs, constitutionally speaking, should first look at fundamental principles and perspectives as guidelines, while processes and practices look at the policies that are derived from the political consent of the democratic legislators. One can see, for example, the different home security policies or their abuse in different countries, where the *policy is separated from principles* or where democratic policy application is *interrupted from undemocratic law making* by the judicial branch. The facts that terrorists are made millionaires in England, just to leave the country,[25] or the US government bugs closest allies and their civilian populations are

[22] Cf. Bork, Robert: *Coercing Virtue – The Worldwide Rule of Judges*. The AEI Press, Washington D.C., 2003. 1-7, 45-51. and Pinto-Duschinsky: *op. cit.* See further, Garapon, Antoine: *A globalizáció mint jogi kihívás* [The Globalisation As A Legal Challenge]. Symposium, French Institute, Budapest, 1 December 2011. Kuby, Gabriele: *Globális Szexuális Forradalom* [The Global Sexual Revolution]. Kairosz, 2013. 80-90; Lord Judge, former UK chief justice, said: "European court is not superior to UK supreme court". http://www.theguardian.com [law/2013/dec/04/european-court-uk-supreme-lord-judge/print] (12 December 2013). Current Supreme Court justice, *Lord Sumption*, in his lecture speaks to the same effect: http://www.globalgovernancewatch.org [docLib/20131204_lord_sumption_lecture.pdf] (17 December 2013).

[23] Good but disquieting examples were also the secretive negotiations by the heads of states or ministers about the *packages* for Greece by the so-called Troika of the IMF, ECB and EU in 2012 and 2013. See to that effect Jordans, Frank: German minister rejects more time for Greece. *Associated Press*, 26 August 2012, http://www.boston.com [news/world/europe/2012/08/26/report-ger...] (11 September 2013).

[24] Henkel, Hans-Olaf: *Die Euro-Lügner* [The Euro Liers]. Wilhelm Heyne, München, 2013. 160-166. Stevis, Matina: Bank Supervision: A Lot Like Love. *The Wall Street Journal*, 16 October 2012, http://blogs.wsj.com [brussels/2012/10/16/bank-supervision-a-lot-like-love/tab/print/] (20 October 2012).

[25] http://www.publicserviceeurope.com [article/2434/britain_should-have-six-month-trialseparation-from-eu] (19 September 2013).

manifestations of these trends. Other example can be illustrative for the separation of policy from principles, too. What effected the introduction of policies, for example, due to illegal immigration in the USA or the „fortress Europe" phenomena in Morocco, Malta, Italy and Greece, were the pursued *unclear policy objectives* that are examples of blurred, hidden (or for the public confusing) original perspectives, abandoned principles and programs that have to do with both human rights and democratic procedures. *Constitutionally speaking, the latter has to be not only transparent but also limited in delegating power and jurisdiction*. The results are often just the opposite of what politicians, parties and governments democratically promised and worked out in the political democracy with their people in an ethically bound national or continental community, in a consent based common ethos.

Since there is a lack on corresponding judicial *checks and balances* instruments for the international policy making capacity of the decision-makers, even systematic analysis on the daily, weekly, monthly basis of a policy speech for the nation of a US president or an EU commissioner help relatively little. By the time societal groups become aware of the *de facto* processes and institutional situation surrounding them – and this is one of the important theses of this section in the paper – they are not on the level desired by logical and legitimate public expectation anymore, but on a far more advanced regulatory stage, out of control by the democratic public. Even if something admittedly went foul in the implementation process, as a result of applying principles and program details – held to be feasible and worthy so far – the turning around of decisions and going back to a democratic debate on the programs, principles and perspectives levels will be largely given up, usually, not even tried.[26] Due to the special interests' activism, politically, economically, and ideologically, that interest might well governmentally or non-governmentally proceed in the social realms or in business and financial sectors. Stable lobby structures and well financed bureaucracies are in place to carry on the dynamics of further regulations, institutionalizations as norms toward a higher supranational level of cutting the next deal, passing the next regulation form, of which the beneficiaries will be the few and those who have to bear the financial and mental sacrifices with a more regulated and more expansive daily life will be the many. Interestingly, the beneficiaries of the effected chaos (the lack of a balance in social harmony and the deficit economically and democratically), in spite of the empirically measurable negative results, will be those who cry for even more supranational or global regulating mechanisms, as international public policy solutions.[27] A good example of the past decade would be the admitted failure of two generations of western multiculturalism in Germany and France (in the words of *then-President Sarkozy* and *Chancellor Merkel*). Another one is the euro crisis based on non-productive placing of irresponsibly printed money and credit supply for and through the big financial institutions of the West. In both (multiculturalism and Euro-crisis) the realization of the supposed to be solutions only lifted the problems to the next level without sufficient democratic mandate, legitimacy and – most importantly – control. The problems simply became „Europeanized" or even globalized – economic and immigration problems crying out for European and global economic and multiculturalist solutions. The same took place with continental and global

[26] White, Jamey: Quack Policy Abusing Science in the Cause of Paternalism. *The Institute of Economic Affairs,* Publ. London, 2013. http://www.iea.org.uk [sites/default/files/in-the-media/files/IEA%20Quack%20 Policy.pdf] (2 January 2014).

[27] Morris, Julian: NGOs and Development. *Institute of Economic Affairs*. Blackwell Publ., Oxford, 2010. 1-5. See further, Bolton: *op. cit.* and Kuby: *op. cit.*

centrist overhaul for the financial sectors (new role for the IMF as global central banker, and new structures for rolling further the EU credit snowball through undemocratic new instruments and institutions like the ESM, EFSF). This occurred in place of the originally agreed upon principles and policy limits of leaving the European Central Bank in charge of financial stability which were originally spelled out in the ECB's Charter in line with the relevant principles in the EU Treaty. As a result of giving up on these principles of the Charter of the ECB and the Treaty, a substantial negative change could impact the Euro's financial potentials; however, by this time, in a regimented, uncompetitive and social redistribution focused common economic realm. Is this *in lieu* of the original vision (perspective) of the EU or the Founding Fathers, or is it rather in line with *Willy Brandt*'s global „*communism*" for which to sustain and carry on, even *founding principles, programs and original policies* (as in the case for the role of the ECB) can be sacrificed? All this can be justified by the supranational administrative bureaucracy on the basis of vaguely defined new common problems and unpredictable policy recommendations usually of an egalitarian or libertarian nature.[28] The supranational administrations undemocratically can alter or reinterpret treaties and connected original policies with the help of „judicial law-making". They adopt unwarranted and not specifically stated new processes and practices, and ignore or reinterpret principles „in an evolving fashion".[29] What really takes place is thereby the *creation of new principles without democratic process or checks and balances or the guarantee of reversibility.*[30] On top of that, the concentration of competences in new undemocratic instruments of supranational and continental (global) levels still does not fulfil their roles and promises. The result is that a once liberty accustomed society is administered from levels far above the nation state. Once the people of liberal democracies could get rid of their national leaders and periodically change the direction of failed policies. Today they still can do that if they are allowed to make use of the constitutionally guaranteed democratic processes. However, if through supranational global regimes and corresponding regulatory mechanisms, their constitutional playing fields are hollowed/emptied, including the playing fields of their national leadership to regulate in the realms that are viewed by their voters as the most important ones, then the culture, society or civilization arrived at *administrative global governance* instead of being a democratic or constitutional representative republic. In the national ethos based democratic context of our culture, such a tendency towards administrative governance at the expense of classical Western legal categories of liberties, order, rights and duties is not to be underestimated.[31]

3. Instrumentalizing the Language of Human Rights for Larger Policy Objectives

One factor that makes it more difficult to recognize this trend is exactly that many of the regulations and the simultaneous shift towards supranational and global levels are presented in the name of human rights as *comprehensive common human security issues*. The undifferentiated

[28] White: *op. cit.*
[29] Lord Sumption: *op. cit.* and Lord Judge: *op. cit.*
[30] Bork: *Coercing…*, 73-84; Woods, Thomas: *How the Catholic Church Built Western Civilization.* Regnery Publ., Washington D.C., 2005. 147-150.
[31] Manent, Pierre: Democracy without Nations? *Journal of Democracy,* Vol. 8 (1997) No.2, 92-102. Manent, Pierre: The Return of Political Philosophy. *First Things*, Vol. 103 (May 2000) 15-22.

way of tactics through such communication is really an abuse of our civilization's hard fought over predilection for liberties and order, rights and duties, subsidiarity and jurisdiction, checks and balances. While the reality of human rights vocabulary is flowing out of our legal traditions and it is a natural expansion of it, *the new contents that subsume* the other classical legal branches – parts of constitutional law, criminal law, international law, family law, etc. – are regrettable and not justifiable, and call for constant differentiation to be corrected.

There are exceptions where the regional or national or local trends flow in the face of the above described global trends. Such exceptions *in* and *outside* of the West and EU are Hungary, Switzerland, Poland, Czech Republic, Sweden – just to name a few. To some extent, especially in a geopolitical and ideological sense, Russia is also amongst those who currently shows adherence to local and national precedents for the maintenance of classical international law concepts instead of neo-utopian *global law* visions. They are in that sense fresh air in the post-Willy Brandt era of "communistic" global institutionalism tendencies in place of classical international cooperation that he and other socialists successfully abandoned. If the scope of new „*commonism*" requires definition, then it reasonably could be described as a revolutionary egalitarian institutionalism within the axioms of a naturalistic worldview, which by instrumentalizing international institutions and operationalizing human needs phenomena with the help of human rights vocabulary, determined to collectivize, redistribute and manage all spheres of life for the first time in history, on a global scale.[32] Thereby, it simultaneously shows the positions of philosophical poverty and that it is a natural elongation and extension of 19th and 20th century collectivistic and „redemptive" approach to life. It is revolutionary not in the sense of speed, suddenly killing countless people, but rather in substance by rewriting the human quality what it means to be human. In this context, the above mentioned nations – the exceptions at the top of this section – are even more underscoring the point that international relations can be done differently on the basis of different perspectives, principles with corresponding programs and policies, largely with a focus on the still available reservoirs of nationally mandated powers for international cooperation. Was not that the principled vision of the European Communities' Founding Fathers, a community and union of nations?

This study is not going to deepen the debate on to what degree the „*commonist*" themes are relevant or primarily human rights focused because exactly the regional and global governance ideas are such to purport that everything is related to everything else.[33] Such broad assumptions make „scientific" hypotheses very vulnerable and weak for empirical research with little access for scientific proof. As *Robert Unger*, law professor at Harvard University succinctly put it in his book *Law in Modern Society*: Having discovered that all things cause each other in social life, as in the world at large, he [the scientist] wants to find a way to represent this insight in what he says about society. Alas, his eagerness is self-defeating. The more causes he takes into account, the less he is able to distinguish discrete

[32] Cf. further, Bork: *Coercing…* and Johnson, Philip E.: *Reason in the Balance – The Case Against Naturalism in Science, Law and Religion*. InterVarsity Press, Illinois 1995, 138-146.

[33] Weeramantry, C. G.: *The Lords Prayer Bridge To A Better World.* Liguori Triumph, Missouri, 2000. 188-196. and 226-228. See also, Etzioni, Amitai: *From Empire to Community*. Palgrave, New York, 2004. 19-25. and 56-65. and CFR: *op. cit.*

relationships of cause and effect. In the end, the very notion of causality flounders in ambiguity.II[34]

In our context, it is suffice to say that exactly this weak line of argumentation with concepts of *interdependence* and *indivisibility* shows the arbitrary nature of „global governance science". Hence, for keeping or strengthening the new „human dimension", the human rights element will be most often used (or at times abused) to justify measures that could otherwise be well placed in classical socio-economical categories such as economical, political, sociological, international political, geographical and demographical fields of research and solutions. Both, the competitive globalization by means of trade globalization and the security concepts of the free world, liberty and democracy is replaced through the operationalization of human rights for the new „human security". The old triangle consists of *international cooperation* (including law, trade and diplomacy), *democratic procedures* (with room for real pluralism and cultural diversity), and *classical human rights* with their branches of *civil and political* as well as *economic, social and cultural rights*. These rights are though interrelated and interlinked but *not indivisibly interdependent*. This is now being subsumed by a new triangle which is composed of *administrative globalism*, *new democratic values*, and *inflated human rights concepts* with essentially an entitlement orientation.[35] The „human security" agenda is becoming the new integrating regime for new interest group politics. The old triangle and its institutions (UN, EU, NATO, Organisation for Security and Co-operation in Europe – OSCE, Council of Europe etc.) are *gradually replaced* under the aegis of *human security* with their *redefined administrative equivalent* by elite consent but without popular and public discussion of the voters. The phenomena are similar and correspond to judge made law – *vis-à-vis* mandated legislation – in the legal branch. The „human security triangle" and judge made law both set up a legal net with new and broader (regional, global) enforcement capacities for societal control. The new global institutional structure is complemented with big (financial and economic) monopolies and big NGOs that become new arms of the administrative globalism that instrumentalizes human rights.[36] The inflated „rights" vocabulary of the new interest groups adds the word „duty" for everyone else thereby forcing an uncritical acceptance on the demos. What really takes place is a brand of socialism that is finally globalized, a global and ideologically targeted distribution of wealth, managed development with the aim for a „global welfare state". *Friedrich Hayek* in his classic *The Road to Serfdom* criticized in 1944 *only the regional equivalent of the same collectivism*, whether it is national socialist, communist or social democratic. With good reason he envisioned and warned against the potential implementation of any of the mentioned redemptive etatisms on a global scale. The applied institutionalism today functions not as procedural democracy but rather as a global net of administrative, legal, political, educational, military, police power-backed institutions, a top down communication and enforcement regime. In all these venues the presupposed substance of rights is „*outcome*" bound thereby affiliated with the 20th century egalitarian totalitarian concepts. Its focus is *not* „*inherent, enabling* or *procedural*" as

[34] Cf. Unger: *op. cit.* 12-13.

[35] Alvarado, Ruben: *Common Law.* http://www.commonlawreview.com [wordpress/] (17 December 2013).

[36] Maira, Arun: With standardised Rules of Globalisation Failing, Thinking and Acting Local Is the Only Way to Sustain Ourselves. *The Economic Times*, 9 July 2012 and http://articles.economictimes.indiatimes.com [2012-07-09/news/326...] (12 September 2012). See also, http://in.news.yahoo.com [nam-summit-democratise-global-governanc...] (11 September 2012) and http://www.stonegateinstitute.org [2851/freedom-of-expression-un-human-rights-council] (16 February 2012).

„independent UN expert Mr. Zayas" would like to make us believe. He and other institutional globalists attempt to obfuscate the issue with new terminology, rewriting the socialist content with classical sounding positivist and natural law terms „inherent" „procedural" and „enabling". At the same time, they are unable to hide their ideological predisposition in favour of the predominance of economic, social and cultural rights.[37] Additionally, they do this, methodologically speaking, not internationally – working with classical UN legal assumptions, advocating the cooperation of nation states – but rather „commonistically" determined to implement the perspective of an egalitarian social-cultural globalism.[38] Structurally speaking, all this is meant to be administrative and not democratic, loaded with socialistic collectivistic content along the lines of *Brandt, Palmer, Brundtland* and *McBride*, independent commissions of the 1980's.

Interestingly, there is a larger democratic consent for a truly human development even amongst the developing nations if their human development does not mean to be steered and regulated in a top down fashion under the umbrella of global environmental regulations of which the benefactors again are the sluggishly lagging unproductive and uncompetitive debt and credit-creating EU and USA. They would be the main beneficiaries of any global environmental governance, through the export of industry standards which would legally bind the developing countries instead of competing with them.

This rather broad multilevel analysis so far has tried to show the six P's model's methodological application from a sociological perspective – focusing on the phenomena of problems around human rights arguments and the democratic deficit that accompanies/correlates with the shifts on the levels in the policy processes. Then it made the transition to the institutional – ideological viewpoint that attempted to clarify much of the trend for global governance of a certain kind. This special – dominant – kind of global governance flows out of the intellectual assumptions of its promoters and their vision. Their perspectives and principles were exposed in the previous pages. One can see that their program instrumentalized human rights in this process and this, institutionally speaking, weakens the traditional branches of law, changes their roles and turns them into administrative agencies, departments and executives of a new global structure. This trend, in turn, in the absence of checks and balances and less and less political democracy, is not potentially neutral or harmless for traditional western values and principles. Simultaneously with this trend, there is the creation and shaping of the new global *common habitat* and global society. Within their scope, the human kind is holistically and principally focused on regarding common problems on every level and in every discipline. The solutions are supposed to secure human security (environmentally, economically, socially, health and gender-wise) through mandatory common ethical rules, common education, common global law and new interest groups dictated political process, backed by a common military and police to enforce it. Of such are *pilot projects* the democratisation of Afghanistan or the European Arrest Warrant.[39]

[37] Cf. de Zayas, Alfred: DEIOrder. Expert Charter is World Constitution. *Statement at the 67the session for the General Assembly.* Third Committee Item 69, New York, 2 November 2012. and see also, http://www.ohchr.org [EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12732&LangID=E] (12 January 2013).

[38] http://www.turtlebayandbeyond.org [2012/abortion/playing-human-rig...] (11 September 2012).

[39] http://www.schreibfreiheit.eu [2011/06/02/der-europaische-haftbefehl-offnet-die-ture-zur-christenverfo...] (25 October 2013) and Kuby: *op. cit.* 119-120. See also, http://www.stonegateinstitute.org [2734/criminalize-free-speech] (7 January 2012).

So far, an attempt was made to show how policy levels vertically and the relevant disciplines horizontally relate to each other and that they are interlinked. Then the study examined the phenomena of democratic deficit from an ideological and institutional point of view that accompanied the policy level shifts to bring about an arguably „more human security" in a „more human global society" for all, always beyond the nation-state concept.[40] This functionalist approach, it had been argued, presents itself holistically. The traditional constitutional, historic, religious values of the United Kingdom, Hungary, Russia or others seem to have no place in this, at least less than enough for self-determination. While degrading the old values and human rights principles to second class negligible local particulars – or even to dangers – they simultaneously create new universals. This is an obvious contradiction of the publically justified human rights terms because in theory all human rights are said to be interconnected and indivisible, however here we experience a new hierarchy of human rights.[41] Accordingly, the *matrix of human rights, human development, and participatory group activism* preoccupied with an *outcome directed* western faith in *human welfare security* ideals. The substance instead of the procedure emphasis of the IOs (inter-governmental organizations) and NGOs is well expressed by the United Nations Research Institute for Social Development: „...the performance of many countries in promoting basic rights, public services and the well-being of citizens is inadequate. Many new democracies retain elements of authoritarian practices and seem unresponsive to voters` interests. It is not enough for countries to be democratic: the substance or quality of their democracies is equally important."[42] (Italics added)

Now, the present paper would like to focus on the last remaining angle of analysis, namely, the geopolitical-international one, which will confirm the trends that we saw on the policy formulation processes so far. It will however validate those trends in a more strategic sense and with long term indications.

4. Governance with/through Multi-Levels

Governance topics became critical and urgent with the shift from the Economic Community and the Political Union to something more than a political, economic, monetary, fiscal, and – as some envision – social union. One can legitimately ask if this topic had been dealt with earlier, from the early 1990's on, would the EU be in such dire straits today? Historically, however, the functionalist approach (of *David Mitrany, Ernst Haas* and others) to policies, which was the essence of the European Community's (and later, the Union's) expanding institutionalization, (economic, social, fiscal and monetary etc.) postponed and avoided the structural, governance, constitutional questions. This came to haunt the post-Maastricht European Union. Recognizing this and envisioning more than

[40] Rentoul, John: *"Right of Rebuttal" against Straßburg?* http://blogs.independent.cn.uk [2011/10/25/a-right-of-rebuttal-against-strasbourg/] (7 November 2011). See further, Hannan, Daniel: *We make up the law as we go along, admits Britain´s new Euro-judge*, http://blogs.telegraph.co.uk [news/danielhannan/100167991/we-make...] (12 September 2012) and http://www.express.co.uk [posts/view/318045/EU-plot-to-scrap-Britain] (11 September 2012).

[41] Bork, Robert: *Slouching Towards Gommorah.* Regen Books/Harper Collins, New York 1997. 3-13. and Kuby: *op. cit.* 83-98.

[42] Cf. http://www.unrisd.org [80256B3C005BB128(httpProgrammeAreasForResearchHome) F1729 B 1683 ...] (28 September 2009).

one scenarios for the future, analysts cannot further postpone these areas of research questions. Notwithstanding the required damage control and the standing in the midst of the current (primarily EU and USA) crisis, the question is unavoidable; how will the New Europe and the *New World* look like by 2020-2050?

4.1. Regional European Governance Level

In the past, governance questions relating to the Council (Heads of State) were avoided or left unanswered. They have to be asked with no delay. *Can/should the Council have both executive and legislative powers? Or should the European Parliament have exclusive legislative authority?* If so (in either case): should the Council's heads of states, be restructured and become members of the EP – just as they are leading members in their national parliaments. Perhaps they should become leaders of MEP party blocs. Relative to the European Commission, the legitimate expectation is not just to be transparent and more in public, but re-structured to become (more) democratic. Hence, should Commissioners be elected by national or European citizens? Should commissioners be restructured become ministers like in a political cabinet? And, should they be elected, either by EP or European citizens? Relative to the constitutional aspects, perhaps the grounded questions were the followings: is the Lisbon Treaty a mere treaty or a treaty of/for a new European constitution? What is/should be the relationship between a European constitutional treaty and new national constitutions, like the Hungarian Constitution?[43] Is it necessary to demand uniformity and conformity in the EU? Or, highlight diversity and respect our rich national and European (cultural) heritage?

4.2. Global and Regional Governance Dimension

One has to be aware of the difference between the EU's agenda of integration and larger regional institutions like that of the OSCE agenda of integration. The two are (inter-)related, but the OSCE is wider – it involves North-American, Euro-Asian states. Understanding the EU inevitably includes understanding these larger regional institutional strategies and ideologies which are at the core of the institutional – ideological viewpoint. In this context it will be clearer that the "New Europe" is not about a united and prosperous Europe based on her cultural heritage including her constitutional and social traditions, but about the UN and a „New World" in other words the UN in Europe. The *Charter for a New Europe* (1990) explains this.[44] Under section 2.3., the *CSCE and the World* (C meant Conference prior to the renaming) one can read the following: "The destiny of our nations is linked that of all other nations. We support fully the United Nations and the enhancement of its role in promoting international peace, security and justice. We reaffirm our commitment to the principles and purposes of the United Nations as enshrined in the Charter and condemn all violations of these principles. We recognize the growing role of

[43] Lady Justice Arden: *op. cit.* http://www.guardian.co.uk [law/2011/dec/14/lord-irvine-human-rights-law/print] (18 January 2012) and http://turtlebayandbeyond.org [2011/abortion/former-belgian-primeminister-annoyed-over-hun...] (30 April 2011).

[44] Cf. http://www.hri.org [docs/Paris90.html] (12 November 2012). To the same effect – a necessarily institutionalized interpretation of human rights – also see the "Paris Principles" *as UN standards* for "effective National Human Rights Institutions" http://fra.europa.eu [en/publication/2012/handbook-establishment-and-accreditation-national-human...] (20 October 2012).

the United Nations in world affairs and its increasing effectiveness, fostered by the improvement in relation among our States with satisfaction.

Aware of the dire needs of a great part of the world, we commit ourselves to solidarity with all other countries. Therefore, we issue a call from Paris today to all the nations of the world. We stand ready to join any and all States in common efforts to protect and advance the community of fundamental human values."

Why is the UN invited to have a greater/enhanced presence (prominence) in the *peaceful* and *united* Europe? Is it a strategic move, aiming at leadership „*Light of the world?*" Out of the OSCE Charter for European Security, one can read the same strategic thrust in Art. 7.[45]

Under Chapter VIII in the Charter of the United Nations, we reaffirm the OSCE as a regional arrangement, as a primary organization for the peaceful settlement of disputes within its region, and as a key instrument for early warning, conflict prevention, crisis management and post-conflict rehabilitation.

There is the link in future relations of the UN, European Union, and the OSCE, in the strategic and visionary sense. Operationalized thereby are instruments, people, timeframe and geography. That now there is a *brand new* perspective for a new world, with *new principles* in space and time, globally, with a program that will have to be carried out, is unmistakably clear. These strategic sentences do not talk about European unity, prosperity, culture, and cooperation but about an outside agenda. One can read the same *perception of the world* (perspective) and strategic understanding in the High-level Tripartite Meeting in Vienna (program) between the Council of Europe, United Nations Office at Geneva and the OSCE, held in Vienna on 14 June 2010.[46]

If this is the case, it can legitimately be asked what regions the EU and OSCE are being integrated into? Do the EU and OSCE integrate into one Enlarged Euro-Asian union? If so, will the „New Europe" and the OSCE become regional dimensions of a new UN's global governance? Here, one inevitably perceives the EU in the context of New Global Regional Relations. What is the real or long-term agenda of what citizens of the nations call the EU? Is it not (merely) a federal Europe of nation-states, but an integrated 'New Europe' of peoples and nations in the *New World/Global Order*? Or, to put it another way, one can envision the new EU/New OSCE's New Europe as a Model of integration for Africa and the Americas – on how to succeed in their integration. Does empirical success not even have to take place to prove the feasibility of integration paradigms? Is the whole pattern just a strategic step and stage of an ideological utopian entity for a *New Europe/EU integration with African Union and the Organization of American States (OAS)* to become *regional dimensions of a fully integrated global order* by 2020, 2040 or 2050?

In connection with the reform and restructuring of the NATO, a similar pattern of internal transformation can be traced to see a process of change in the role of military power from international defence and security to a global police power. „We cannot build a safer world unless we take democratization, development and human rights seriously," said *Kofi Annan* at the Munich Conference on Security Policy in 2005,[47] referring to what this paper earlier highlights as the new triangle under the aegis of „human security". There is a

[45] Istanbul, November 1999. Art. 7. http://www.osce.org [docs/english/1990-1999/summits/istachart 99e.html] (11 November 2012).

[46] http://www.coe.int [t/der/docs/DER_Inf_2010_7_Tripartite_meeting-EN.pdf] (2 November 2012).

[47] http://www.securityconference.de [konferenzen/rede.php?menu_2005=&menu_konferenze...] (21 February 2005).

transformation taking place on two levels – European and regional. A shift in substance is effected on all levels of the *six P's* policy processes *from an Alliance for Collective Defence of nation-states to Common Defence of European nations.* Related questions are the followings. Should the NATO disappear – wither away with the progress of EU integration and, should defence rely on the European Forces (WEF)? Logically, taking the dynamics of the integration as a clue and pattern, in a *United* Europe, NATO should disappear. However, alternatively, in the larger „*commonistic global picture*" the strategic next step for the NATO is to become a global peace making and peace building force around the globe for global human security for all societies. This, however, will not merely copy the *Clinton/Bush* schemes of the 1990's and the new Millennium's early peace building projects, (a Kosovo or an Iraq) but goes beyond it. In the *Obama* pattern, the NATO should become a global force ['Salvation Army'] for human security what is attempted and pushed for in Afghanistan. Current NATO Secretary-General *Anders Fogh Rasmussen* stated that NATO must „reach its full potential as a pillar of global security."[48] This perspective is not uncontroversial and has difficulties in it.[49] A further background question can be put forth as to whether what is the *substantial* (i.e. „gender and comprehensive security"[50]) or *geographical* limit for these security developments. On whose security is the priority laid? Is the goal to maintain European and Western Unity? Will this not sound familiar for the developing nations (previously called the South, the Non-allied Nations or the Periphery) and for the new or recovered '*real-political Giants*' like China, Russia, Iran, Turkey and others as „imposing a Neo-Western imperialism"?[51] With the elucidation of critical links and questions, this study tried to bridge over and hope to have come closer to different and alternative perspectives of international law, international relations and governance goals. Continuing from the third analytical vantage ground in this paper, namely, the „*geopolitical, inter-national or real-political*" viewpoint the following can be added.

4.3. International Law

International law traditionally deals with legal issues (including disputes) between states. New international (or world) law would deal with disputes between (and within) states, it would apply to people and corporations simultaneously.[52] Having stated that, the question could be asked: what concept or ideal would apply/prevail at the global regional governance

[48] *Afghan priority for new NATO head.* BBC. http://news.bbc.co.uk [2/hi/europe/8181303.stm] (17 July 2010).

[49] At least from *George Friedman*'s analysis entitled "*NATO Decline and the End of Western Unity*", one can get that sense of qualitative change. See particularly in detail, http://www.realclearworld.com [articles/2013/05/07/nato_decline_and_the_end_of_western_unity_1051404.html] (29 May 2013). It is also republished with permission of Stratford under the title: Geopolitical Journey: Nostalgia for NATO.

[50] Cf. High-Level Tripartite Meeting, *op. cit.*

[51] *Russia Eyes Joint Drive with Turkey on Rights.* http://www.hudson-ny.org [2665/russia-eyes-joint-drive-with-turkey-on-rights] (19 December 2011).

[52] Secretary General: *Responsibility to Protect Faces Urgent Test `Here and Now`*, SG/SM/14490 GA/11271, 5 September 2012, http://www.un.org [News/Press/docs/2012/sgsm14490.doc.htm] (19 September 2012). See also, Roberts, James M. – Markley, Andrew W.: Why the US should oppose international corporate social responsibility. *The Heritage Foundation Backgrounder*, No. 2685, May 4, 2012. and Knox, John H.: *The Ruggie Rules: Applying Human Rights Law to Corporations,* August 16, 2011 draft, http://ssrn.com/abstract=1916664 (5 June 2012).

level? Would it be traditional international law and an international customary (world) law naturally gradually evolving out of it *or* – and this is the salient point throughout this paper – global human rights law – which operationalizes meta-governance perspectives and visions on (global) society? The latter is often instrumentalized *as minority laws* of different kinds (environmental, refugee, gender, health etc.).[53] In the process it gains supremacy by the consent of elites (politics, media, international organizations and NGOs over traditional international law – whether it is public or private international law).[54] Out of that first follows an escalation of the human rights dimension because of the crisis of western welfare states (central banking and artificial growth plus poverty). It apparently cannot be maintained in the present form any longer. The second problem is the perceived anarchism of postmodern subjectivism: economic, cultural-ethical, psychological, environmental, legal etc. In the light of this and in the light of the tendencies and measures to deal with these realities, it can be stated that there is a *consensus on the need for human rights as justification of a meta-governance/ethical vision* for justice, equality, equity, freedom and responsibility. The crux of the matter is as to whether the spectrum of all this should be only regional (national, local, and supranational) or global?

On the other hand, there is also a conflict over the content of rights. The context; history and evolution of human rights in Poland, Hungary, United Kingdom, France or Germany, can be (and is) different. Pluralism, checks and balances, democracy, equality, freedom, historically, culturally, philosophically (theologically) developed and can differ. Academic elites mainly teach from non-static, synthetic and „evolutionary" – categorizing it „process philosophy" presuppositions (since the 1860s on in Western higher education) by the present paper.[55] In other words in a sense we all became Hegelians. Its application in legal studies „*sociological law*" (from the 1890s on), came to be known under different names, *legal realism*, *critical legal studies*, *communitarian law*, *public policy*, etc. but for the most part, not the *classical positivist approach* or the *laws of nature/natural law* approach with their institutional product, *the liberal democratic nation-state*.[56]

Hence, law as a discipline and the rule of law as principles and methodology came to be *time and circumstances bound* (*relative)*, *open-ended, sociological balancing of interests* and *less and less historical or precedential.* Judges play more the role of social scientists and not that much the role of crystallizing historic precedence and its message and principles – as renown legal scholars of different legal traditions – including the positivist supreme court nominee *Robert*

[53] *Redefining Health: Center for Reproductive Rights and Anand Grover working together.* http://turtlebayandbeyond.org [2011/abortion/redifining-health-crr-and-anand-grover-working-t...] (11 November 2011). Cf. further, http://www.acc.hudson.org [index.cfm?fuseaction=publication_detals&id=6205] (13 May 2010) and *Penalising women who wear the burqa does not liberate them*, http://commisioner.cws.coe.int [tiki-print_blog_post.php?postId=157] (5 August 2011) and Kuby: *op. cit.* Rivers, Julian: Three principles for Christian citizens. *Jubilee Centre*, Volume 18 (March 2009) No. 1. http://www.jubilee-centre.org/document.php?id=297 (21 April 2010).

[54] EU HR, http://europa.eu [pol/rights/index_en.htm] (10 November 2012). Of special interest are the sections on "universal and indivisible," "fighting discrimination", "a global force for human rights". Cf. for critic of that Sumption: *op. cit.,* Judge: *op. cit.*, Bork: *Coercing*.... and Pinto-Duschinsky: *op. cit.*

[55] Martin, Glenn R.: *Prevailing Worldviews of Western Society Since 1500.* Triangle Publ., Marion, Indiana, 2006. Especially important in this respect is for establishing the link between philosophy, policy and law *Chapter 12* "Institutional Structure and Procedure of Process Philosophy".

[56] Fonte: *op. cit.* and Johnson, Philip E.: *op. cit.* 179-185. See further, Berman, Harold J.: *Faith And Order: The Reconciliation of Law and Religion*, Scholars Press, Emery University 1993. 302-304. and Unger, Roberto M.: *Law in Modern Society, a Criticism of Social Theory.* The Free Press, New York, 1976. 3-6.

Bork, the historicist Harold Berman of Emery University, and Harvard University educated natural law scholar Philip Johnson – affirm. Activist judges do so in spite of written provisions in a treaty to the contrary.[57] That *explains parts of the conflict on the content of Human Rights* in Europe, it casts more light on the EU's disputes with Poland, Hungary, United Kingdom, Czech Republic, Lithuania or Russia. In these countries *history still plays a greater role in understanding the rather more permanent principles* on equity, liberty, equality, etc. and the judgements following from this fact, especially with regard to the nation state´s competencies to set norms for its citizens.

In revisiting the concrete European and national/international levels relative to international law too, one holds up the chain of application and implementation model of the „*six P*'s model" for this vantage point also. This means one moves:

1) From Perspective (s) to Principles
2) From Principles to Programs
3) From Programs to Policy
4) From *Policy* to *Process* (legislative, executive, judicial, – they are also regionally and internationally interlinked)

5) From *Process* to *Praxis* (efficiency, feedback, adjustment, restructuring)

Other connected dimension to deal with in the policy making process will be the sequencing of priorities, proper nature of compromise, strategy and tactics-timing. As a thesis can be stated that due to different historic development and experiences, conflicts arise relative to international law in the material and procedural realms on all the above levels. Hence, the customary and treaty background of (historical) international law (material and procedural), including the UN-system today, cannot be regenerated so easily in sociological categories of a „new „global" law for „human security" on the basis of prioritized „common needs". The danger of this would be the ideological interpretation of "needs". What is the reference for needs can be critically asked. A „danger of reductionism" in the materialistically determined „common needs" agenda of „communism" is real and the globalisation of it is detrimental, it is the violation of the human spirit which is not only material, but also relational and spiritual. For human relationships and for the needs of the human spirit to be defined and nurtured – individually and in groups – the answers should be sought not only in the 19th and 20th century naturalism, neither in its Marxist egalitarian, nor in its pantheistic (called *romantic* in the West) forms.[58] The dangers of a doctrinal monopoly in the place of western traditional pluralism of worldviews, tolerance and institutions are many folds. Here, it will only be suffice to mention two. Legal procedurally speaking, this naturalist „commonist", open-ended (spaceship earth), evolutionary methodology has its current temporary "needs" focus. If this remains the rule, the dominant doctrine will *not only complete* but inevitably *replace* classical international law. Secondly, how do we derive from *current needs „universal human rights*"? Whenever that nevertheless publically and democratically (instead of elitistically or secretively) attempted, the resulting discussion and debate of truly global standards on human rights can facilitate a

[57] Lord Sumption: *op. cit.* and Bork: *Coercing*…106-110.
[58] Gray, John: *Die Geburt al-Qaidas aus dem Geist der Moderne* [Al Quaeda and What It Means to be Modern]. Kunstman, München, 2003. 40-47.

more consent oriented theory and praxis, independently of the degree of finality of the conclusions.[59] That is one reason why it was beneficial for the international community that Russia pushed through a resolution in the UN Human Rights Council (HRC) in 2012 on family and traditional values as essential and indelible components of international human rights. It expressed a new tendency not only in geopolitical terms but also for a preference of developing UN law on the basis of the classical triangle of international cooperation, democratic procedure and classical human rights principles. The advantage of this is that as a culture or cultures, we cannot suddenly experience the old principles and values *superseded and subsumed under newly created principles*. We only experience a *complementary role* of the new dimensions, principles and values without their triumphing suppression of the others. This way the UN can be what it was envisioned for namely, a forum and organisation of *voluntarily United Nations and not fundamentally and merely united by political elites for global levelling and arbitrary entitlement for interest groups*. The German language captures this difference in a succinct way through the remarkable differentiation between the „*vereinten*" „*Nationen*" and the undemocratically sounding – carried out by means of elite manipulation – „*vereinigten*" „*Nationen*".

5. Conclusion

The critic of Hungary and others from supranational levels on human rights violations relative to the *division of branches of government*, *constitutional court review* of certain government decisions, *constitutionality of certain laws* including "basic laws" right under, next (or equal?) to their constitution, can be a double edged sword that *if also applied to the European Union structures* (Founding Treaties, Lisbon Treaty etc.) – as they should be –, will intensify the *questions on truly democratic reforms and processes in the EU*. This adjustment process in the long run can potentially change the communication and procedural environment giving room not just to a sort of self appointed NGO-elite (which is a sort of „insider trading")[60] but to more balanced participation in the redistribution of European Union or national public funds.[61] Many former communists (and or their family members) in Eastern Europe established their „private/public" partnership, association or NGO through public funds with an opportunistic „insider" approach to their „free societal" pluralism. Insider trading in the financial institutions is exposed and even criminally sanctioned – at least since the 2008 crisis of the world economy. However insider trading of another sort through big NGOs, big governments (national and supranational), central banking and subsidized big businesses at the expense of public funds for purposes that have no democratically legitimized mandates are looked over and rolled further in the name of human rights governance and by special interest defined „democratic values".

[59] Cf. *Traditional Values Resolution Passes UN Council*, http://www.wunrn.com [news2012/09_12/09_24/092412_traditional.html] (11 July 2013) and Ruse, Austin: *Following the Russians?* http://www.thecatholicthing.org [columns/2012/following-the-russians/print.html] (16 November 2012). Russia pushed through this resolution in the HRC on family and traditional values *as essential components of universal international human rights* (results of the vote taken were, pro resolution: 25, against: 15, abstained: 7).

[60] Bhagvati: *op. cit.* Chapter 4, especially the pages 76-77. and 174-178.

[61] ibid.

With more clear and democratic structure processes and constitutional limits for the EU – which presupposes a European Union that accepts more democracy and new reforms – there will be less repercussions for current deficits in democracy and subsidiarity.

In other words, the problems around *competencies and accountability* (*and not only transparency*) *in the EU* are similar to the constitutionality questions directed at Hungary on (for example) the Fundamental Laws that in effect supposedly and arguably became parts of the new constitution of (2011).[62] Regulative (administrative) dimension of the EU (instead of legislative processes) – like *standards, recommendations, directives, orders, or monitoring mechanisms* etc. – *that is governance* **–** with their insufficiently democratic character and new bureaucratic / ministrative functions and capacities – well warrant a comparison to Hungary's regulation and arguable „infringing" on the boundaries of pluralistic institutions in the name of the „public good". For Hungary this can be the case just as much because of her communist historic context that she still attempts to leave institutionally behind, but also because of the empirically measured dimensions of corruption – in the field of public-private privileges and oligarchic monopolies (in the economy, media, bureaucracy including high public offices) – are so pervasive. However, at the same time in the EU, the limited single mandate („*Einzelermächtigung*") or the interpretation of subsidiarity clauses, or "simplified versions of procedures" (decision-making in the Council etc.) in initiating open ended – originally not warranted – policies in the EU's founding treaties, the so-called *Flexibility Clause* in the Treaty about the Procedures of the EU, are reflections of the same legal questions but on higher levels. Legal and policy academics, international relations and social science experts have a duty to raise, discuss or partly even answer *critically directed questions also at the supranational institutions and not just at the nation states*. To this effect see the analyses and recommendations during the British presidency of the Council of Europe (2012) in the aftermath of the XIV Protocol to the ECHR and the Interlaken Declaration.[63]

Solution in the current human rights regime dilemma could be the thorough academic differentiation of the truly interrelated and interlinked dimensions in international relations and human rights from those that are often undifferentiated and designated far too fast as *interdependent* and *indivisible* by social activists and policy makers in the egalitarian mold of the last century. Fruitful development of international law to a kind of world law can, at the same time, only take place, if the constitutional boundaries are respected, traditional values tolerated and not replaced commonistically under the „urgency education" of world disaster scenarios be it in the name of environment, discrimination, terrorism or immigration. We should continue to retain a careful distinction for the role of governments between life spheres to be *protected* and those to be *promoted*, without falling into the trap of social engineering after the failed century of socialism and unsustainable „*welfareism*" that is still in parts ongoing. Instead of a new postmodern *democratism* (on the place of political democracy) – this is to say instead of absolutizing sub-cultural group collectivisms and their demands – we could again principally discern the areas of societal life for unhampered cultivation (productive use), for care (charity for the poor), and conservation of a „healthy" environment. This last aspect is especially needed also for the human spirit which transcends material needs. It is too valuable to be derived merely from the social and material environment around us in the mold of late 19th century process philosophy with

[62] Varga, András Zs.: Beyond the Rule of Law. *Pázmány Law Working Papers*, 2012/44, http://www.plwp.jak.ppke.hu/ .

[63] Cf. Arden: *op. cit.* and Pinto-Dushinsky: *op. cit.*

her since tested and found failed ideological determinisms (materialism, relativism, progressivism and scientism).

The answers to these dimensions in the context of a „new federalism" on a continental level in Europe have a high priority because of the thrust of the current governance policies are not encouraging. This paper, nevertheless also attempted to look further, beyond the European dimensions – to other regions and continents – in the context of the new „commonistic" global policy agenda formulations. These perspectives for the analyst belong together, because the nature and the praxis of currently dominant perspectives on multilevel constitutions, laws, and policies have the institutionalization of an administrative governance system as their aim. Because of its „communistic" nature, such will only repeat the unsuccessful policies of the past but for the first time in the history of the world on a global scale and will only shift the arbitrarily defined „reductionist" human problems to the global level without *checks and balances*. In this case humanity will not only be *reduced* as an object of ruling elites but also *seduced* in the name of human security and human rights to a new universal religion. It will be holistic and cosmic in nature but definitely not self-governing, pluralistic, and democratic.

EU IMPACT ON THE INTERPRETATION OF INTERNATIONAL TREATIES BY UKRAINIAN COURTS

IEVGEN ZVIERIEV *

The interpretation of international treaties by national courts is a very challenging task as treaties are unique objects of interpretation. Many external factors affect this process, and EU law is one of those factors (usually not legally binding upon Ukraine but very influential in many cases). This is study deals with the impact that EU law is making on the approaches that Ukrainian courts apply in interpreting international treaties. In doing so, the study analyzes the available Ukrainian court practice as well as theoretical findings.

1. Introduction

International treaties form an important framework of regulating interstate relations. They provide basis for the existence and functioning of international organizations, international projects, as well as solve interstate issues. Being one of the main sources of international law, international treaties may also be viewed in a different status. Likewise, they can be considered as sources of national state law. However, treaty on paper does not always equal treaty in real force. In order to make treaty provisions „work", they have to be interpreted by a competent body (usually the court).

The interpretation of international treaties is a very challenging task as they have dual status (that of an international law source as well as the source of national law). By interpreting international treaties, national courts have to take the dual nature of these documents into account, as well as their international status. Interpretation of those treaties is correlated with the interpretation and application of foreign law – legal norms that were designed in another legal system, and were meant to be applied according to different rules.

This article analyzes general approaches to legal interpretation, its specifics concerning international treaties as a special object of legal interpretation, and the level of affection of the interpretation of international treaties by Ukrainian national courts by the relevant provisions of the law of the European Union.

2. Legal Interpretation

Interpretation as a process has been applied since the very birth of the mankind. The first feeling that a baby has, leaves a certain result for his/her whole life. That result (as well as the process that precedes it) is called *interpretation*, and it follows the new human being throughout his/her lifetime. Ancient Greek philosophers approached this term in their

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philosophical findings.[1] *Aristotle*, for example, called it an art, and supported special interpretation competitions to be held between the ancient Hellenic people.[2] That was also the time when a new study of *hermeneutics* appeared; most probably taking its name from the ancient Greek god 'Hermes', whose task was to interpret the will of other gods to the people. The current study is about different approaches of interpretation.[3]

With a time flow, hermeneutics appeared to be useful not only in philosophy (however, up to now, it primarily exists in that field), but also in theology, literature, art and many other branches of scholarship that benefit from its findings. Law is not an exception here. Ancient Rome (which is widely viewed to have followed Ancient Greece in the terms of human development) created a system of specially trained men whose primary task was to interpret legal norms. They invented the Latin term *interpretacio*, which was the ground of today's word, *interpretation*.[4] These were mostly legal scholars whose task was not only to interpret the law but also to generally research and codify it. Considering their high status and theoretical background, Roman law had a famous norm allowing legal scholars' teachings to be considered as a source of law. That norm can still be found in international law in the Statute of the International Court of Justice (Art. 38). This shows that the status of legal interpretations made by famous legal scholars in the Roman Empire was very high.

However, attitude to interpretation had its downside, as well. A widely known one is the complete resistance to legal interpretation expressed by Emperor Justinian (concerning his Digests). The resistance resulted in the criminalization of such activity; however, it was widely ignored after his death because other Emperors „forgot" about that norm.[5] Other famous examples of interpretation resistance include Napoleon and his Civil Code, which he forbade to interpret by any means. Similar laws also existed in the medieval Austria and Prussia.[6]

Nevertheless, all those means did not stop the development of legal interpretation in scholarship and in practice. Numerous philosophers approached the idea of the interpretation generally and legal interpretation in particular. Views tremendously differ: from those favoring the abolition of legal interpretation to those considering it to be the primary source of extracting legal sense out of every norm.

1 Малента В. Історичні аспекти становлення тлумачення норм права // Вісник Академії адвокатури України, Число 1 (17), 2010. – С. 19 [Malenta V. *Istorychni aspekty stanovlennya tlumachennya norm prava* // Visnyk Ademiyi advokatury Ukrayiny, Chyslo 1 (17), 2010. – S. 19]

2 Bederman, D. J.: *Classical Canons Rhetoric, classicism and treaty interpretation.* Ashgate, Aldershot-Burlington-Singapore, Sydney, 2001. 11-13.

3 Квіт С. Герменевтика стилю. – К.: Вид. дім «Киево-Могилянська академія», 2011. – С. 13. [Kvit S. Hermenevtyka stylyu. – K.: Vyd. dim "Kyevo-Mohylyanska akademiya", 2011. – S. 13.]; Барихин А. Б. Большая юридическая энциклопедия. – М.: Книжный мир. – 2010. – С. 175. [Barihin A. B. Bolshaya yuridicheskaya enciklopediya. – M.: Knizhniy mir. – 2010. – S. 175]

4 Schiller, A. A.: Roman Interpretatio and Anglo-American Interpretation and Construction. *Virginia Law Review*, Vol. 27 (1941) No. 6, 734-735.

5 Maclean, I.: *Interpretation and Meaning In the Renaissance: The Case of Law.* Cambridge University Press, Cambridge – New York – Port Chester – Sydney, 1992. 54-55.

6 Шершеневич Г. Ф. Курс гражданского права. - Тула: Автограф, 2001. - С. 61. [Shershenevich G. F. Kurs grazhdanskogo prava. – Tula: Avtograf, 2001. – S. 61.]; Протасов В. Н., Протасова Н. В. Лекции по общей теории права и теории государства. - М.: Издательский дом «Городец», 2010. - С. 318. [Protasov V. N., Protasova N. V. Lekcii po obschey teorii prava i teorii gosudarstva. – M.: Izdatelskiy dom "Gorodec", 2010. – S. 318.]; Maclean: *ibid.* 50-59.; Merryman, J. H.: The Italian Style III: Interpretation. *Stanford Law Review*, Vol. 18 (1966) No. 4, 584.

Generally, interpretation is viewed either as a process or as a result of this process. The most general approach is also to divide the process into to autonomous processes of ascertainment and explanation. This view is supported both by representatives of Soviet and post-Soviet legal schools[7] as well as the representatives of Western legal scholarship.[8]

However, the process (and the result, as well) requires basis. This basis is usually referred to as an object of interpretation. In those terms, scholars' approaches also differ. Some adopt the position that the only object of interpretation is a text of the norm, others

7 See Шершеневич Г. Ф. Учебник русского гражданского права / Редкол.: Е. А. Суханов (вступ. ст.). 3-е изд. М.: Спарк, 1995. - С. 50. [Shershenevich G. F. Uchebnik russkogo grazhdanskogo prava / Redkol.: E. A. Suhanov (vstup. st.). 3-e izd. M.: Spark, 1995. – S. 50.]; Шершеневич Г. Ф. Курс гражданского права. - Тула: Автограф, 2001. - С. 61. [Shershenevich G. F. Kurs grazhdanskogo prava. – Tula: Avtograf, 2001. – S. 61.]; Пиголкин А. С. Толкование нормативных актов в СССР. - М.: Госюриздат, 1962. – С. 8-9 [Pigolkin A. S. Tolkovanie normativnyh akrov v SSSR. – M.: Gosyurizdat, 1962. – S. 8-9.]; Вопленко Н. Н. Официальное толкование норм права. - М.: Юрид. лит., 1976. – С. 61-62. [Voplenko N. N. Oficialnoe tolkovanie norm prava. – M.: Yurid. lit., 1976. – S. 61-62.]; Нерсесянц В. С. Общая теория права и государства: Учебник для вузов. - М.: Издательство Норма, 2002. – С. 491. [Nersesyanc V. S. Obschaya teoriya prava i gosudarstva: Uchebnik dlya vuzov. – M.: Izdatelstvo Norma, 2002. – S. 491.]; Проблемы общей теории права и государства: Учебник для вузов / Под общ. ред. академика РАН, д. ю. н., проф. В. С. Нерсесянца. - М.: Норма, 2006. – С. 442. [Problemy obschey teorii prava i gosudarstva: Uchebnik dlya vuzov / Pod obsch. red. akademika RAN, d. yu. n., prof. V. S. Nersesyanca. – M.: Norma, 2006. – S. 442.]; Протасов В. Н., Протасова Н. В. Лекции по общей теории права и теории государства. - М.: Издательский дом «Городец», 2010. – С. 320. [Protasov V. N., Protasova N. V. Lekcii po obschey teorii prava i teorii gosudarstva. – M.: Izdatelskiy dom "Gorodec", 2010. – S. 320.]; Алексеев С. С. Общая теория права: учеб. - М.: ТК Велби, Изд-во Проспект, 2008. – С. 502. [Alekseev S. S. Obschaya teoriya prava: ucheb. – M.: TK Velbi, Izd-vo Prospekt, 2008. – S. 502.]; Теория государства и права: учебник для вузов / В. В. Лазарев, С. В. Липень. - М.: Издательство Юрайт, 2010. – С. 484. [Teoriya gosudarstva i prava: uchebnik dlya vuzov / V. V. Lazarev, S. V. Lipeny. – M.: Izdatelstvo Yurayt, 2010. – S. 484.]; С. Л. Лисенков. Загальна теорія держави і права. Навчальний посібник. - К.: "Юрисконсульт", 2006. - С. 200. [S. L. Lysenkov. Zahalna teoriya derzhavy i prava. Navchalniy posibnyk. – K.: "Yuriskonsult", 2006. – S. 200.]; Толкование права: теоретич. и практ. аспекты / Е. М. Шилина. - Минск: Тесей, 2008. - С. 28. [Tolkovanie prava: teoretich. i prakt. aspekty / E. M. Shilina. – Minsk: Tesey, 2008. – S. 28.]; Смирнов А. В., Манукян А. Г. Толкование норм права: учебно-практ. пособие. - М.: Проспект, 2008. – С. 6. [Smirnov A. V., Manukyan A. G. Tolkovanie norm prava: uchebno-prakt. posobie. – M.: Prospekt, 2008. – S. 6.]; Власов Ю. Л. Проблеми тлумачення норм права. - К., 2001. - С. 14. [Vlasov Yu. L. Problemy tlumachennya norm prava. – K., 2001. – S. 14.]; Молибога М. П. Тлумачення (інтерпретація) правових норм: наукове та практичне значення. - Автореферат на здобуття наукового ступеня канд. юрид. наук. - К., 2010. - С. 3. [Molyboha M. P. Tlumachennya (interpretaciya) pravovyh norm: naukove ta praktychne znachennya. – Avtoreferat na zdobuttya naukovogo stupenya kand. yurid. nauk. – K., 2010. – S. 3.]; Дудаш Т. Деякі герменевтичні поняття у теоретичній та практичній юриспруденції // Вісник Львівського університету. Серія юридична. - Вип. 50. - 2010. – С. 19-24. [Dudash T. Deyaki hermenevtychni ponyattya u teoretychiniy ta praktychniy yurisprudenciyi // Visnyk Lvivskoho universytetu. Seriya yurydychna. Vyp. 50. – 2010. – S. 19-24.]; Молибога М. П. Тлумачення норм права: сутнісні характеристики // Часопис Київського університету права, № 2. – 2010. – С. 45. [Molyboha M. P. Tlumachennya norm prava: sutnisni harakterystyky // Chasopys Kyivskogo universytetu prava, No. 2. – 2010. – S. 45.] *and others*

8 Moore, M. S.: Interpreting Interpretation. Marmor, A. (ed.): *Law And Interpretation. Essays in Legal Philosophy*. Clarendon Press, Oxford, 1997. 6.; Ricoeur, p.: The Model of the Text: Meaningful Action Considered as a Text. *New Literary History*, Vol. 5 (1973) No. 1, 104.

dwell more on substance. There are also other approaches which focus on legal relations, intentions of the author (or authors) and others.[9]

Depending on the focus most favored by the person when conducting interpretation, three most widely accepted approaches (theories) to legal interpretation exist: textualism, intentionalism, and teleological theory.[10] The first theory focuses on the interpretation of the text, and is reluctant to apply extratextual sources. The second one mostly dwells on the intentions of the author of the norm, and allows application of extratextual sources, and the third one considers the norm to „live its own life" and interprets it relying on the purpose that the norm is supposed to serve at a certain point in time. All three theories have their advantages and disadvantages, so the most appropriate would be to apply a certain combination of the three main theories, as well as their varieties.

3. International Treaties as a Special Object of Interpretation – the Ukrainian Situation

As it had already been noted, the interpretation of international treaties is a challenging task. This situation exists due to the dual nature of international treaties. On the one hand, they are clearly sources of international law, and they primarily function in that legal system. They are designed according to the rules of international law, and are mostly aimed at serving its needs.

On the other hand, international treaties may well become part of national law. There are two main procedures applicable in the world in this matter.[11] The first one is not to provide international treaties the status of national legislation acts but to adopt a special national legal act which would include the terms of the signed treaty or referral to it. This approach is mostly applied in so-called „dualistic" countries. They have the position that international law and national law form two different systems which do not correlate. Usually, dualistic approach is adopted by common law (legal) systems.

The second procedure is to automatically provide international treaties the status of national legal act. This is mostly accepted in monist countries. Opposite to dualist countries, these consider national and international law to be parts of one legal order, hence, no special act of legislation is needed in order to provide international treaty with a national legal act status. This approach, however, has its dark sides. The most obvious one is a problem of determining the status of international treaties in the national law of monist countries. Unlike the dualist countries, where this status is determined by the status of the act of national legislation incorporating the appropriate treaty in the national legal system,

9 Cf. Білозьоров Є. В. Проблеми тлумачення норм чинного законодавства України // Матеріали наукової конференції 23-24 квітня 2009 року. – К.: Видавництво НПУ імені М. П. Драгоманова, 2009. – С. 78. [Bilozyorov Ie. V. Problemy tlumachennya norm chynnogo zakonodavstva Ukrayiny // Materialy naukovoyi konferenciyi 23-24 kvitnya 2009 roku. – K.: Vydavnyctvo NPU imeni M. P. Drahomanova, 2009. – S. 78.]

10 Зверєв Є. Тлумачення міжнародних договорів у національному праві: сучасні теорії та підходи // Наукові записки НаУКМА. – Т. 116, Юридичні науки, 2011. – С. 35-37. [Zvieriev Ie. Tlumachennya mizhnarodnyh dohovoriv u nacionalnomu pravi: suchasni teoriyi ta pidhody // Naukovi zapysky NaUKMA. – T. 116 Yurydychni nauky, 2011. – S. 35-37.]

11 Зверєв Є. Міжнародний договір як джерело національного права // Наукові записки НаУКМА. – Т. 103, Юридичні науки, 2010. – С. 41-44. [Zvieriev Ie. Mizhnarodniy dohovir yak dzherelo nacionalnoho prava // Naukovi zapysky NaUKMA. – T. 103, Yurydychni nauky, 2010. – S. 41-44.]

monist states usually determine this status by the special provision in the constitution or in the special law. This is true for most of them, however, not for all.

Ukraine is one of the latter ones. Article 9 of the Ukrainian Constitution provides that international treaties which received Ukrainian parliamentary consent on their obligatory application on the territory of Ukraine (usually this consent is expressed in the form of ratification of the treaty) are parts of Ukrainian national legislation. The basic law of Ukraine, however, is silent on the exact status international treaties have in Ukraine. Unlike the Russian Constitution (Article 15), which automatically provides that in case of conflict of norms between national legal acts and international treaties; the latter prevail, Ukraine does not have that norm in the Constitution. It is found in the act of lower level – the Law of Ukraine „On International Treaties of Ukraine" (Article 17). However, legal purity of such norm is disputed by many researchers.[12]

Concerns are mostly related to the issue of legal hierarchy. There is a position that since international treaties are ratified in the form of the law of Ukraine (a status that any other law adopted by the parliament and signed by the President of Ukraine), international treaties, as far as the national legal system of Ukraine is concerned, also have such status.[13] Others argue that international treaties are products of international law, and they are adopted into the national legal system of Ukraine like stepchildren, hence, may not prevail in national legal acts. Usually, this view is expressed by the older generation of Ukrainian legal scholarship trained in the Soviet Union, where this norm existed in order to protect socialist law from the „bad views of capitalist legal order".[14] Others adopt the view that since the norm of the law exists, we are bound by it, hence, the norms of international treaties prevail in the norms of national legislation in case of their conflict.

The latter view is mostly adopted by Ukrainian courts which usually apply a very simple argumentation approach lacking ties between the arguments. They mostly do not go into deep analysis of the legislation, international norms and other sources. The simple textualist application of the norms of the Law of Ukraine „On International Treaties of Ukraine" is usually the approach of the courts. However, such situation not only concerns international treaties but also other cases, as well. The state of Ukrainian court argumentation technique is extensively criticized.[15]

4. European Union and Ukraine

The European Union has been on the Ukrainian agenda probably from its birth as a nation state. Following the example of its eastern neighbors; Poland, Slovakia, Hungary and the Czech Republic that also had to be engaged in a long way of reforming their economic,

[12] Козюбра М. І. Тенденції розвитку джерел права України в контексті європейських правоінтеграційних процесів // Наукові записки НаУКМА. – Т. 26. – 2004. – С. 4. [Kozyubra M. I. Tendenciyi rozvytku dzherel prava Ukrayiny v konteksti yevropeyskyh pravointegraciynyh procesiv // Naukovi zapysky NaUKMA. – T. 26. – 2004. – S. 4.]

[13] Ibid.

[14] Petrov R. – Kalinichenko P.: The Europeanization of Third Country Judiciaries Through the Application of the EU Acquis: the Cases of Russia and Ukraine. *International and Comparative Law Quarterly*, Vol. 60 (2011) 335.

[15] О. Мінін, О. Шемяткін Український суд: коли «все пофіг» // http://www.epravda.com.ua [publications/2012/10/24/341024/] [O. Minin, O. Shemiatkin Ukrayinskiy sud: koly "vse pofig"].

political and social life and adopting a new system of checks and balances, Ukraine was inspired by a great idea, namely, to enter the family of the European nations as a full member. That idea still exists, and is supported by the majority of the Ukrainian population.[16] Moreover, Ukraine's goal to enter the European Union is clearly prescribed in the laws (Law of Ukraine „On the fundamentals of internal and external policy").[17] For quite a long time, the Ukrainian Ministry of Economics had an additional „and European Integration" phrase beside its name. Failing to fulfill the aim, the phrase disappeared, however, legal acts still keep the norm stating the general aim to join the EU.

In order to fulfill that aim, the Ukrainian legal system had to be reformed according to EU standards. It mostly concerned judicial reform, reform of the criminal procedure, as well as reforms in many other spheres. Some goals are fulfilled, however, the majority of them are only fulfilled on paper and nothing has been done in reality in order to conduct the reforms in practice.

Unfortunately, Ukraine adopts a very simplistic approach to reform its legal system. Usually, what is done is that the appropriate Ministry simply translates the appropriate EU directive into Ukrainian, and requests the parliament to pass it as a law, which is usually done by „piano voting", and does not even try to adjust the text to Ukrainian real life.[18] Moreover, in the process of lobbying, some deputies add their amendments to the existing laws reflecting EU directives, in which many cases break the balanced system prescribed by the directive. That way, we get a situation in which obligations of the implementation of the EU norms in Ukrainian national legal system are implemented on paper – the directive is copied – but it still does not work because of the amendments.[19]

5. EU Law and Ukrainian Courts

EU law is considered to be a law of foreign entity, and cannot be automatically applied in Ukraine. What can be applied is the principles EU law is based on, or EU law can be applied in analogy to Ukrainian law, where the latter lacks regulation. Ukrainian courts also refer to EU law as the additional argument when proving some position or principle that Ukraine obliged to follow in its „eurointegration" attempts. The Ukrainian court practice proves that despite of some hesitance in the application of the norms of foreign law in Ukraine, the courts of this country have been starting to pay more and more attention to what is being proposed by these norms in order to follow the regular worldwide accepted tendencies. The amount of the appropriate decisions is small; however, the tendency is growing.

[16] http: // www.eu.prostir.ua [files/1323958642893/EU_poll_ukr.pdf]

[17] Закон України «Про засади внутрішньої та зовнішньої політики» №2411-VI від 01.07.2010 // http://zakon2.rada.gov.ua [laws/show/2411-17]

[18] Cf. Для імплементації другої газової директиви ЄС ніякі наві закони не потрібні [*For the implementation of the EU Second Gas Directive no new laws are needed*]// http://dt.ua/ECONOMICS /dlya_implementatsiyi_drugoyi_gazovoyi_direktivi_es_niyaki_novi_zakoni_ne_potribni.html

[19] Cf.: Королева без корони [*Queen without a crown*] // http://ukurier.gov.ua [uk/articles/koroleva-bez-koroni/p/]

The main spheres of EU law influence on Ukrainian court decisions are the consumer rights protection,[20] refugee related cases,[21] and cases concerning the representation of the legal entity[22]. The latter group of cases deals with reference to the EU Council's First Directive 68/151/EEC (March 9, 1968) concerning the limitation of the authority to represent the legal person. All these decisions state this rule as a reference to a set up world practice. Additionally, it is worth mentioning that this reference is copied word to word in almost all of the noted decisions.

Nevertheless, even having the decisions completely „copy-pasted" (as in the last case), Ukrainian courts do start referring to the EU law for guidance in argumentation of their position. The majority of decisions only make this simple referral, however, there is one case that needs a separate glance. The Decree of High Administrative Court of Ukraine of August 3, 2010 (No. K-19198/10) in case of the Private Person v. Southern Customs Office is the only decision found in "reyestr.gov.ua" state-run court decisions database, in which a Ukrainian court made a referral to the decision of European Court of Justice. No other case can be found in that database that turned to European Union case law.

The issue concerned with the import of a car by a person from a Transnistrian Moldovan Republic – a *de facto* existing but unrecognized state which borders Ukraine on the Southwest. Due to her domicile change, the person wished to import a car that was registered in that "state" to Ukraine. Should this car be registered in the Republic of Moldova, the person would be exempted from Ukrainian customs duty, VAT and excise. However, Ukrainian customs authority refused to apply this rule concerning the person, basing its decision on arguments that official documents of Transnistrian Moldovan Republic are not recognized in Ukraine. Lower courts ruled in favor of the person, and customs authorities turned to High Administrative Court of Ukraine to overrule their decision.

Unlike many cases that end up in High Administrative Court of Ukraine, this one was carefully analyzed, and moreover, the court not only turned to international treaties and the internal legislation of Ukraine, it also referred to foreign case law. One case came from a British court („Emin v. Eldag"), while the other came from ECJ case law („R" v. „The Minister of Agriculture, Fisheries & Food, ex Parte S.P. Anastasiou (Pissouuri) and Others"). Both cases are concerned with the recognition of the documents issued by the Turkish Republic of Northern Cyprus. In the first case, a British court ruled that acts of private law of unrecognized states could be found valid in British courts in case the law does not forbid such recognition. The Ukrainian court, by referring to this conclusion, states that this approach makes state unrecognition consequences easier for private

[20] High Court of Ukraine on Civil and Criminal matters Decree of August 1, 2012 in the case of Private Person vs. PJSC „Bank "Finansy ta kredyt"

[21] See a number of High Administrative Court of Ukraine Decrees in cases No. K-4707/10 of May 11, 2011; K-42905/10 of June 1, 2011; K-30486/10 of March 28, 2012; K/9991/89649/11, K/9991/89646/11, K/9991/12805/12 of June 21, 2012; K/9991/37950/12 of August 30, 2012.

[22] Cf. a number of High Commercial Court of Ukraine Decrees in cases No. 4/127-ПД-06 of February 28, 2008; 2-21/3136-2004 of May 21, 2008; 13/363 of April 1, 2010; 18/186 of June 16, 2010; 2/467-3/338 of June 21, 2010; 29/245пд, 29/246 пд of July 14, 2010; 11/66-10-3108 of February 2, 2011; 1/191пд of February 9, 2011; 22/135-10-3502 of June 1, 2011; 33/128-22/397 of July 20, 2011; 7/44, 5008/349/2011 of October 12, 2011; 5020-5/017/77/2011 of December 20, 2011; 30/5009/6977/11 of May 8, 2012; 5010/1702/2011-12/38 of July 23, 2012; 5011-33/2803-2012 of September 5, 2012; 5015/7221/11 of October 17, 2012; 5011-27/1392-2012 of November 7, 2012 and some other cases.

individuals. The second case did not prove this position. ECJ ruled that customs documents issued by the Turkish Republic of Northern Cyprus could not be recognized.

Ukrainian court, however, took the first approach stating that British exception rule „follows modern needs when public law and foreign law of unrecognized states would not have a negative influence on private law, on rights of private individuals." Stating that, the court dismissed Southern customs office claims and ruled in favor of the private person.

Unfortunately, this case is more of an exception than a rule in Ukraine. The court of higher rank took its time and analyzed not only the obstacles of the case but also turned to foreign case law, and, after careful analysis, only made a conclusion that EU case law will not be applicable in the given case. Unfortunately, such cases do not appear in Ukrainian courts on a daily basis. However, one should also note that its existence is already a positive step forward from the old Soviet tradition of justice to European standards.

This case also proves that cases concerning the interpretation of international treaties can also be objects of referral by Ukrainian courts. Unfortunately, as for now, none of such attempts has been detected. To the most part when Ukrainian legal scholars and practitioners talk about the application of European case law in terms of international treaty interpretation, they mean the practice of the European Court of Human Rights. However, Ukrainian judges are obliged to apply that practice by a special Ukrainian law that expressly states that. Going outside of the „letter of law", in this case is still not a common practice in this country.

6. Conclusion

Despite of the downturns in its „eurointegration" policy, Ukraine still did not deny its goal to become a full member of the European Union. In order to do that, it adopted a strategy of reforming its laws in line with European standards. In most cases, especially in practice, the efforts failed. Legal system, especially the courts, in a situation where, even the international treaties' status is not clearly defined, still make attempts to engage in applying the norms of EU law. The most parts of this application is chaotic, it only exists for reference purposes, and usually does not have a direct binding nature. Nevertheless, even these rare facts leave the possibility to still believe that Ukraine being a full member of the European Union is not a nice Ukrainian tale for children, but a real goal, product of realistic steps that can and will be done. The few exceptions of the Ukrainian court practice prove that the light in the end of the long tunnel does exist. This definitely concerns the referral to EU law in the interpretation of international treaties by Ukrainian courts. Lacking such practice now, the judges would have to do that sooner or later.

EUROPEAN UNION TRANSPORTATION POLICY FROM THE TREATY OF MAASTRICHT UP TO NOW

MAGDALENA MAJEWSKA *

1.

The formation of the legal dimension of the EU transportation policy actually started with the Treaty of Paris. In 1951, documents giving the origins of the Community containing specific provisions concerning transport were signed. Treaty of 18 April 1951, establishing the European Coal and Steel Community in Title III Chapter 9 contained Article 70 dealt with transport. Only 6 states signed the treaty at that time – France, West Germany, Italy, Belgium, the Netherlands and Luxembourg –, and these states recognized that „the establishment of a common market necessitates the application of such rates and conditions for the carriage of coal and steel as will afford comparable price conditions in comparably placed customers."[1]

The provisions in the Treaty concerning transport were expressed in only one article, but when they came into force in July 1952, they not only seemed to be an initiative by Robert Schuman suggesting that through the exercise of control over the two most important branches of industry in France and Germany, they should ensure peace on the Continent, but also a great achievement in the history of European integration. Unfortunately, this regulation of transport resulted in a failure in the implementation of transport policy in force. High Authority was not in a position to prohibit the application of special tariffs imposed by the Member States.[2]

The Treaty of Rome of 1957 created another legal foundation for a common European market based on the free movement of goods, services, capital and labor and as a natural consequences of that - common transport policy.[3] The member Countries stressed the importance of transport in the formation of the Community by placing Article Nr. 3 point e) which states that: „ [f]or the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein (e) the adoption of a common policy in the sphere of transport"[4] at the very beginning of the Treaty (establishing the European Economic Community, hereinafter: EEC).

Transportation policy is one of the oldest EU policies. Next to the common agricultural policy, common commercial policy towards third countries, and the common customs

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[1] Treaty Establishing the European Coal and Steel Community and Annexes I-III, Paris, 18 April 1951.

[2] Zając Grzegorz: *Wspólna polityka lotnicza Unii Europejskiej* [*Common Aviation Policy of the European Union*], Państwowa Wyższa Szkoła Wschodnioeuropejska w Przemyślu, Przemyśl, 2009. 18.

[3] Grzelakowski, Andrzej: *Polityka transportowa Unii Europejskiej i jej implikacje dla systemów transportowych krajów członkowskich*, [European Union Transportation Policy and the Implications in Member States] Wydawnictwo Akademii Morskiej, Gdynia, 2008. 60.

[4] Treaty of Rome, 25 March 1957.

policy, transportation policy has become one of the main tasks of the newly established Economic Community. The European Union's priority was to create a single market for transport, allowing Europe to realize the idea of freedom in providing services and opening transport markets. The special role of transport was manifested in Art. 61 of the Treaty, stating that „Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport."[5] Title IV of the second part of the Treaty has been strictly dedicated to transport policy. Articles 74-84 (now Art. 70-80) described the objectives, scope, and form of the policy, and therefore entered this field very seriously and extensively.

The policy included in the Treaty of Rome only referred to the so-called overland transport modes (Article 84, section 1). The application of the provisions for sea and air transport in Article 84, Section 2 of the Treaty was left to a subsequent decision by the Council. Consequently, all decisions on sea and air transport have been delayed until an unspecified date. Most likely, such a solution has been adopted for the cause of the Netherlands, declaring advocate of liberalism and non-interference in the affairs of inland states afraid of the „subordination" of these intergovernmental or quasi-governmental bodies of EEC. The voice of Netherlands could not, of course, be decisive, but such policies answered another, protectionist oriented need that is most significant in EEC countries such as France, Italy and West Germany. These countries rated sailing among their traditional areas of special and strategic importance, requiring special attention and care from the government. Thus, they did not want to give up their sovereignty too easily in this field. Such postponement in a common shipping policy formulation should be regarded as justified because of the international freight market mechanism that has advanced the level of integration in maritime transport in comparison to other modes of transport.[6]

Despite of being more than ten articles about transport in the Treaty from 1957, there were no in-depth delineations of the common results in a number of key aspects of the development and inhibition of transport.[7] There was also a lack of definition of the policy. Nevertheless, these treaties have launched more than a decade of enhanced cooperation for the development of trade between the members of the European Communities. In 1961, a document called the Memorandum SCHAUS [*SCHAUS memorandum*][8] (named after the then Commissioner for Transport) was adopted, specifying the Communities' orientation in the field of transport. This memorandum set out a far-reaching, strategic goal of establishing a common transport market through the progressive removal of barriers. This document emphasized to seek means to remove obstacles in trade posed by the institutional structures governing transport, as well as to foster competition once a level playing field of harmonized fiscal, social, and technical conditions was established.[9]

Therefore, three objectives of transport policy were proposed, as follows:

[5] Ibid.

[6] Bredima-Savopoulou, Anna: *Wspólna polityka żeglugowa Unii Europejskiej* [Common shopping policy of the European Union], Wydawnictwo Uniwersytetu Gdańskiego (ed. Kujawa, Jerzy) Gdańsk, 1999. 13.

[7] European Transport Policy, Present situation and future prospects, March 2004. [http://www.eppgroup.eu/Activities/docs/transport-en.pdf] (1 March 2013).

[8] Memorandum on the General Lines of the Common Transport Policy. COM (61) 50 final. 10 April 1961.

[9] El-Agraa, Ali: *The European Union: Economics and Policies*. Cambridge University Press, Cambridge, 2007. 299.

- removal of the obstacles created by transport and limitation of the single market by abrogating tariffs discriminating on the grounds of nationality;
- integration of the transport market through the liberalization of transport services within the EU (including regulations regarding the control of the market);
- establishment of the European transport system, including the adaptation of the infrastructure to the needs of the growing cross-border exchange, the harmonization of technical requirements, and the fiscal and social professional qualifications.[10]

In the year of 1962, the Commission provided another document for a common transport policy, entitled *Action Programme for the Common Transport Policy*. This program was in fact a document containing slightly broader information from the Commission to the Council, and failed to include any specific projects, solutions or a timetable for their implementation.

The development of the transport policy was, however, restrained in the 1970s when a resources and energy crisis caused by a sharp increase in oil prices on world markets arose from the embargo of countries, which were members of the Organization of Petroleum Exporting Countries (OPEC), against the United States. These changes directly affected the European market where oil was scarce and raw materials were imported. Rising oil prices led to a rise in the prices of other energy commodities imported to Western Europe as well as enormous imbalances in payments, which coincided with rising unemployment and inflation in Europe. On the one hand, the economic shock made politicians aware of the need of a deeper integration and the need to build an independent European monetary system. On the other hand, Europe took a cautious approach to all forms of integration.

2.

A breakthrough in terms of changes in the transport policy[11] occurred on 23 January 1983, when the European Parliament, supported by the European Commission, submitted a complaint to the European Court of Justice against the Council. The reason behind the unprecedented appeal to the Court was the lack of progress in the implementation of the liberalization of the transport market and, therefore, breach of the Treaty of Rome. The Parliament argued that the implementation of these provisions comes from Article 3 and 74 of the EC Treaty. On 22 May 1985,[12] the Court found the Council guilty and ordered the Council to strengthen its efforts to carry out the tasks in this area.

The ECJ judgment of 1985 caused a considerable stir in the European arena. During the preceding 30 years, the Community was not able or did not want to (because of the presence of significant differences between the countries) implement objectives of the common transport policy. Without doubt, a significant recovery of the European countries

[10] Molle, Willem: The Economics of European Integration. Theory, Practice, Policy. Gdańsk, 2000. 351.

[11] Gawlikowska-Hueckel, Krystyna – Zielińska- Głębocka, Anna: *Integracja europejska od jednolitego rynku do unii walutowej, podręcznik ekonomii europejskiej nie tylko dla ekonomistów* [European Integration: from the Common Market to Monetary Union, European Economics Textbook not only for Economists] Wydawnictwo C.H. Beck, Warszawa, 2004. 233.

[12] Judgment of the Court of 22 May 1985, European Parliament v. Council of the European Communities, Common transport policy – Obligations of the Council – Case 13/83.

in implementing the provisions of the Treaty in the field of transport came with the judgment.[13]

A return to the trend of integration was associated with changes in the political scene of the late 1970s and early 1980s. The European Commission, acting on behalf of the Council, prepared and published a White Paper on the internal market on 14 June 1985 in Brussels (that was actually in the three weeks after the judgment of the Court of Justice in Case 13/83).[14] The European Council held in Milan on 28-29 June 1985 adopted the White Paper, which later came into force on 1 January 1986. This document is also known as Cockfield's White Paper. This document was a report containing two hundred eighty-two acts (mostly Directives) that accelerated the introduction of an „*area without internal frontiers*", thus, accelerated the internal market.

The White Paper identified and classified three types of barriers as well as methods to dispose of such barriers. There were physical barriers, which could be liquidated by abolishing customs and immigration control, fiscal barriers that would have to be eliminated through the harmonization of VAT and excise duties, as well as technical barriers which would be liquidated by the harmonization of technical standards and regulations. The elimination of all of the above mentioned should be done by the harmonization of the law. Consequently, the White Paper enumerated acts, thanks to the transposition into the internal legal order, should result in the deepening of integration in this area. The White Paper also sets out guidelines for a common transport policy. The Council adopted three guiding principles, such as: the creation of a free market (without quantitative restrictions) by 1992, an increase of bilateral and EU quotas, and elimination of distortions in competition.

In addition, the Council adopted a work plan to achieve specific goals in the field of all types of transport (land, sea and air) by 31 December 1992.

As far as road transport was planned, the Council considered the following issues:

- freedom to provide services by international coach until the end of 1989;
- elimination of the Community fees for the carriage of goods on roads between Member States and the definition of conditions under which carriers of a Member of the Community will be able to carry out cabotage transport services in the other one - by the end of 1988.

Legislation on maritime transport was mainly to include:

- freedom of operations conducted in this sector between the Member States by the end of 1986,

And in terms of air transport:

- adoption of measures relating to the determination and application of tariffs and levies on aviation, liberalized restrictive bilateral agreements – by the end of 1987
- Inland water transport:
- abolition of restrictions on access to inland waterways freight market (freedom of cabotage) – by the end of 1989.[15]

[13] Zając: *Wspólna…* op. cit. 35.

[14] Completing the Internal Market. White Paper from the Commission to the European Council, COM (85) 310 final, 14 June 1985.

[15] Zając: *Wspólna…* 36.

The realization of these objectives included the development of a transport infrastructure in the interest of the Community, the simplification of inspections and formalities at the borders, and an increase of safety. The content of the White Paper was based on the concept of the internal market in the EC, as it relates to the way the internal market would come to fruition. To a large extent, the White Paper was different from previous works because it practically formulated important and logical consequences of a common market with a plan of action to realize them.

The program set out in the White Paper had a significant impact on the content of the Single European Act (SEA) from 28 February 1986, as the SEA sanctioned assumptions from the Cockfield's Book.

The Single European Act was signed by the European Communities Member States on 17 February and 28 February 1986. The final content of this document was accepted in Brussels on 16 December 1985 and approved the next day at a meeting of the European Council. This act was the first major revision of the Treaty of Paris on 18 April 1951, establishing the European Coal and Steel Community (ECSC) and the Treaty of Rome, from 25 of March 1957 establishing the European Economic Community (EEC) and European Atomic Energy Community (Euratom). The Single European Act came into force on 1 July 1987. The most important provision of JAE was an agreement on measures leading to the progressive establishment of the Single Market by 31 December 1992. The Single European Act expanded the powers of the European Communities in economic and monetary policy. It also extended the four freedoms – already contained in the founding treaties – on the single internal market: free movement of goods (removal of the necessary pre-customs and border control), free settlement within the Member States, free movement of capital and free movement of services.[16] In terms of decision-making, it expanded the scope of qualified majority instead of unanimity in the Council of Ministers. It also slightly strengthened the powers of the European Parliament. The Single European Act established a mandatory target date for completing the internal market, which was 31 December 1992.

However, the creation of the Common Transport Policy only entered into a decisive phase in the early 1990s – with the „fulfillment" of the internal market.[17] Initialed in December 1991 and signed on 7 February 1992, the Treaty on European Union (TEU) was an important step towards the creation of a united Europe.[18] This Treaty transformed the European Economic Community in the European Community and the European Union was also formed.

The Treaty articulated the following objectives of the European Union:[19]

- supporting the continuous and sustainable economic growth and social progress in particular, by creating an area that is free from internal borders; deepening the

[16] Łastawski, Kazimierz: *Historia Integracji Europejskiej* [History of European Integration]. Wydawnictwo Adam Marszałek, Toruń, 2011. 198.

[17] Barcz, Jan: *Inne polityki unijne i działania wewnętrzne*. In: Barcz, Jan – Kawecka-Wyrzykowska, Elżbieta – Michalowska-Gorywoda, Krystyna (eds.): *Integracja europesjka w świetle traktatu z Lizbony, Aspekty ekonomiczne* [European Integration in the Scope of the Lisbon Treaty. Economical Aspects]. Polskie Wydawnictwo Ekonomiczne, Warszawa, 2012. 355.

[18] Popowicz, Krzysztof: *Historia Integracji europejskiej* [History of European Integration], SGH, Warszawa, 2006. 189.

[19] Traktat z Maastricht, Warszawa, 1998. 15-16; and Nicoll, William – Salmon, Trevor: *Understanding the European Union*. In: Łastawski: Historia integracji … 227.

economic and social cohesion, and the establishment of economic and monetary union, which will lead to the creation of a single currency;

- confirmation of its identity on the international arena, primarily through the implementation of a common foreign and security policy, which might lead to a common defense;
- strengthening and protecting the rights and interests of nationals of Member States through the introduction of citizenship of the European Union;
- development of a close cooperation in justice and home affairs;
- strengthening legal structures as well as integrating and consolidating its mechanisms and institutions.

At that time, the Treaty created the three pillars upon which the European Union was based. This treaty was an expression of a holistic approach (economic policies are linked to the social and wider society and policies that comprise the broad concept of political union). The main position was received by the European Community and its dozens of policies which included, among others, common transport policy. Matters relating to transport policy were located in Article 3 Point f) of the Treaty. Like the Treaty of Rome, transport was identified with a separate title. In the next part of the Treaty the rules for trans-European networks were standardized. Subsequently, on 2 December 1992, the Commission adopted a White Paper, entitled „*The future development of the common transport policy. A global approach to the construction of a Community framework for sustainable mobility*". This paper showed the state of the transport system in the newly established European Union and the prospects of its development. The main emphasis was placed on the opening of the transportation markets as soon as possible, and its dependence on economic growth. Another objective of the White paper was to link the need to move with the environmental issue. The White Paper also marked the turning point for an integrated approach, covering all modes of transport based on a model of sustainable mobility.

Nevertheless, it favored road transport (especially rail) and maritime transport. It acknowledged the creation of trans-European transport network (Transeuropean Transport Networks – TENs) as one of the most important projects that needed to be achieved in the 90s. Before the relevant provisions were mentioned in the White Paper, they were included in the Treaty of Maastricht.

Additionally, the Green Paper of the Commission from 20 December 1995 entitled *Towards fair and efficient pricing in transport*[20] addressed another important issue, the external costs of transport. In this document, the Commission sought to create an effective and fair system of charging in the transport sector, thereby, reducing the distorted nature of the competition between transport modes. In this context, tax measures were subject to discussion.

3.

1996 brought another important development in transport policy. On 6 March, in Brussels, a document for the management of air traffic was adopted and in July, the Parliament and the Council adopted guidelines for the development of TENs up until 2010, which referred

[20] Towards Fair and Efficient Pricing in Transport Policy. Policy Options for Internalizing the External Cost of Transport in the European Union. Green Paper. COM (95) 691 final, 20 December 1995.

to the infrastructure, traffic management and navigation systems. This year another White Paper concerning the revitalization of the railway was published.

The year of 1996 is also the launch of the so-called *TINA process* (Transport Infrastructure Needs Assessment) which developed a transport network development program up until 2015, taking the countries of Central and Eastern Europe into account. The TINA network was made up of about 18 thousand kilometers of roads, more than 20 thousand kilometers of railway, 38 airports, 13 seaports and 49 river ports. The cost of these networks (or generalization of the missing sections of roads and railways) for the period up until 2015 is estimated at 90 billion euros.

The realization of the objectives set out in the White Paper runs differently in various sectors. In general, the progressive liberalization of the various modes of transport and the increase in the EU legislative processes leading to the harmonization of the different rules in the Member States can be evaluated positively.

In order to assess the implementation of the provisions contained in the 1992 White Paper, general assumptions must be made (with the exception of those in the rail sector). In aviation, there has been a far-reaching liberalization resulting in rapid increase in the number of air carriages. Along with the success of the common transport policy is the release of the consumer price, the combination of high quality services to a wider range of choice. This does not mean that the policy was developed without major difficulties.

We may enumerate, among others, such problems as:

- uneven growth of different modes of transport;
- congestion on main roads, railway lines and airports as a result of the imbalance between different modes of transport;
- adverse effects on the environment and a large number of road accidents.

Elimination of various barriers, as well as deficiencies in the legal framework for the development of the common transport policy were described in the White Paper of 2001 which was published almost ten years later.

After more than a year and a half of negotiations and prolonged period of drafting work, on 2 October 1997, the Ministers of Foreign Affairs of the Member States signed another treaty in Amsterdam.[21] The provisions of this treaty can be divided into six key areas: 1) freedom, security and justice, 2) the Union citizens, 3) an effective and coherent external policy, 4) the Union's institutions, 5) more cooperation-"flexibility", 6) simplification and consolidation of the Treaties. Provisions relating to transport policy were already present in Article 3, which states that: „*for the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein*; *(f) a common policy in the sphere of transport; (o) encouragement for the establishment and development of trans-European networks*." Article 51 (*ex-Article 61*) states that the free movement of services in the field of transport is governed by the provisions of the Title relating to transport. Articles 70 (74) and 78 (82) of this Treaty were devoted to Transport policy.

In Articles 72 to 75 there was a record for the non-discrimination of carriers of other Member States, which did not have the consent of the Council. Discrimination towards the

[21] *Treaty of Amsterdam amending the Treaty on European Union*, The Treaties establishing the European Communities and Related Acts, C 340, 10 November 1997.

carriers of the same goods in the same transport routes for different transport rates and conditions because of the country of origin or destination of the goods was prohibited. The Treaty also prohibited the usage of rates and conditions involving any element of support or protection of one or more particular undertakings or industries, unless it was permitted by the Commission.

The Commission was entrusted with the obligation to investigate cases of discrimination, as well as the application of rates and conditions inconsistent with the provisions of the Treaty. The Commission's investigation under the provisions should take into account the particular requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances and the effects of such rates and conditions on competition between different modes of transport.

The Commission, if it finds irregularities, was given the authority to make the necessary decisions (in the framework of the rules laid down in accordance with the provisions of the Treaty) after a consultation with each concerned Member State. Among the provisions of the Treaty there were provisions discussing the need not to exceed a reasonable level of fees charged by a carrier with respect to crossing the border. In article 78 it was indicated that the Community may also contribute, through the Cohesion Fund set up pursuant to Article 161, specific projects in Member States in the field of transport infrastructure. However, in Article 79 we can find reference to the Advisory Committee consisting of experts designated by the governments of the Member States and the Commission established to consult on this transport, whenever it considers it desirable, without prejudice to the powers of the Economic and Social Committee.

Article 80 (*ex-Article 84*) made it clear that the provisions of the Treaty included in the title will only be used for transport by rail, road and inland waterway. The Council, acting by qualified majority, has the power to decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

Further provisions for the creation of trans-European networks were also located in the Treaty. Article 154 expressed the Community's willingness to contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy so as to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the creation of an area without internal borders. Further provisions relating to transport policy included in Article 155 (*ex-Article 129c*) suggested that the Community should establish a series of guidelines covering the objectives, priorities, and broad lines of measures envisaged in the field of trans-European networks through which guidelines should identify projects of common interest.

4.

The Treaty of Amsterdam was not, however, warmly admitted. Instead, this treaty was treated as a relative failure on the road to a common Europe. There was a common belief that too little had been achieved and that Amsterdam aroused hopes that haven't been met. During the negotiations, the growing heterogeneity of the Union revealed, enlarged by the Scandinavian countries, having rather cold attitude towards the idea of the European integration.[22] The Treaty, in the absence of adequate institutional reform only allowed the acceptance of five new Member States. As assessed from the perspective of time, it is regarded as a mistake, since it led to the creation of new dividing lines in Europe.[23]

In the White Paper entitled Fair payment for infrastructure use: a phased approach to create a common framework for charging for the use of transport infrastructure in the EU[24] and published on 22 July 1998, the European Commission noted the significant differences between Member States in the application of transportation charges, which led to many distortions of competition within each mode. Furthermore, the existing charging systems did not sufficiently take the environmental and social aspects of transport into account. The Treaty of Amsterdam was supposed to lay down the foundations for institutional reform before EU enlargement but it failed to do so.

Therefore, it was necessary to organize a new international conference that would address the previously unregulated issues. An international conference convened in 2000 was a consequence of the absence of a prior agreement between the Member States and the postponement of important institutional reform until the next EU expansion.

The European Council meeting in Nice, which ended on 11 December 2000, resulted in a new Treaty. As it was necessary to prepare a final version, the signing ceremony was held on 26 February 2001 in Nice. The treaty came into force on 1 February 2003, after its ratification by all Member States. Officially, this treaty was called the *Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*.[25] The common transport policy has been regulated by the changes laid down in Article 133.

Another important step in the development of this policy was the adoption of the *Lisbon Strategy* by the European Council in March 2000. The *Lisbon Strategy* was a ten-year long socio-economic development program designed to make the European Union *the most competitive and dynamic economy in the world*. In terms of transport policy it focused primarily on air and rail transport. The first priority contained in the document, specifically referring to the transportation policy, was the establishment of the Single European Sky (Single European Sky – SES) and a rule change for the allocation time operations at Community's airports. The document proposed to speed up the process of liberalization in rail transport.[26]

[22] Popowicz: *Historia…* 222.

[23] Podraza: *Unia Europejska…* 237.

[24] White Paper, Fair Payment for Infrastructure Use: a Phased Approach to a Common Transport Infrastructure Charging Framework in the EU - White Paper, COM/98/0466 final, http://eur-lex.europa.eu [smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=1998&nu_doc=466] (12 March 2013).

[25] *Treaty of Nice amending the Treaty on European Union*, the Treaties establishing the European Communities and certain related acts, (2001/C 80/01).

[26] Bokajło, Wiesław – Dziubko, Kazimierz: *Wspólna polityka transportowa. Unia Europejska. Leksykon integracji* [Common transport Policy. European Union. Integration's Lexicon]. Wroclaw, 2004. 522-523

5.

One of the most important documents in the development of the EU transport policy was the White Paper of 2001, entitled *European transport policy for 2010: time to decide*,[27] in which the Commission examined the problems and challenges of the European transport policy, particularly in the context of the forthcoming EU enlargement to the east. It predicted a massive increase in transport, accompanied by traffic jams and congestion, especially for road and air transport, as well as increasing burden on health and the environment. These factors seriously threaten the EU's objectives in the field of competitiveness and climate protection.

In order to overcome these tendencies and to contribute to the creation of cost-effective, environmentally and socially responsible transportation system, the Commission presented a package of 60 measures. Their goal was to remove the dependence between economic and transport growth and the struggle against uneven development of different modes of transport. The imbalance in the development of different modes of transport was, according to the Commission, one of the biggest challenges. The Commission drew attention to the fact that all modes of transport should be treated equally, particularly since there was a clear practice of favoring some sectors.

In addition, the Commission announced a review of the guidelines for Trans-European Networks (TEN-T) and their adaption to a larger EU. Moreover, the Commission proposed, stronger than before, conducting activities to eliminate cross-border „bottlenecks". They decided to promote different methods of transport and their mutual consistency so as to prevent congestion. The White Paper also highlighted the rights and obligations of transport users. The White Paper envisaged measures such as an action plan to improve road safety, and determined the appropriate cost of all modes of transport by harmonizing the rules for charging for use of the infrastructure. Moreover, the Commission decided to widen the sphere of protecting passenger rights, taking aircraft carriers against harmful practices (e.g. the so-called overbooking) into special consideration. Finally, the Commission stressed the need to tackle the problem of the consequences of globalization in the transport sector. In order to better protect its interests, the Commission proposed that the Community should play a significant role in international organizations such as the International Maritime Organization and the International Civil Aviation Organization. They also decided to introduce a European satellite navigation system called Galileo.

2004 brought another White Paper, this time concerning the application of the competition rules of the European Communities for sea transport.[28] This paper directly

[27] *White Paper: European Transport Policy for 2010: Time to Decide*, COM(2001) 370, September 2001, [http://ec.europa.eu/transport/themes/strategies/doc/2001_white_paper/lb_com_2001_0370_en.pdf] (12 March 2013).

[28] *White Paper on the Review of Regulation 4056/86*, applying the EC competition rules to maritime transport, COM(2004) 675 final. http://eur-lex.europa.eu [LexUriServ/site/en/com/2004/ com2004_0675en 01. pdf] (12 March 2013).

refers to Regulation Nr. 4056/86.[29] In 2006, they adopted a *White Paper on a European Communication Policy* in Brussels.[30]

Subsequent changes in the EU's transport policy were brought by the *Treaty of Lisbon* [31] in 2007. When it finally came into force on 1 December 2009, the Lisbon Treaty represented a historic overhaul of the European Union's rulebook and the streamlining of EU institutions. Among other things, it changed the voting structure, creating two new posts in the EU Council President and High Representative for Foreign and Security Policy, and boosted the powers of the European Parliament. Lisbon represents some subtle but significant shifts regarding transport policy.

Transport policy was already mentioned in Article 2c, which states that transport is a sphere of shared competence between the Union and the Member States. Title V of the EC Treaty (Title VI of the Treaty on the Functioning of the European Union) was also devoted to transportation policy.

Until now, most transport legislation have been adopted under the co-decision procedure, and by a qualified majority of votes in the Council of Ministers (Article 74 of the Treaty of Rome already envisioned the creation of a common transport policy). But Articles 70-80 of the Lisbon Treaty introduced new wording; the changes offered derogation from the co-decision procedure for measures that could, if applied, have an adverse effect on living conditions and employment in certain areas as well as on the use of transport equipment. The Lisbon Treaty's Article 72 removed this derogation. It states that the impact of these measures on living conditions, employment, and the use of transport equipment should be taken into account. However, unanimity is not required to adopt these measures. And other provisions concerning state aid in transports, non-discrimination, taxes and duties, etc. (currently under Articles 70-80) remain unchanged. The same goes for provisions about the Trans-European Networks.

Another important issue in transport policy of a united Europe is the Commission's Green Paper of 2007 entitled „*Towards a new culture for urban mobility*"[32]. 2009 brought a Green Paper entitled '*TEN-T: A policy review*'[33]. It worked towards a better integrated trans-European transport network at the service of the common transport policy.

Under the Belgian Presidency (July-December 2010), the Council initiated a political debate on the new White Paper of Sustainable Transport for 2010-2012, a strategy launched by the European Commission. Special attention was given to the interconnectivity between different transport modes, the development of intelligent transport systems, quality public transport, goods logistics, urban mobility, road safety and vulnerable user protection.[34]

[29] *Council Regulation (EEC) No 4056/86* of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31986R4056:en:NOT] (12 March 2013).

[30] White Paper on a European Communication Policy, COM(2006) 35 final http://europa.eu [documents/comm/white_papers/pdf/com2006_35_en.pdf] (12 March 2013).

[31] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. 2007/C 306/01, http://eurlex.europa.eu [LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF] (12 March 2013).

[32] Green Paper, Towards a New Culture for Urban Mobility, (COM) 2007, 551 final.

[33] Green Paper, TEN-T: A Policy Review – Towards a Better Integrated Trans-European Transport Network at the Service of the Common Transport Policy.

[34] *The Railway Business Magazine* [http://www.railwaypro.com/wp/?p=2444] (12 March 2013).

The last set by Brussels was the *White Paper of 2011*,[35] dedicated to the plans of creating a Single European Transport Area.

6.

The European Commission adopted a comprehensive strategy (Transport 2050) for a competitive transport system that would increase mobility, remove major barriers in key areas, fuel growth and employment. At the same time, the proposals dramatically reduced Europe's dependence on imported oil, and cut carbon emissions in transport by 60% by 2050. To achieve it, it will require a transformation in Europe's current transport system. By 2050, key goals will include:

- No more conventionally fuelled cars in cities.
- 40% use of sustainable low carbon fuels in aviation; at least 40% cut in shipping emissions.
- A 50% shift of medium distance intercity passenger and freight journeys from road to rail and waterborne transport.
- All of which would contribute to a 60% cut in transport emissions by the middle of the century.[36]

The Transport 2050 roadmap to a Single European Transport Area sets out to remove major barriers and bottlenecks in many key areas across the fields of transport infrastructure and investment, innovation and the internal market. The aim is to create a Single European Transport Area with more competition and a fully integrated transport network which links the different modes as well as allows for a profound shift in transport patterns for passengers and freight. To this purpose, the roadmap puts forward 40 concrete initiatives for the next decade.[37]

As presented above, transportation policy has always been a key aspect in the European's Union rule. It is easily noticeable that the past sixty-two – particularly the past twenty – years have brought important changes in the Member States' actions towards transportation policy. The newly proposed changes seem to be long distanced and uneasy, but their implementation and influence can only be judged through the lens of time.

[35] White Paper Roadmap to a Single European Transport Area – Towards a Competitive and Resource Efficient Transport System, COM/2011/0144 final */. http://eur-lex.europa.eu [LexUriServ/LexUriServ.do?uri=CELEX:52011DC0144:EN:NOT] (12 March 2013).

[36] *Europa Press Releases Rapid* http://europa.eu [rapid/press-release_IP-11-372_en.htm] (12 March 2013).

[37] *Ibid.* see more: http://europa.eu [rapid/press-release_MEMO-11-197_en.htm. (12 March 2013).

EXECUTIVE-LEGISLATIVE RELATIONS IN ITALY AFTER THE LISBON TREATY

FANNI MANDÁK *

1. Introduction

Political actors, institutions and game rules of the Italian politics have been significantly transformed and have moved toward a presidential model during the last twenty years. The most visible parts and driving forces of this tendency are the semi-direct election of the Prime Minister (PM) and the concentration of legislative initiatives, the bills introduced by the government (the extreme use of decree-laws and the delegated legislations).

This paper analyses whether the empowerment of national parliaments (NPs) carried out by the Lisbon Treaty (furthermore referred to as TEU) has had a positive effect on the balance of power between government and parliament in Italy or not. The study deals with the rights of national parliaments ensured by the LT and their implementation in Italy, via examining the approved rules and amendments in this field and analysing the parliamentary statistics regarding the "new" tools and procedures.

2. Executive-Legislative relations in Italy – the Signs of Presidentialization

After the decades-long feebleness of the Italian governments, abandoning the system known as „integral parliamentarism"[1]; the revolution of the executive branch began with the reversal of the balance of power between the government and the parliament in the 1980s, in which the previously attained predominance in an increasing number of fields put the parliament and especially the opposition into disadvantage.

This tendency was brought about by the extraordinary increase of the government's normative activities, the reorganization of the PM's Office[2], the strengthening of the PM's monocratic powers[3] which occurred with a more general widening and consolidation of the role of the government, attributing various competencies and directional capacities to it, and finally, by the relations with EU-institutions. There were several changes which affected the electoral system too, like the bipolarization of the party system, the formation of pre-electoral instead of post-electoral coalitions and the indication of the names of leaders

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[1] It was called "integral parliamentarism" because of that the parliamentary assembly had an important role in determining government actions. G. Miglio, G.: Le contraddizioni interne del sistema parlamentare-integrale. *Rivista Italiana di Scienza Politica*, 1984. Vol. 14. No. 2., 209-232.

[2] The creation of a strong apparatus of administrative support for the PM's Office, the development of the PM's staff, and the organization of the departments at the PM's Office on the basis of the principal functions of policy-making.

[3] Pajno, A. – Torchia, L.: *La riforma del governo*. Il Mulino, Bologna, 2000. and Criscitiello, A.: *Il cuore dei governi. Le politiche di riforma degli esecutivi in prospettiva comparata*. Edizioni Scientifiche Italiane, Napoli, 2004.

within the symbols shown in each ballot brought about a kind of informal direct election of the president of the council of ministers.[4]

According to the significant tendency of the last three decades, cabinets and prime ministers have been attaining predominance in an increasing number of fields, putting the parliament and the opposition into disadvantage. This process has created such a hybrid form, which is neither a pure parliamentarianism anymore nor a presidential system yet. The transformations of the Italian political system lead to a more presidentialized form of government.

3. Reforms of the Lisbon Treaty on National Parliaments

The LT is a great milestone for NPs as – for the first time ever – it named the national parliaments in the body of the Treaty and not only mentioned them in annexes or protocols.

The Treaty gives the national parliaments greater scope to participate alongside the EU legislation.[5] A new clause clearly sets out the rights and duties of the national parliaments within the EU. The Protocol on the role of national parliaments (Protocol 1) establishes a procedure in which the Commission directly informs the national parliaments about its non-legislative and legislative proposals, including the annual legislative programme. Other actors with legislative powers also send their draft legislative proposals to NPs. Then, national parliaments have eight weeks to react to these proposals before the legislative process begins.

The Treaty renders it possible for national parliaments to participate in the mechanisms for policy evaluation in the field of freedom, security and justice. Furthermore, it gives them right to participate in the procedures of the reformation of the treaties unless the European Council (with the consent of the European Parliament) decides that a given change does not necessitate a convention method; national parliaments may also take part in the evaluation of accession applications, and the Treaty also confirms the inter-parliamentary cooperation between national parliaments and with the European Parliament.

One of the greatest innovations of the Treaty is the new power to enforce subsidiarity.[6] If there is suspicion of a breach of the subsidiary principle, each national parliament or each chamber of a national parliament has eight weeks to communicate the reasons to the presidents of the European Commission, the European Council and the Council why it considers that a given draft does not respect the principle of subsidiarity.[7]

[4] R. D'Alimonte, R. – Bartolini, S.: *Maggioritario finalmente? La transizione elettorale 1994-2001.* Il Mulino, Bologna, 2002.

[5] See Article 12 of the Lisbon Treaty.

[6] Subsidiarity means that – except in the areas where it has exclusive powers – the EU only acts where action will be more effective at EU-level than at national level.

[7] Regional parliaments with legislative powers can also be consulted. This new power has two stages. If one third of national parliaments consider that the proposal is not in line with subsidiarity, the Commission will have to re-examine it and decide whether to maintain, adjust or withdraw it. Article 7, paragraph 2 of Protocol 2, of the TEU. If a majority of national parliaments agrees with the objection but the Commission decides to maintain its proposal anyway, the Commission will have to explain its reasons, and it will be up to the European Parliament and the Council to decide whether or not to continue the legislative procedure. Article 7, paragraph 3 of Protocol 2, TEU.

The national parliaments also gained the power to veto the application of the *passerelle clause*.[8] The clause can be used to change the decision-making mechanism from unanimity to majority voting in the Council, or to change the special legislative procedure to an ordinary one (i.e. giving greater oversight of a policy to the European Parliament). Such a decision can only be taken by the European Council unanimously. However, any individual national parliamentary chamber has an individual veto power within six months following the proposal.[9]

However, the Lisbon Treaty reforms are only theoretical opportunities, the implementation of the new privileges attributed to the national parliaments depends on the member states, particularly on national governments' will and national parliaments' determination and activity.

The new rights and means given to the national parliaments by the Treaty may be integrated into the existing legislative-executive control mechanism systems and by doing so, the member states could represent their national interests in a more efficient way, national parliaments may extensively control the governments, but if there is not an adequate government will to implement the new competencies, they will not put any effect into practice.

We can distinguish three main models regarding how national parliaments have participated in the EU's legislative process after the LT:

- the document based approach,
- the procedural approach and
- the *mixed* one.

Regarding the *document based approach*, national parliaments systematically examine the EU legislative proposals or by *ad hoc* selections, eventually adopt policy prescriptions. In some of the countries while conforming to this method, the government can suspend its action within the Council on its own initiative or under parliamentary request about a certain proposal, until parliamentary scrutiny is over. At the *procedural approach*, the national government presents its negotiating position on the main draft proposals of the EU to the parliament before every Council meeting. In this case parliamentary accountability over the government's position is exerted in advance rather than just on draft proposals and it can be politically fixed and in some cases also legally binding acts. It is worth mentioning that Italy has been using the *mixed approach* after the approval of law No. 234/2012.

4. How the Lisbon Reforms Are Put into Practice in Italy?

At the end of 2009, law No. 11/2005 (Law on European affairs) was in force in Italy. That law was a great sign of modernization of the means for the Italian participation in the EU legislation at that time, but it was not appropriate to establish an efficient system for representing Italian interests.[10] In the field of European affairs, there had been a real necessity for a wide reform already before the Lisbon Treaty came into force. Despite of

[8] Article 48 paragraph 7 TEU.

[9] The same procedure applies to a specific *passerelle clause*, which can be decided by the Council on legislation concerning family law with cross border implications. Article 81 of the TEU. Here too, any individual national parliamentary chamber can veto the decision within six months.

[10] Although, law No. 11/2005 was amended several times after 2007, it was unable to ensure an adequate system of means and procedures.

this fact and the need for the implementation of the LT, the revision of the existing legal frameworks was very ponderous and remained without any significant results till the end of 2012.

However, the necessity of the reform of law No. 11/2005 was pointed out from the beginning of the XVI Legislation, there were no reforms of the Rules of Procedure neither in House of the Italian Parliament on the new means introduced by the LT, nor any important legal acts had been adopted in this field.

Between 2009 and 2012, there were only two interpretations of the Committee on the Rules of Procedure about the relevant articles of the Standing Orders and amended law No. 11/2005. For three years there was not any ensured appropriate legal framework for the practice of the new competencies.

4.1. Interpretations of the Rules of Procedure and a Letter Written by the President of the Senate

Before the Lisbon Treaty came into force, the Committee on the Rules of Procedure in the Chamber approved an interpretation of the articles on dealing with EU affairs.[11] This interpretation introduces an experimental process for the subsidiarity check and declares that the documents sent by the European Commission for consultation to the Italian parliament are passed on to the appropriate Parliamentary Committee for consideration and to the Committee for EU policies for its opinion. The relevant Committees may formulate observations and adopt policy-setting instruments for the government.[12] Furthermore, the interpretation stables that general committees may invite not only Members of the European Parliament and of the European Commission, but also representatives from all EU institutions to their hearings.

After that on 14th July 2010, the Committee approved a further interpretation which declares that if the Committee for EU policies recognizes problems concerning whether draft EU legislative instruments conform to the principle of subsidiarity or not, it has to be discussed by the plenary before the eight week deadline ends for the national parliaments' scrutiny.[13]

These two interpretations do not contain any real innovative instruments for the new tasks as they apply the procedures introduced by law No. 11/2005 or their little modified versions. In the Senate, its President published a letter on the day when the Lisbon Treaty came into force, defining his indications on the implementation of the privileges introduced by the Treaty.[14]

It is not only the lack of an adequate legal framework but also the lack of cooperation between the two chambers at the elaboration of the procedures concerning the new powers that obstacles the strengthening of the Italian parliament in the European affairs. As a consequence, the Italian parliament lost the advantage offered by the Lisbon Treaty, namely, the opportunity to represent the country's interests in a more effect way at European level in the first years after the Treaty came into force.

[11] Article 127, paragraph 1. of the TEU.

[12] http://www.camera.it [593?conoscerelacamera=236]

[13] http://www.camera.it/ [593?conoscerelacamera=241]

[14] The letter was published in Capuano, D. A.: Funzioni delle Camere italiane nel procedimento legislativo dell'Unione europea. *Rassegna parlamentare*. 2011. No. 3, 519-590.

4.2. The „EU law 2009"

A little step forward was the approval of the so-called "EU law 2009" which says that the position represented by Italy in the EU Council of Ministers or in relation to other institutions and organs of the EU shall take the prescriptions defined by the Chambers into account. Furthermore, it introduces the duty of the government to report on the European affairs to the parliament at least twice a year.

4.3. The Law 96/2010

The next step of the implementation of the rules of the Lisbon Treaty in national parliaments was the approval of law No. 96/2010. The law confirms that duty of the government to inform the parliament about the actual EU draft legislative acts and the government's positions about them at least twice a year. Furthermore, the government has to take the parliament's opinions into account and has to integrate its prescriptions at the official Italian positions presented at the EU Council of Ministers. At the next parliamentary report the government has to inform the parliament how its prescriptions were presented at the EU Council meetings.

However, the law has a great lack; it determines a longer period of time for the government to give the required and compulsory information to the parliament in the subsidiarity exam than the period ensured by the Lisbon Treaty for the national parliamentary exams, making it impossible to make the conclusion of the procedure in time.

4.4. The Law 234/2012

The problem of the inadequate legal framework may be resolved by the law 234/2012, approved at the very end of 2012, and before the dissolution of the Italian parliament in the XVI Legislation. The law 234/2012 has four main objectives.

- It aims at creating new appropriate means of the interactions between parliament and government, parliament and regional councils, regions and local authorities and improving the already existing instruments.
- It focuses on strengthening the parliamentary interventions in the elaboration of the official Italian national positions.
- The third objective of the law is to render the realization of duties introduced by the EU to the member states more efficient.
- Last but not least, the law aims at redefining the concept of the European Union affairs declaring that they are not foreign affairs anymore but dimensions of national policies.

It preserves the rules of law No. 96/2010 regarding the government's duty of reporting to the parliament at least twice a year and the government's duty of informing the parliament about the official Italian positions which will be presented at the EU Council meeting. Prior to the meetings, the government has a duty for integrating the parliament's prescriptions in the official Italian positions, taking these opinions and suggestions into consideration. It determines a short deadline (maximum 15 days) for the government's reporting duty after the EU Council meetings. If the official Italian position differed from the parliament's prescriptions in financial and monetary questions, the government has to explain and justify its reasons.

Furthermore, it assures more opportunities to participate in the creation of European policies for the parliament and the local autonomies. It cuts down the deadlines of the government to inform the parliament. The law confirms and strengthens the duties of the government to inform the parliament and send it not only its opinion on an EU legal act, but also the notes and reports made by the Permanent Representation of Italy to the European Union and a table which explains how the new legal act will modify the actual rules in that field.[15] Obliging the government to provide the parliament more information renders it possible to finish the parliamentary exam during the eight week period.

Concerning the subsidiarity check, it does not create a new form of procedures but declares that the two chambers have to use the procedures determined by the Rules of Procedures to complete this task.

The law 234/2012 has an important innovation as it declares that any of the two chambers may ask the government to declare at the EU Council that the Italian parliament is examining the draft legislative act under discussion and to ask to suspend the procedure at the Council for 30 days.[16]

Another important innovation is that the mechanisms foreseen by the law, with particular reference to the role of the parliament and of the coordination in the government, do not only concern normative acts in a strict sense but any type of EU documents.

The law introduces the new notion of European affairs and uses the Ministry of European policies for the Ministry of European affairs.[17]

5. Parliamentary Statistics Regarding the EU Legislative Acts

In this paragraph the study introduces the statistics of the Chamber of Deputies in order to see how the parliamentary activity has changed in the field of European affairs. The studied period ends before the approval of law No. 234/2012, so the following tables will not contain any information on the effects and consequences of that reform.

The table 1 contains the XVI and the XV Legislation, monthly values which help the correct comparing can be found between the brackets.

Table 1. Parliamentary activities in the field of European affairs

Legislature	XVI (29/4/2008-30/11/2012)	XV (28/4/2006-28/4/2008)
Examined acts and draft legislative acts (art. 127. R.C.)	173 (3,1)	8 (0,33)
- approved final documents	64 (1,16)	5 (0,2)
Subsidiarity exams:		
- examined acts	19 (0,34)	-
- approved documents	17 (0,31)	-
- from which reasoned opinions	3 (0,05)	-
Government's communications on European Council and other institutional activities	20 (0,36)	2 (0,08)
PM's notes on the activities of the EU institutions (plenary)	3 (0,05)	-

[15] Cf. Articles 4 and 6, Law No. 234/2012.

[16] Cf. Article 10, Law No. 234/2012.

[17] The new name of the Ministry of European Policies was introduced by the Monti government in 2011.

Hearings on the activities of the EU:	307 (5,58)	70 (2,92)
- European commissioners	25 (0,45)	10 (0,42)
- MEPs	22 (0,4)	10 (0,42)
- members of the Italian government	35 (0,64)	14 (0,58)
- heads of public administration	29 (0,53)	4 (0,17)
- others	196 (3,56)	32 (1,33)

Source: Interventi della Camera dei Deputati nella formazione delle politiche Ue (29 aprile 2008 – 30 novembre 2012), Interventi della Camera dei Deputati nella formazione delle politiche Ue (28 aprile 2006 – 28 aprile 2008).

As we can it see from table 1, the Parliament examined much more EU acts and documents in the XVI Legislation than in the previous one, but the index of the approved final documents was not very high, only in 37 per cent of the examined acts and drafts was the final document approved. A great step forward, a great development which shows the strong interests and commitment of the parliament to participate actively in the EU legislation is the significant increase of the organised hearings. In the XVI Legislation there were four times more hearings than in the previous Legislation.

The Parliament examined 19 acts for subsidiarity check and approved 17 documents about them from which three were reasoned opinions. With this number Italy is one of the most active countries in subsidiarity check exams.

The table 2 presents parliamentary activities divided by policy areas. It shows that the Italian parliament concluded or is conducting exams in all EU policies. The most acts and documents were examined in the field of freedom, security and justice, foreign affairs and security, economy, industry and internal market.

Table 2. Parliamentary activities in the field of European affairs divided by policy areas

Policies	Concluded exams	Ongoing exams	Hearings	Fact-finding inquiries
Institutional and general questions	3	2	8	1
Freedom, security and justice	15	10	4	1
Foreign affairs and security	6	13	3	0
Economy	8	2	14	1
Cohesion	1	1	1	1
Financial services	4	2	1	4
Fiscal affairs	3	0	0	0
Education	3	0	2	1
Sport	1	0	0	0
Energy and environment	4	3	2	0
Transportation	5	1	2	0
Communication	0	0	1	0
Industry and internal market	8	5	2	0
Consumer protection	0	1	1	0

Employment and social affairs	2	0	4	0
Health	1	1	2	0
Agriculture and fisheries	2	3	8	0

Source: Interventi della Camera dei Deputati nella formazione delle politiche Ue (29 aprile 2008 – 30 novembre 2012), Interventi della Camera dei Deputati nella formazione delle politiche Ue (28 aprile 2006 – 28 aprile 2008).

6. Conclusions

The paper has shown the innovations of the Lisbon Treaty regarding how important national parliaments could be in the case of Italy, in a country, where the interactions between the parliament and the government are unbalanced and have great defects in the field of European affairs.

Regarding the steps of the implementation of the new privileges and procedures, unfortunately, significant changes were not taken to render the legal framework appropriate for the Italian participation at EU legislation till the end of 2012. The interpretations of the Rules of Procedure of the Chamber of Deputies, the letter written by the President of the Senate and the amendments of law No. 11/2005 did not seem sufficient enough to realise an efficient control on the executive and an adequate participation of the parliament in European affairs.

However, it may seem that law No. 234/2012 is an important development which contains a number of innovations regarding parliamentary procedures and governmental duties, but the approval of the law could not replace the necessary and already missing reform of the Rules of Procedure in both Chambers.

In conclusion, the study assumes that for having a positive effect of the Lisbon Treaty reforms on the unbalanced relation between the parliament and the government in Italy, the legal framework should be completed by amending the Rules of Procedure. Once the legal framework will be appropriate, both actors; the parliament and the government should use the new means in an adequate manner respecting the rules. Not like for example with the institution of the PM's question time which was created to have a direct dialogue and parliamentary control on the PM, but from the 1980s, when it was introduced, none of the PMs participated in this weekly event, ignoring this duty.

To sum up, the Lisbon Treaty innovations may have a positive effect on Italy only with a complete and appropriate legal framework and with a strong commitment of the government and the parliament.

MARKET WITHIN THE MARKET

LIQUIDATORS IN HUNGARY WITH SPECIAL REGARD TO COUNCIL REGULATION (EC) NO 1346/2000 OF 29 MAY 2000 ON INSOLVENCY PROCEEDINGS

MÓNIKA NACSA *

1. Introduction

In 2012 the Hungarian government decided to conclude an overall reform considering the registry of liquidators[1] via opening the application for special operating licence. Under provisions of Act XLIX of 1991 [hereinafter: *Insolvency Act 1991*.], in Hungary, only those economic organizations (company form which is either limited liability company or private limited company) can operate as liquidators who obtained the operating licence. The licence permits the licencee to serve for seven years. As Hungary acts in line with its obligations deriving from the EU membership, by virtue of the 123/2006 EC directive it is mandatory to open up the market of liquidation proceedings. The relevant EC directive considers the conduct of liquidation proceedings by the professionals as a special service which can be carried out at European level, hence, falls under the principle of free movement of services.

It is without doubt that the conclusion of liquidations is loaded with legal shortcomings in Hungary.[2] That malfunctioning could be traced back to the inappropriate regulation of the legal institution and the solidified practice of the actors in liquidation, let it be the court ordering the liquidation, the debtor gone insolvent, the creditors unwilling to support any reorganization or the liquidator whose *status* is just as unclear in the Hungarian regulation as the creditors' expectation in a standard liquidation for any return on their claims against the debtor. The liquidator can be considered both as actor of the market of liqudations and as member of the juridical system.

On the one hand, the Hungarian practice has had its difficulties since 1991, which is the national level of the issue, on the other hand, since Hungary joined the European Union in 2004 one cannot ignore the European narrative of liquidations. That circumstance, however, is not even represented in the Insolvency Act 1991, while in other European Member states the effects of both international and European legal influences could be traced in acts by the incorporation of new provisions.[3]

With the creation of the internal market and later on the single market of the European Union, the lack of regulation of insolvency proceedings by general terms was a shortcoming

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[1] 114/2006 (V.12.) Government Decree.

[2] Korrupciós kockázatok a felszámolási eljárásokban, a Transparency International Magyarország riportja. [Corruption Related Risks in the Liquidation Proceedings in Hungary. A Report by Trancparency International Magyarország], available at: http://www.transparency.hu [uploads/docs/tanulm2_levil1.pdf] (22 December 2013).

[3] Wessels, Bob: Current developments towards international insolvencies in Europe. *International Insolvency Review*, Vol. 13. (2004) 45.

until 1995.[4] In 1989, the then Member States articulated their wish for a unified and universal legal framework of insolvency proceedings that culminated in the Convention of Insolvency Proceedings signed in 1995[5] That Convention, as a multilateral agreement, applied for all Member States of the European Union.[6] This was the first time that the so-called main insolvency proceeding appeared at community level while secondary proceedings remained available at national level. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[7] replaced the Convention in 2002. As a result of German and Finish initiatives, the newly accepted Regulation 2000 set up rules about the governing jurisdiction of insolvency proceedings for an undertaking having its center of main interest in the territory of the Community. It also clarified the range of judgments that were „delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings"[8] and last but not least, some judgments and provisions of applicable law became recognized. The direct effect enables Regulation 2000 to operate both in the old Member States and the newly joining Member States such as Hungary, without any further legislative measures and this way it aims at proving the European way of creditors' bargain theory in its own way.[9] By 2011, in Hungary, only a few number of cases[10] were brought before the Metropolitan Court of Budapest that is the authorized *fora* of both main and secondary proceedings of European seated undertakings in Hungary.[11]

At the European level the most important issues of insolvency proceedings are the assessment over the center of main interest,[12] the dual system of the main and the secondary proceedings and the most dominant of all is the satisfaction of creditors' claims. Some of these fault lines are present in Hungary too,[13] however, due to the fact that only a few European main or secondary cases reached the Court in Hungary and these mostly cover the qualification of the C.O.M.I.,[14] for the purpose of present paper, it is better to observe those shortcomings that derive from the unsettled legal situation of liquidators in Hungary, and how it could affect the outcome of a European main or secondary insolvency proceeding. The author of present paper is, therefore, eager to provide a glimpse on the Hungarian market of the conclusion of liquidations within the single market of European insolvency.

[4] Report on the Convention of Insolvency Proceedings by Miguel Virgos and Etienne Schmitt, The Council of the European Union, Brussels, 3 May 1996, 6500/96, 6. (Hereinafter: *Virgos-Schmitt Report*), available at: http://aei.pitt.edu/952/ (22 December 2013).

[5] Cf. Virgos-Schmitt Report, 7.

[6] Omar, Paul J.: Genesis of the European Initiative in Insolvency Law. *International Insolvency Review*, Vol.12. (2003), 161.

[7] Published in the Official Journal of the European Communities 30.6.2000, L 160/1. (hereinafter *Regulation 2000*).

[8] Regulation 2000 Recital (6).

[9] de Weijs, Rolef J.: Harmonisation of European insolvency law and the need to tackle two common problems: common pool and anticommons. *International Insolvency Review*, Vol. 21. (2012), 69.

[10] Juhász, László: *A magyar fizetésképtelenségi jog kézikönyve* [Handbook of the Hungarian Insolvency Law]. Novotni Alapítvány, Budapest, 2012, 52-54. and 58.

[11] Insolvency Act 1991 Section 6 paragraph 2.

[12] Hereinafter: C.O.M.I.

[13] Csőke, Andrea: *A határokon átnyúló fizetésképtelenségi eljárások* [Insolvency Proceedings Having Cross-Border Effects]. HVG-ORAC, Budapest, 2008. 97.

[14] Cf. ÍH.2008.122. and ÍH2009.139. (only in Hungarian).

2. Liquidators at Work in Regulation 2000 and Insolvency Act 1991

However Recital (6) of Regulation 2000 confirms competence to the European Union only in matters of jurisdiction, recognition of judgments and recognition of certain substantial, member states-law it is also important to note that by observing the abovementioned Regulation 2000 more accurately, there are provisions mostly covering substantial regulation relative for liquidators.[15] More interestingly it is even Article 4 paragraph 2 (c) which declares that „*respective* (…) *powers of the liquidator*" must be determined by „*the law of the State of opening the proceedings*."

Still, Regulation 2000 empowers European liquidators to operate broadly in case they are nominated as third person for insolvent undertakings to „*administer or liquidate assets*" and even „*supervise the affairs*" of economically failed organizations.[16]

The substantial power of liquidators confirmed by Regulation 2000 can be divided into two major groups based on the dynamics of the insolvency proceeding: *(i) the first category of rights* covers the competence of the liquidator of the so-called main proceeding by which he/she is authorized to „request the opening of secondary proceedings"[17] in another state different from the one where the main proceeding takes place and by requesting the proceeding, the court of the secondary proceeding is automatically obliged to order the opening of the secondary proceeding which proceeding must be a liquidation proceeding. Such substantial competence of the liquidator reaches far beyond the general aims of Regulation 2000 and creates doubts regarding its conformity with national regulation, especially in Hungary. The *(ii) other group of powers* confirmed upon the liquidator of the main proceeding is typically limiting power against the actors of the secondary proceeding, let it be the liquidator of the secondary proceeding, the court or even the creditors.

Right to request for secondary proceeding

According to Recital (19) in line with Article 27 and Article 29 (a), liquidator of the main proceeding may request for a secondary proceeding. In such case, the secondary proceeding results in the lack of the examination of the debtor's insolvency; by legal terms, the secondary proceeding will be an automatically ordered proceeding which must be liquidation18, hence, the termination of the debtor and the realization of the debtor's assets. Insolvency Act 1991 is not in line with Regulation 2000 which deficiency may result in misleading legal practice in Hungary.19 At first, Section 22 of Insolvency Act 1991 defines the list of parties who may file for liquidation proceeding against the debtor in Hungary, these are: in case the liquidation proceeding was preceded by bankruptcy proceeding that failed to result in composition, the court will ex officio order the

[15] In terms of Regulation 2000 relative for the Hungarian cases, under liquidators the present publication understands *bankruptcy trustee and liquidator* in line with the informative summary of Regulation 2000 incorporating previous modifications, the consolidated text is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:en:NOT (22 December 2013).

[16] Regulation 2000 Article 2 (a).

[17] Regulation 2000 Recital (19).

[18] Regulation 2000 Article 27.

[19] For the aims of the present publication, the comparative analysis of Regulation 2000 and Insolvency Act 1991 solely covers liquidation proceeding out of the enumereted insolvency proceedings in Annex A of Regulation 2000.

liquidation, then the debtor, the creditor or a third party being responsible for the voluntary dissolution of the debtor may request, while the court of registration may dispose of the claim, and in case of criminal charges, the criminal court may request. In the abovementioned enumeration there is a clear lack of the liquidator of the main insolvency proceeding from a different jurisdiction.

It is the incoherent codification that resulted in the obscurity of the Insolvency Act 1991. In some provisions it has implemented the rules of Regulation 2000,[20] while in other cases ex. enumeration of entities empowered to request for liquidation or exceptions are completely misleading. Besides the fact that such a shortcoming is a legislation malfunctioning and raises questions about the clarity and transparency of legal matters, it also gives ground to the loopholes of the legal system. Does this shortcoming about the failed enumeration mean that in the Hungarian legal system the Court can rule out the order on the request for the secondary proceeding?[21] The answer should be negative; however, from the viewpoint of a liquidator without Hungarian origin, such question might occur before filing the request at the Metropolitan Court of Budapest and raising costs for the procedure.[22]

One can also ask the question about the independence of the Court ordering the secondary proceeding. According to Section 26 of Insolvency Act 1991, the court „shall investigate the insolvency of the debtor" which means that the court must substantially observe the debtor's position. Such a conflict must be resolved; however, in principle in course of a potential conflict between European law and national law, the former shall prevail. In that case the Hungarian legislator is in default since Insolvency Act 1991 should have covered the exceptional cases where European provisions prevail over national regulation.

The issue about Article 27 of Regulation 2000 is twofold. The second part is more related to the dichotomy of main and secondary proceedings that are launched within the European Union.[23] It could, though, happen that while the main proceeding aims at the reorganization of the undertaking concerned so that the continuation of economic activity is of high probability, secondary proceeding against the same economic organization in a different country cannot be other than a liquidation which proceeding is – by definition – the mean of termination of activities and existence of the undertaking.[24] Legal practice shows that the liquidators of main proceeding try to avoid the dichotomy of proceedings. Evaluation of the dichotomy of proceedings shows that it may result rather in disadvantages than advantages.[25]

[20] Insolvency Act 1991 Section 6 paragraph (2), Section 6/B.

[21] However Article 26 of Regulation 2000 describes public policy principle applicable for only the recognition of opened insolvency proceedings and judgements of insolvency proceedings, by secondary interpretation the main proceeding's liquidator's request may be ruled out since the liquidator's appointment could be founded on a judgement and his request for the secondary proceeding presupposes an ongoing main proceeding that the court must implicitly acknowledge while deciding upon the request for secondary procedure.

[22] Cf. *Korrupciós kockázatok…*[Corruption Related Risks…].

[23] Moss QC, Gabriel: The Impact of EU Regulation on UK Insolvency Proceedings. *International Insolvency Review*, Vol.11. (2002) 142.

[24] Csőke: *op.cit.* 210-211.

[25] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of May 2000 on

While in Recital (19) the Regulation 2000 describes the liquidator's right to request for secondary proceeding as a necessary measure in case the debtor's assets are of great complexity. However the secondary proceeding as liquidation may threaten the interest of creditors in the Member State of the secondary proceeding.[26] In addition to that shortcoming, it must be mentioned that by virtue of Article 18 paragraph (1) of Regulation 2000, the liquidator of the main proceeding even „in particular remove[s] the debtor's assets from the territory of the Member State" in which the secondary proceeding takes place. For such a power Article 5 and 7 uphold limitations that may be a relief only for creditors having *in rem* rights.[27] That limitation, however, has not yet brought case law based explanation at the European level; hence, mostly jurisprudential modeling is available.[28]

The right to the removal of assets leads to the second category of rights conferred to liquidators of main (and second) proceedings which are the rights of disposition.

Rights of disposition

The right of disposition is a collective category mostly covering Article 18 of Regulation 2000. According to Article 18 paragraph 1, the liquidator of the main proceeding „may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State." The full empowerment of the liquidator of the main proceeding is not without exceptions. In case there is a secondary, territorial proceeding in that other Member State or preservation measures were taken in line with a filed request for an insolvency (mostly liquidation or bankruptcy proceedings in Hungary) proceeding, the liquidator of the main proceeding is restricted. Article 18, therefore, underlines that in the European framework of insolvency proceedings; the liquidators of the main and the secondary proceeding cannot be identical.[29]

In Hungary, the only preservation measure that the Court may order is the appointment of a trustee in liquidation.[30] There used to be an interpretative loophole between the regulation of Insolvency Act 1991 and Regulation 2000. In Article 38 of Regulation 2000, it is clearly regulated what kind of powers are conferred to the temporary administrator by European standards are.[31] He/she may "request any measures to secure and preserve any of the debtor's assets situated in another Member State." Whilst in Hungary, the necessary modification of the Insolvency Act 1991 was delivered by introducing Section 24/A in the Act only in 2011.[32] By standards of Section 24/A, the trustee, however, only has a limited and rather informative role. The trustee may only check the books and other documents of the debtor and may be authorized to enter the working areas used by the debtor. In case of potential infringements, the trustee is not authorized to file any claim, by strict

insolvency proceedings, Strasbourg, 12.12.2012. COM(2012) 743 Final, 13-14., available at: http://ec.europa.eu/justice/civil/files/insolvency-report_en.pdf (22 December 2013).

[26] Csőke: *op.cit.* 212.

[27] Moss: *op.cit.* 146.

[28] Smart, Philip: Rights *in rem*, Article 5 and the EC Insolvency Regulation: An English Perspective. *International Insolvency Review*, Vol. 15. (2006) 18.

[29] Cf. also Article 31 of Regulation 2000.

[30] Csőke: *op.cit.* 181.

[31] By observing Hungarian regulation of the trustee in liquidation and the European regulation of the temporary administrator, they can be considered as correspondents of each other.

[32] *Act CXCVII of 2011* introduced the modification, that act affected the act on Business Associations and the act on Public Company Information, Company Registration and Winding-up Proceedings.

interpretation of Section 24/A paragraph 7, he/she may only *inform* the court any may only *warn* the debtor for taking measures in order to avoid violation of law.

There is a hypothetical possibility of coordinated procedure for entities dealing with liquidation in the Member States of the European Union offered by the Hungarian insolvency regulation, indeed. Since 114/2006 (V.12.) Government decree offers the chance for European seated economic organization to gain licence in Hungary for the conclusion of liquidation proceedings,[33] the court ordering insolvency may choose a liquidator different from the one offered by the special electronic system, in case, based on the need for special knowledge, it finds derogation necessary.[34] In case of the undertakings having both their C.O.M.I. and establishment in at least two different Member States of the European Union and out of the two States one is Hungary, if they finally become insolvent, a coordinated „European liquidator" with establishment and licence in Hungary as well can operate more effectively.

Paragraph 2 of Article 18 of Regulation 2000 clearly identifies the major fault line between the liquidator of the main proceeding and the one of the secondary proceeding. While the liquidator of the main proceeding can directly operate in accordance with the laws of the State of the secondary proceeding, the liquidator of the secondary proceeding may „claim through the courts." Out of court there is a limited power conferred to the liquidator of the secondary proceeding, while the power to bring any action „to set aside which is in the interest of the creditors" remains at the national level of the secondary proceeding.[35] In case the liquidator of the main proceeding removes assets of the debtor from the State of the secondary proceeding, the liquidator of the secondary proceeding only remains with virtual power to exercise.

It is clear that the liquidator of the main proceeding is empowered to conduct his/her activity in any Member State, the liquidator of the secondary proceeding, actually, may only assist. Unfortunately, the Hungarian Insolvency Act 1991 does not cover the details of such a cohabitation of liquidators, while Regulation 2000 remains silent on the precise cooperation of the two, separate liquidators. What is absolutely clear is that the liquidator of the main proceeding has two further controlling powers over the secondary proceeding. According to Article 31 paragraph 3, the liquidator of the main proceeding may submit proposals to the liquidator of the secondary proceeding which proposals can even be instructions. The provision explicitly confirms the hierarchy of the two separate liquidators which is missingly not regulated in the Hungarian Insolvency Act 1991, either. Considering the dynamics of a liquidation, it is without surprise that the liquidator of the main proceeding also has his/her final words upon the closure of the secondary proceeding according to Article 34 paragraph 1.

Considering the lack of coherently and transparently implemented regulation relative for the liquidators of both the main and secondary proceedings, that situation widens the loopholes in the practice of the Hungarian insolvency proceedings. Inaccurate regulation of the conduct of liquidators may result in corruption risks.[36] On top of the the abovementioned disadvantages the most critical aspect of a disfunctioning liquidation may

[33] 114/2006 (V.12.) Government decree Article 2 paragraph 2 (b).
[34] Insolvency Act 1991 Section 27/A paragraph 1.
[35] Csőke: *op.cit.* 184.
[36] Cf. *Korrupciós kockázatok…* [Corruption Related Risks…].

be added, namely, the harm of the creditors' interests.[37] Let it be the main or the secondary proceeding, in case rules and powers are not clearly conferred upon participants of a liquidation, creditors may lose their chance to gain satisfaction at the end of procedure.

3. Concluding Remarks

Conclusion of insolvency proceedings, more accurately, liquidations, by liquidators of both the main and the secondary proceedings raises questions in Hungary. Besides the fact that there is a clear govermental dedication about the renewal of the market of the conclusion of insolvency proceedings, Insolvency Act 1991 still remains effective with its shortcomings. However, Hungary is member of the European Union since 1 May 2004, Insolvency Act 1991 has not caught up with the European legal flaw. The incoherent regulation may result in conflict of national and European law,. Liquidators coming from Member States different from Hungary may face serious difficulties.

The most comprehensive solution for the abovementioned shortcomings would be the drafting and passing of a new insolvency act that should be in full conformity with the European regulation and the demands of the single market.

[37] Csőke, Andrea: Problems Related to Collective Insolvency Proceedings Having Cross-Border Effects – From the Perspective of Hungary. *International Insolvency Review*, Vol. 13. (2004) 84.

IMPACT OF THE EUROPEAN LAW ON THE CHANGING CORRELATION BETWEEN ATTORNEY'S INDEPENDENCE AND THE RIGHT TO FAIR PROCESS

KATALIN BÉCSI *

1. Functional Independence of Attorneys[1]

The function of fundamental legal protection of attorneyship is only realized according to the requirements of fair process – similarly to public trust realized in attorney's contribution to jurisdiction – when the attorney taking part in jurisdictional procedure is independent. This requirement about functional independence referring to the jurisdictional activity and proceedings of the attorney settles the constitutional frames for legislation. While structural independence can mainly be interpreted as independence from the state and its bodies, within the scope of functional independence we can distinguish independence from the state and from any other undue influence.

The requirement to be independent from the state was formulated during the political debates of the 19th century, and was about the protection against the intervention and its possibilities of authorities. This means independence from all the bodies of the states including the authoritative bodies of the municipalities. Except for the laws and the norms of general scope of attorneys' self-governments (chamber, etc.), any other type of intervention that can threaten the independence of the attorney is prohibited".[2] For practicing the rights of fair process, being independent from the state and its administrative authorities is a basic condition for the attorney who takes part in jurisdictional procedure. Defence by an attorney does not meet the requirements of the right to fair process if the proceeding attorney is not independent from the state or any of its bodies. The Constitutional Court handles the independence of attorneys from the state as a historical axiom when it talks consequently about the traditionally formulated independence.[3]

Unlikely structural independence, the requirements of functional independence not only involves the requirement of being independent from the state but during his contribution the attorney has to be independent from every influence that is suitable for distracting the attorney from his activities related to his oath and his professional convictions.

On the one hand, this means that the attorney taking part in jurisdictional procedure must be exempted from „any relationship of subordination or influence exercised by a third party for achieving its own interests"[4], on the other hand, the result of the procedure cannot affect the attorney in person either directly or indirectly, moreover, he cannot be directly interested in the result of the procedure, in default whereof the attorney's

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[1] See further, Sulyok Tamás: Az ügyvédi függetlenség és a tisztességes eljáráshoz való jog viszonyának néhány kérdése [Some Issues of the Relation between the Attorney's Independence and the Right to Fair Process]. Bírák Lapja [Bulletin of Judges], Vol. XXII (2012) No. 1-2.

[2] Cf., Redeker, Konrad: Vereinheitlichung der öffentlichen-rechtlichen Gerichtsbarkeit. *Neue Juristische Wochenschrift*, 2004. Issue 13.

[3] *428/B/1998 ABH* (428/B/1998 Resolution of the Hungarian Constitutional Court), III.4, and *907/B/2004 ABH* (907/B/2004 Resolution of the Hungarian Constitutional Court), III.1.

[4] Schiller, Kaspar: Ein Gesetz mit 125 Jahrige Verspatung. *Zeitschrift für Schweitzerisches Recht*, 1998/1, 71.

contribution cannot be regarded as respectable. In the scope of functional independence of the attorney, the aspect of independence was also historically formulated which presented the attorney the exemption of the right to command labour laws as a constitutional requirement**.**

The Hungarian legal thinking regards attorneys' existential independence as well as they are and shall be functioning as a freelancer as a constitutional requirement. The Constitutional Court highlighted the following points: „the distinctive characteristic feature of an attorney's profession is that it is such a private activity as an intellectual freelancer, which in the scope of the operation of public authorities on the score of guarantee separates from public authorities as a definite private activity."[5]

In the Hungarian law, this principle is ceaselessly realized, perhaps in a bit exaggerated way. By exaggerated realization we mean that there is no constitutional obstacle to prohibit the attorney to have an employment relationship with his own office and to utilize the specific social advantages of employment relationship. The present law generally prohibits attorneys to create an employment relationship, while these extremely strict regulations cannot be justified by constitutional reasons.[6]

In Switzerland or in Germany the question of the relations of the so-called *Syndicusanwalt*[7] to attorneyship was the focal point of technical debates.

Not only the existential vulnerability incorporated within the scope of the right of labour law commands or directs business interest, e.g. operating as a managing director of an Ltd. infringes the independence of the attorney and as a consequence the right to fair process, but such a tariff agreement with the client that makes the attorney interested in the result of the case.

According to the statement of the German Constitutional Court: „the attorney, as an authority of jurisdiction, cannot lower his own dignity to a level so that the clients handle him as a business partner."[8]

The independence is restricted, more precisely excluded if the attorney is directly and personally affected in the result of the case represented by him, consequently, an objective approach to the case cannot be expected from him.

According to the viewpoint of *Sulyok Tamás*,[9] the requirements of functional independence are basically violated by the following circumstances:

- The attorney's dependence from the state, municipality or any other similar authority.
- The existence of employment relationship or relationships result in direct business dependency.
- Direct or indirect interest of the attorney regarding the result of the case.

The attorney can fulfil the function of fundamental legal protection suitable to the requirements of fair process in jurisdiction if the whole process of the attorney is objective and deserves the trust of public and the client, thus, the attorney's legal situation can only

[5] *22/1994 ABH* (22/1994 Resolution of the Hungarian Constitutional Court), II.2
[6] Sulyok: *op. cit.*
[7] It refers to an attorney employed by companies with employment relationship.
[8] BverfG, 1 BvR 2576/04 vom 12.12.2006.
[9] Cf. Sulyok: *op. cit.*

meet the requirements of fair process if there are no facts excluding or restricting the attorney's independence which threaten public security and its maintenance.

To filter the aforementioned facts, measures of incompatibility are needed, which are regulated in detail by the attorney law of Hungary (Act XI of 1998 on attorneys).[10] As for the reasons of incompatibility, it is typical to distinguish absolute and relative reasons for incompatibility.

The Constitutional Court summarizes the situations in which the attorney's representation is incompatible with the principle of fair process in the concept of the so-called unprincipled representation. The scope of the concept of unprincipled representation seemingly crosses the borders defined by the itemized regulations of the attorney's incompatibility. The representation is unprincipled if the attorney is not independent.

The right to fair process is a requirement viewed as an absolute right.[11] Relative incompatibility rights defined in the Act of Prosecution Authority are non-exhaustive, but they are exclusively listed in the Act besides the definite relative incompatibility rights.

We have to examine how the regulation in effect meets the defence requirements of the attorney's functional independence which has been settled by the practice of the Constitutional Court.

2. The Problem of the Correlations of the Legal Regulations Referring to the Appointment of Defence Attorney

The Hungarian Code of Criminal Procedure declares that the right to appoint the defence attorney is the task of the proceeding authority or court. The main findings of the

[10] The Act XI of 1998 on attorneys:
Art. 6.
(1) The attorney
a) shall not have labour relation, service relation or any other type of relation that mean work obligation; shall not be a civil servant, public-sector employee, notary and full-time mayor
b) shall not perform entrepreneurial activities with personal contribution or with unlimited financial liability.
(2) The following activities do not belong to the application of the ban in Art (1)
a) scientific, artistic and sport activities,
b) tutorial activities,
c) activities as experts except for justice,
d) arbitration activities,
e) relation as a Member of Parliament, Member of European Parliament, representative of a municipality,
f) membership of management board and supervisory committee without labour relation,
g) membership and office holder of board of trustees,
h) service relation of voluntary reserve officer.
(3) The attorney is obliged to report the cause of incompatibility to the bar within 15 days of its appearance.
Art 7. The attorney shall not act for 2 years before the court, the prosecutor's office or the investigatory authority of which s/he was the member as a judge, prosecutor or investigatory power before the membership of the Bar Association.

[11] According to the practice of the Constitutional Court 'fair trial' is not simply one of the requirements of features demanded by a court or the procedure for instance: fair trial, beyond the constitutional requirements includes the fulfilment of other guarantees concerning especially the criminal and the procedural law. The articles on procedural guarantees of the European Convention on Human Rights also professes the principle of 'fair trial'.

researches about appointed defence attorneys' activities justify that the appointed defence attorneys perform far less work as regards quantity and less effective work than their authorized colleagues, furthermore, in many cases the appointments by the police affects a limited group of attorneys.[12] Generally speaking, the regulation about appointing a defence attorney does not favour the realization of the right to fair process and violates the constitutional requirements of the attorney's independence. It is worth noting that the Constitutional Court has examined the procedure of appointing attorneys in several resolutions; however, it did not find that the appointing procedure violates the constitution.[13]

The Constitutional Court in its 763/B/2001 ABH (763/B/2001 Resolution of the Hungarian Constitutional Court) derived the procedure of appointing not from the right to defence or from the right to fair process, but from Art. 70/A (3) of the Constitution, according to which the attorney meets the requirements of the realization of legal equality and provides counsel via appointment. The state cannot exclusively meet these requirements of the appointment procedure accomplished by the authority. It is difficult to tone the requirements about the independence of attorneys with the fact that the defence attorney is appointed by the authority and the authority is not bound by any regulations as regards which attorney to appoint, concerning what aspects.

The circumstances are aggravated as during the investigations the function of appointment (selection) of the defence attorney is in the hand of the investigative authorities, namely, in a body which is not interested in the effective work of the attorney on the basis of its procedural situation, thus, „it is completely incomprehensible how it is possible that the prosecution body appoints the defence."[14] This legal situation violates the requirements of the attorney's independence from more aspects and as a consequence, the right to fair process. In accordance with the content of the 365/B/2000 ABH (365/B/2000 Resolution of the Hungarian Constitutional Court), the attorney's representation meets the constitutional requirements of independence, even if it avoids the resemblance of the violation of independence or unprincipled advocacy.

3. International Overview on the Amendment of the Code of Criminal Procedure

The accession to the Council of Europe made it necessary for Hungary to apply further amendments in order to harmonize the Hungarian legal regulation and practice with the European convention on the protection of fundamental human rights and freedoms and its complementary Protocols (hereinafter: Convention).[15] These amendments were introduced by the Act XCII of 1994 on the amendment of the Code of Criminal Procedure.

[12] Cf. Fenyvesi Csaba: *A védőügyvéd: a védő büntető eljárási szerepéről és jogállási szabályairól* [The Defence Attorney: On the Rules of Role and Status in Criminal Procedure]. Budapest-Pécs, Dialóg Campus, 2002.

[13] *763/B/2001 ABH* (763/B/2001 Resolution of the Hungarian Constitutional Court).

[14] Kádár András Kristóf: A tisztességes eljáráshoz és a védelemhez való jog 20 éve Magyarországon [20 Years of the Right to Fair Process and Defence in Hungary]. *Fundamentum*, Vol. 4 (2009) 84.

[15] The Convention entered into force in Hungary on 5 November 1992.

In accordance with Art 6.(3) c), anyone charged with a criminal offence has the right to get an officially appointed defence attorney free of charge if the interest of the justice demands that and there are no means for financing a defence attorney.

In the regulation which had been in effect prior to the amendment of the Code of Criminal Procedure in 1989, the defence attorney had to be appointed to take part in the criminal procedure by taking the interest of the justice into consideration, so generally speaking it used to be irrelevant whether the accused did not appoint an attorney because of financial reasons or because of personal choice. Naturally, in most of the cases the accused did not authorize an attorney because s/he could not afford that due to his/her financial conditions.

The necessity appeared during the creation of the new Code of Criminal Procedure according to which the court, the prosecutor or the investigatory authority has to appoint a defence attorney even if the defence is not compulsory but the accused applies for it, as on the basis of his/her financial circumstances s/he cannot provide proper defence.

The Hungarian legal framework became harmonized with the Convention, but as for *Kádár András Kristóf*, the Hungarian practice of the defence of the needy accused does not meet the expectations set forth by Art 6.(3) c) of the European Court of Human Rights. In his opinion, the *Artico v. Italy* case[16] can be mentioned as an example for this, in which it was noted that the state, barely with an appointment, does not fulfil the obligations prescribed in the Convention, as the activity of the defence attorney has to be effective.

On the basis of this viewpoint in the case of *Kamasinski v. Austria*,[17] as regards the European Court of Human Rights, the state cannot be held liable for all the shortages of the appointed defence attorney's activities, in the meantime, it became obvious that if the appointed defence attorney does not accomplish his duties properly which is obviously sensible even by the authorities, or if his failures are reported to the authorities, the liability of the state can be stated. The system of appointment mechanisms is in accordance with the requirements of the Convention if the appointed defence attorneys' level of service provided to the entitled suits the minimum level of expectations.

The appointed defence attorneys' level of professional service is not the very question of the 19th century. This fact is supported by the findings of the Prosecution Service of the Capital City of Hungary which conducted a random research with one hundred and thirty cases with a single accused person in 1988.[18] From the one hundred and thirty cases, seventy were performed with appointing. From the seventy appointed defence attorneys fifty-five attorneys did nothing at all during the investigation, and from the remaining fifteen attorneys, eleven only took part in the exposition of the documentation. From them six attorneys participated in the exposition of the documentation at the same time as the accused, and only one in the preceding interrogation of the accused. On the contrary, in case of the sixty cases of authorized defence attorneys nearly four-fifth of the attorneys took part in the interrogations and more than one-third also made different motions.

As far as the research conducted by the Hungarian Helsinki Committee (HHC) in 2003 is concerned, based on the questionnaires of five hundred people in pre-trial detention it

[16] *Artico v. Italy*, Judgment of the European Court of Human Rights, 13 May 1980, Series A, No. 37.

[17] *Kamasinski v. Austria*, Judgment of the European Court of Human Rights, 19 December 1989, Series A, no. 168.

[18] Cf. Tóth Mihály: Nyomozás és védelem, a fal is lehet üveg [Investigation and Defence. The Wall Can Be made of Glass]. *Magyar Jog*, 1989. No. 3, 350-355.

can be seen that while 40% of the authorized defence attorneys got in touch with their clients at least until the first interrogation, this proportion in case of appointed defence attorneys was merely 24%. There was a client who was not even visited by his appointed defence attorney during the one-year-long period of pre-trial detention.

Other reasons beyond the attorneys' responsibilities may cause to end up with such a ratio, for example if the notion about appointment is delivered with delay by the appointing authority.[19] If the appointing authority, according to the current practice, sends the notices on fax, the interrogations at nights and at the weekends will still likely be conducted without defence as it cannot be expected from a defence attorney even on their day of duty to be in their offices 24-hour long. This questionnaire highlighted other weaknesses of the operation of the system of appointed defence attorneys concerning the attorneys' activities. More participants claimed that their attorneys did not say a single word during the interrogation or the trial.

The basis of the problem is thought to derive from the fact that in accordance with the regulation in effect the fee of an appointed defence attorney is 3 000 HUF (+VAT), while for consultation with the accused in custody the attorney is entitled to get the half of this sum. No fee is provided for editing motions or for keeping contact with the paroled accused. The question of infrastructure is an additional problem. In many cases the penitentiary institution is more hundred kilometres away from the attorney's seat.[20] Concerning the professionals' aspect, the primary reason why the majority of the attorneys do not take considerable efforts in the investigatory phase (when the presence of the defence attorney is not compulsory) is the remuneration which is far beyond the market price, ignoring that the investigation is a key factor as regards determining criminal liability, and deficiencies during the investigatory phase are very difficult to resolve later.

Referring to Kádár András Kristóf to ensure an effective defence system for those in need, four fundamental functions must be provided.

- provision of appointed defence attorneys in such cases when it is compulsory or otherwise necessary (appointing function);
- controlling the quality of the appointed attorneys' activities (individual quality assurance);
- monitoring and assessment of the whole system (general quality assurance);
- drafting and implementation of the budget of the system (budgeting function).

The researches, which are repeatedly mentioned by technical literature as 'the problems of attorneys settled at the police', refer to the real violation of the attorney's independence. Kádár András Kristóf refers to the researches of the National Police Headquarters (ORFK), according to which in the capital city 12 regional police headquarters regularly appoint the same attorneys. The risks, which can emerge from the aforementioned practice is that these attorneys, besides police appointments, are not involved in any other activities, their financial existence is based on that, consequently they are getting more and more dependent on these police appointments. The latter dependency therefore can result in real dependency on investigative authorities and as a consequence not only the pretence of

[19] Kádár András Kristóf: A vétkesség védelme: sérelmes bánásmód és védői tevékenység az előzetes letartóztatásban lévő terheltek ellen folyó eljárásokban [The Defence of Culpability: Prejudicial Attitude and the Defence Attorneys' Activity in Criminal Procedures of the Accused in Custody]. Budapest, Magyar Helsinki Bizottság [Hungarian Helsinki Committee], 2004. 124-127.

[20] Cf. Bánáti János: Szabadságkorlátozások [Restricted Freedoms]. *Fundamentum*, 2005. No. 2, 50-51.

independence is compromised but even the independence itself can vanish. That is the reason why the law of appointing procedure needs to be re-regulated which would delegate the task of appointment for an independent body.

During the research of the National Police Headquarters, the interviewed bodies formed the general opinion that 'the investigatory bodies prefer the appointment of those attorneys on whose presence and undertaking they can always rely on under every circumstance.'[21] If the investigatory bodies really appointed those attorneys who appear in the majority of the cases, the figures would not be so unfavourable.

According to the research conducted by the HHC in 2003, some accused had the impression that the appointed attorneys „in reality work for the investigatory bodies which appointed them and only interested in having their clients make a confession and a plea agreement."[22]

We are definitely talking about such a structural problem of which solution would need a radical reform on the whole system, namely, it requires to pass over the responsibility of appointing function to another body in order to achieve that the investigatory body and the prosecution authority could only note the necessity of appointing in cases in progress before them, while the actual appointing, to be concrete, the selection and notification of the appointed defence attorney could be conducted by such an authority which is completely uninterested in the procedure.

The international examples are quite varied: in the United Kingdom a legal service – which is completely independent from the investigative authority – registers the appointable defence attorneys; the investigative authority is obliged to inform the accused about the defence attorneys who can be appointed for him by handing over a list to choose from them. Within the frame of the aforementioned service, 24 committees and nearly 300 local appointed defence attorneys operate. The committees handle two types of registers; one of them is the so-called *service record*, on which all the appointed defence attorneys can be found, the other is the *sequence record*, which contains the available defence attorneys at different times. There is a similar situation in Canada; in more states the court decides about the appointment of the defence attorneys in the phase of investigation. This rule prevails even in (in our wider region) Czech Republic, Germany, Poland and Slovakia, where regardless the seriousness of the criminal offences the court appoints a defence attorney for the accused if the defence is compulsory, or the accused does not have an authorized defence attorney, but he would like to have one.

4. The Attorney's Direct and Indirect Personal Concern during Judicial Assistance

The attorney's direct personal interest or concern in the outcome of the given case is due when the attorney as a natural person or as a legal person represented by her/him in accordance with the regulation of statutory representation is directly affected by the outcome of the case. This is the situation in such a case when the attorney himself or the legal person represented by her/him in accordance with the regulation of statutory representation is the client. Here, the question is how the right to fair process and the

[21] Cf. Bánáti: *op. cit.*
[22] Cf., Kádár: A vétkesség védelme…

requirements for the attorney to be independent can be compatible with the case if the attorney simultaneously acts in the aforementioned cases in jurisdiction as a legal person and as a client in such cases when legal counselling is obligatory.

On the basis of Hungarian civil procedures and administrative legislation, the direct personal concern of attorneys participating in their own cases does not hinder them to proceed as attorneys even in case of obligatory legal representation. With reference to this, the *Court Decree* (Bírósági Határozat – BH) *129/1995* must be emphasized which claims that in review procedures the party – even if s/he is an attorney – shall use the services of a legal representative.

The attorney's direct personal concern according to the European Law does not allow the proceedings before the European Court of Justice. Art. 19 of the Statute of that judicial body rules out the possibility for a party with direct concern in the given case to proceed as a legal representative in front of the European Court of Justice.

5. The Attorney's Indirect Personal Concern, Namely, the Limits of the Empowerment of the Client

We can talk about the attorney's indirect personal concern in the outcome of a given case, when the attorney is not directly affected in the development of the case but he is not indifferent about the outcome of the case due to economic interests. This is especially the case in the case of attorneys' contingency fees, as in such cases the attorneys' work fee directly depends on whether the result of the case fulfilled the interests of the client or not. Such an attorney's commission referring to remuneration bears the features of a contracting agreement, hence, the attorney is entitled to get the fee in case of the realization of a given result. In most European states there is a law against the remuneration of attorneys concerning the results of the case (*pactum de quota litis*).

6. The Attorneys' Contingency Fee

Hungary, along with the former socialist states, belongs to those states in which the law allows attorneys' contingency fees without restrictions. Western European states nearly without exception view the violation of the attorney's independence in such agreements. The German law considers it null and void due to its immorality.[23] The attorney practises his profession in return for compensation; consequently, the agreement between him and his client about the attorney's remuneration fundamentally affects his interest.

Generally, to main forms of tariff agreements relating to the results of the activities of attorneys are known between the attorney and the client. The aforementioned one (*pactum de quota litis*) with the expression in English speaking territories (*no win – no fee*) and the other widespread form of contingency fees (*pactum de palmario*) in English (*no win - less fee*). The two types of remuneration differ from each other on the basis whether the attorney's remuneration completely depends on the outcome of the given case, or the attorney can also claim a kind of compensation if his proceedings on the client's point of view were not successful, but in case of success he is entitled to receive a higher fee. The fundamental difference between these two types of tariff agreements is that according to the *no win – no*

[23] BverfG, 1 BvR 2576/04 vom 12.12.2006.

fee type, the attorney has a share from the result of the case achieved by the client, but in case of failure the attorney does not receive any remuneration. In case of *no win - less fee*, the attorney can obtain bonus and higher remuneration on the basis of successful proceedings, while regarding failure he is entitled to be remunerated to a limited extent.

The contingency fee agreements mean such an umbrella term within which a wide range of agreements can be made and these agreements are not judged in a similar way in close connection with the attorney's independence.[24]

In Germany any form of contingency charging schemes is prohibited,[25] the basic reasons of which are described by the principle of the attorney's independence; the detailed interpretation of the German Constitutional Court refers to remuneration based on results as a possible risk evoking conflict of interests, including the agreement on sharing the results. With such an agreement the attorney contributes to create a kind of financial interest of his own.

The *Attorneys' Code of Ethics of the European Union* directly prohibits contingency fee agreements based on *no win – no fee* form, which ultimately means that while providing legal counselling services beyond borders the application of *no win – no fee* form is prohibited.[26] In Hungary and generally in the Central and Eastern European countries the two principles, the two bodies of law are not separated sharply from each other and that is why it does not have any special legal importance. The laws about attorneys in the Central and Eastern European countries introduced 'a model for widely result-oriented tariff schemes for attorneys' after the political transition.[27] Intrinsically, the Hungarian law of attorneys does not contain any bonding procedures about the attorneys' remuneration charging. The Czech law is a bit less concessive, although, it is familiar with both legal institutions, by introducing a general clause and a threshold value; the law means a less liberal regulation than the current Hungarian regulation. As for this general clause, the agreements on the attorneys' fee have to be equitable and proportionate, namely, an agreement about a remuneration including more than 25% of the value of the subject of the case is considered null and void.

According to Sulyok Tamás, a regulation which allows attorneys to agree on receiving a financial share in case of a successful result without restrictions is contradictory to the provision of the requirements of fair process. It is also remarkable that the Hungarian legislation does not contain any regulation in case of the attorney's indirect personal concern and in case of any other concerns, namely, the Hungarian legislator has failed to elaborate besides the mere mentioning of the principle of the attorney's independence and the legal regulation of some incompatibilities the details of the attorneys' functional independence.

In contrast with the attorney's theoretical independence, in practice the attorney can proceed in his own case and can make contingency fee agreements without restrictions due to which he will become financially interested in the result of the case. This fact means a direct threat to the attorney's independence and on its basis to the right to realize fair process.

[24] The German terminology for attorney's organization suggests using remuneration for attorneys based on success instead of contingency charging.

[25] BverfG 1 BvR 2576/04 vom 12.12.2006

[26] Last amendment of the Attorneys' Code of Ethics of the European Union adopted in 6 December 2002.

[27] Cf. Ros, Mirko: *Der Erfolg und das Honorar des Anwalts*. Dike Verlag, 2007. 40-48.

7. Alternations of the Function of Fundamental Legal Protection of Attorneyship in the Hungarian Constitution, the Fundamental Law of Hungary

The main function of the profession of attorneys' is to enforce the protection of the fundamental rights provided by the constitution, and within this scope especially the enforcement of the right to defence. The right to fair process is an unrestricted fundamental law against the judicial power of the state.[28] According to Art. 2 (1) of the Constitution, the focal point of the rule of law is the distinction between the branches of sovereign authorities. An essential requirement deriving from the principles of the attorney's independence is the complete organizational and functional separation of attorneyship from the authorities of the state. The Constitutional Court has defined the relationship of judicial power and jurisdiction as follows: „judicial power separates from legislative and executive power in the Hungarian parliamentary democracy, the manifestation of state authority that decides about the debated or violated rights with bonding force via the help of an authoritative body. Judicial power is therefore connected to the judicial independence, manifests in jurisdiction"[29]

Justice is more than judicial power, besides the judge, other participants are also incorporated in its process, thus, participation in penitentiary justice is the constitutional obligation of the prosecutors, as well. In accordance with Art 51 (1) of the Constitution, prosecutors deal with the protection of civil rights and the prosecution of criminal offences. Owing to law enforcement and prosecution, prosecutors' office with authorized licences is an independent participant of justice system.

As regards the role of defence attorney, the conditions of procedural laws, especially concerning the peculiar status of the defence attorney and legal the representative, the Constitutional Court stated the followings: „the profession of an attorney is mainly an activity which is connected to justice and law enforcement, contributing to justice as a defence attorney or as a legal representative is a constitutional requirement and the prescription of obligatory law enforcement regulations. The law enforcement status and conditions of the attorney is regulated by law, similarly to the rights and obligations of law enforcement."[30]

The judicial power in a rule of law is realized in the scope of a procedure according to fair trial. According to the Constitutional Court, attorneyship is distinguished from all the other professions by the fact that it shall proceed legal representation and defence, therefore, it can be conceived as an institutional guarantee for justifying all the constitutional rights regulated in Art 12. of the Constitution, but it also has a direct connection with the right to defence as for Art. 57 (3) of the Constitution.

„Without professional legal counselling there is no hope for a success in opening and partaking a procedure, as a consequence the deprivation from the possibility to have legal representation by an attorney in front of a court may constitute an obstacle of the constitutional law provided by the Art 57 (1)."[31]

[28] Cf. Sulyok: *op. cit.*
[29] *53/1991 ABH* (53/1991 Resolution of the Hungarian Constitutional Court).
[30] *22/1994 ABH* (22/1994 Resolution of the Hungarian Constitutional Court)
[31] *8/2004 ABH* (8/2004 Resolution of the Hungarian Constitutional Court).

This guaranteed function of fundamental legal protection of attorneyship as a bond of right to fair process receives constitutional defence. On the one hand, while gaining and practising the status of an attorney, attorneyship as regards the functions of fundamental legal protection of direct constitutional laws on the basis of Art 57 (3) of the Constitution and the indirect constitutional laws enlisted in Art. 12 of the Constitution, is entitled to receive fundamental legal protection. This means that the function of fundamental legal protection of attorneyship is the right to fair process demanded by the rule of law receives the defence according to Art. 8 (1) of the Constitution as a bond of justifying unrestrictable fundamental right which can only be restricted by Art 8 (2) of the Constitution.

As regards the legal regulation of attorneyship which derives from the defence of the fundamental legal protection concerning the right to the function of fundamental legal protection of attorneyship, there is a constitutional expectation, which ensures ceaseless public trust for attorneyship. For this, it is inevitable to elaborate such a regulation about the organization and operation of attorneyship that provides an adequate basis for the principles of fair proceedings.

The attorney's independence as a bond of the right to fair process

For strengthening this principle such an attorney organization and attorney status must be created by the legislator, which is suitable for maintaining public trust in the organization of attorneyship and attorneys as procedural institution.

Structural independence of attorneyship

The requirements of the structural independence of attorneyship besides the rights to fair process are closely connected to a conceptual principle of rule of law, namely, the principle of legal certainty. The Constitutional Court in its *22/1994 Resolution* also draws attention to the connection between the defence of the institutional attorney's independence and the principle of legal certainty: „guarantee reasons and the constitutional legal certainty make it necessary and justify, that the defence attorney's representative duties fulfilled as a private person, to ensure institutional counterbalance, institutional legal protection, institutional authority against the organized public authority." The requirement of institutional independence deriving from the function of fundamental legal protection of attorneyship, measuring by the scale of legal certainty, is constitutionally ensured in regulation if the organization concerning the separation of attorneyship from the state as a whole and in parts is clear, according to its unequivocal effects, it is predictable and the regulation as a whole or as parts is adequate for the factual realization of the structural independence of attorneyship. Thus, the function of fundamental legal protection can be justified in reality.

The aforementioned Constitution is the part of our „constitutional history" now, as on 25 April 2011, the Fundamental Law came into effect, which has amended the previously mentioned references as follows: Art. 2 of the Constitution remained unaltered, the fundamental rights and their restrictions presented in Art. 8 of the Constitution are presented in Art. 17 of the Fundamental Law. The connection of the fundamental rights and their restrictions within Hungarian circumstances could seem the remains of the fundamental rights pragmatics of socialism, but they were specified concerning the defence of the former constitutional fundamental rights.[32] Former Art. 57 and former Art. 58 were amended and now they are presented in Art. 21-22 and 23. in the Fundamental Law. Former Art. 57 inserted a grammatical change into the Fundamental Law, i.e.: instead of right process, it altered the expression to fair process. The newly inserted Art. 22 got into the text taking Art. 41 of the Charter of Fundamental Rights of the European Union as an example, also highlighting the right to public administration, with rule of law guarantees. Similarly, former Art. 58 was adapted to harmonize with the regulations of the European Union.

Conclusion

The Act on Attorneys which was declared on 16 March 1998, still shows significant deficiencies as regards the remuneration of attorneys. There are several international examples for these, which could be adequately applied in the Hungarian legal system, however, similarly to other fields of life, the field of remuneration and financing is the most awkward area; thus, the regulation of this field is still there to be defined.

[32] Cf. Jakab András: *Az új alaptörvény keletkezése és gyakorlati következményei* [The Elaboration of the New Fundamental Law and its Practical Consequences]. Budapest, HVG-ORAC, 2011. 112-118.

CONSTITUTIONAL LEGAL SYSTEM'S CUSTOMIZATION IN THE SERBIA WITH THE *EU ACQUIS*

CONTEXT OF THE NATIONAL MINORITIES

NIKOLINA MATIJEVIĆ – LJILJANA DRAGUTINOVIĆ – VELJKO MILIĆ *

1.

Individual and collective human rights as well as rights of national minorities, belong to a very sensitive area of political and everyday life in Serbia. Since 2006, the above-mentioned rights have been incorporated into the Serbian Constitution and by several different laws, however, in Serbia, prior to 2006, the roots of the problems were not the missing laws rather the lack of proper execution of the existing ones.

2.

The adjustment of the Serbian constitutional system to the *EU acquis* is a really demanding work, especially, if we keep in mind that the Serbian legal system is in a crisis because of the poor reform of the judicial system a few years ago. Serbia's potential accession to the EU requires, among many other laws and documents, the acceptance of the convention on the protection of human rights and fundamental freedoms, and the incorporation of it in the fundamentals of the law, like the Constitution. It is often said that Serbia respects all of the international standards in the domain of human rights, and according to that, they are all supposed to be part of the Serbian Constitution of 2006.

Since 2006, constitutional provisions on the freedoms, rights and duties of people and citizens, where the rights of national minorities are integral part of the Constitution, right after the Basic provisions. Content analysis of this part of the Constitution lead us to the conclusion that almost all human rights which protect physical and mental integrity, political freedoms and rights of the individual, as well as a number of social and economic rights, are included in it. The Republic of Serbia is a multinational state and everyone is free to express his/her nationality but is not obliged to do so (Article 47 of the 2006 Constitution). Creating a special subsection devoted to national minority rights can be seen as an attempt of positive discrimination or affirmative action, if we take the percentage of national minorities in population in account. Affirmative action is a measure aimed at improving the situation of vulnerable groups in the society. Vulnerable groups in the society are often the poor, the sick, women, people being in criminal record, and of course, minorities and many others. Generally, vulnerable groups are disabled or have difficulties in

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achieving all or some of the rights. The main goal of affirmative action is to allow these groups to reach out to the majority. Examples of affirmative action include: chance for the less frequent number of ethnic minorities in terms of state functions, representation in the parliament, education and job, where quotas had been introduced for ethnic minorities and providing in order to provide greater and certain access to public services.

Discrimination is any unequal treatments, exclusions, restrictions or preferences to someone, which are based on prohibited grounds such as skin color, race, origin, language, religion, sexual orientation, economic status, ethnic or national origin, political affiliation, which often leads to the disabling of the enjoyment of human rights in general. This area is regulated by a significant number of legal acts, namely the European convention of 1950, the Convention on the Elimination of All Forms of Racial Discrimination of 1965 and several important documents issued in the Republic of Serbia. According to Article 14 of the European Convention on Human Rights, discrimination is forbidden. At this point, we shall point out that the international documents carry narrower and broader notions of discrimination.

Based on the following documents, the narrower term of discrimination includes freedom from discrimination in the enjoyment of human rights: Article 2 of the 1948 Universal Declaration on Human Rights, Article 2 of the 1966 International Covenant on Civil and Political Rights and Article 14 of the European Convention on Human Rights.

The broader sense of discrimination involves a general guarantee of equality in front of the law and that everyone deserves to have equal protection against discrimination. This is guaranteed by Article 7 of the 1948 Universal Declaration, and Article 26 of the 1966 International Covenant on Civil and Political Rights.

In the Anti-Discrimination Act of 2009, Article 2 says the followings: the terms „discrimination" and „discriminatory treatment" mean any unjustified discrimination or unequal treatment, or omission (exclusion, restriction or preference), in relation to individuals or groups as well as members of their family or persons close to them, open or covert, that is based on race, color, ancestry, citizenship, nationality or ethnic origin, language, religious or political beliefs, sex, gender identity, sexual orientation, property, birth, genetic characteristics, health, disability, marital and family status, criminal record, age, appearance, membership in political, trade union and other organizations, and other real or supposed personal characteristics. Article 24 is about discrimination against ethnic minorities: discrimination against ethnic minorities and their members on the basis of nationality, ethnic origin, religious beliefs and languages is prohibited. Way of practicing and protecting the rights of personal belongings of national minorities shall be regulated by a special law.

There are six conditions that need to be fulfilled for any community which has the intention to be declared as a national minority:

- Members of the community must be citizens of the Republic of Serbia.
- Their number has to be less than 50% of the total of the population.
- They must be representative enough.
- They must be long-term inhabitants of the Republic of Serbia.
- They must differ from the rest of the population – by nation, religion, language, etc.
- They must want to preserve their identity.

The first problem with defining which community can be identified and named as a national minority is that the law defines only upper numerical limit of members of certain community (their participation in total population must be less than 50%) and does not provide a minimum number of group members.

The second problem with defining is deciding about how much time is needed for a group to reside in the territory of Serbia so that they can be considered as long-term inhabitants. These two conditions allow a wide arbitrariness in deciding which group can be considered as a national minority and which cannot.

The third problem is the term national minority which is a legal term used in Serbia. However, in the Autonomous province of Vojvodina, they use the term national community. Vojvodinians believe that it is inappropriate to call someone minority because what follows is inferior position compared to majority. But if all citizens enjoy the same rights, there is no need to emphasize any numerical minority or majority.

National minorities also have, beside rights which are common to all citizens, individual and collective rights. Collective rights are not mentioned in any relevant international (chiefly European) documents. However, there are certain countries that guarantee collective rights for their minorities and Serbia is one of those. What are the collective rights according to the Serbian Constitution? According to the Serbian Constitution of 2006, collective rights are realized in community with others. This is the first mistake that writers of the Serbian Constitution made. Council of Europe, in its No. 157 explanatory report on Framework Convention of the Protection of National Minorities wrote that the term „others" shall be understood in the widest possible sense and shall include persons belonging to the same national minority, to another national minority, or to the majority. This would mean that the term 'in a community with others' is inappropriate. But it should not be surprising given that the universal definition of collective rights does not exist because of the difficulty of their specification. It is even stranger than the attempt of the writers of the Serbian Constitution to define collective rights.

As a part of the collective rights, national minorities have the right to decide on issues related to culture, education, information and the official use of language, in accordance with the Serbian law. In order to achieve self-government in these areas, representatives of national minorities have the opportunity to form their own national council. The law on the protection of rights and freedoms of national minorities defines conditions for creating national councils and their role in establishing self-government in areas of culture, education, information and the official use of language. Bodies of the state, territorial autonomy and local governments are obliged to consult with national councils when deciding in those areas. Most of the problems in its practice occur with financing these institutions as the state does not set aside enough financial assistance to fund them, therefore, these rights are not adequately realized. Cultural and historical heritage of national minorities should be represented in State Museum galleries after consultations with national councils.

When the collective rights of national minorities in education are concerned, members of national minorities have the right to attend pre-school, elementary school and secondary school in their own language. Education must be carried out with elements of the national culture and the history of the national minorities. Curriculum shall be developed in consultation with the national councils. National minorities can establish private educational institutions in the minority language or bilingually. However, the minority also has to learn the Serbian language. Therefore, there must be a possibility that members of the majority learn minority languages in areas where the minority language is in the official use.

Collective rights of national minorities in the area of information consist of the right to obtain, express, receive and exchange information in their own language. In the official programs of the state televisions there must be enough content in the languages of national minorities and national minorities have the right to establish media in their own language.

Collective rights of national minorities in the official use of language are: the right to register personal names in accordance with the language and spelling of the national minority, the right to equal language and script usage in areas where national minorities are present more than 15% of the population, the right to conduct judicial and administrative proceedings in the language of national minority, the right to use toponyms in the minority language where the officially used language is minority language. National minorities have the right to use their own symbols, however, these symbols cannot be identical to any symbols of other states.

Position of national minorities in any country seems to be and it is a very complex question which cannot be solved in an easy or fast way. Their positions in the EU countries are solved in different ways but some basic rights are present in each of them. In that sense, Serbian basics of law 'cover' that area very well. But it is not enough to have those rights guaranteed only in paper – people live their life in reality, in every day's life. Execution of the regulations being in force is crucial to achieve the wished and planned aims.

IMPACT OF THE ECONOMIC CRISIS ON THE SITUATION OF POLISH WOMEN

KATARZYNA BIELESZ *

1. Introduction

The current economic crisis, which was caused by the collapse of the financial system in the United States, then spread onto foreign markets, is being felt not only in the economic sphere but also in social and political life, making living conditions of people belonging to disadvantaged groups such as women, the poor and minorities, significantly degraded.

The persistently repeated thesis that the crisis is only related to the financial system makes people think that remedies which need to be found only have to stabilise the financial system. In the first reports, broader macroeconomic perspective was not included. Meanwhile, it became clear that not saying anything – as well as ignoring – about social causes of the crisis does not mean they do not exist.

As it is clear from the international organisations' reports, Polish economy has not undergone serious recession, just drag on economic and monetary issues. But what does it mean? Does these reports show any change in the living condition of an average person?

Currently, approximately 60% of Poles live from about 193 EUR per month. This amount represents an average limit of minimum subsistence. But, do the earnings of the middle class give a sense of security? Should the state not intervene in order to protect its citizens, so the 60% of Poles (!) from poverty? Or should it be left to the mercy of the public financial mechanisms and the idea of capitalist society, reducing state intervention to minimum support from financial organisations? So, on the other hand, in the name of capitalism cutting off all social programs and reducing (through media campaigns) all sense of human solidarity? By popular slogans, making people believe that in times of crisis only those may survive who deserve it. Only those who are doing well can rely on support from the state. Those who are below the line have to cope alone.

All these factors make costs of the crisis going far beyond the financial policy. Therefore, when discussing impact of the crisis, we cannot only focus on the description of the financial system, but we also have to consider the other social perspectives.

The social cost of recession in Poland, caused not only by the crisis but also by the current economic policy, which primarily results in the lack of resources, the inability to participate in social life by a significant part of the Polish population. And this not only implies poverty but also other aspects: deprivation of voice, respect, self-esteem and (in the end) vulnerability to violence.

Another social problem in Poland is high unemployment, currently amounting to 12.4%.[1] Compared to the same period in the previous year (in 2011 it was the equivalent to 11,9%) it showed an increase in the number of unemployed and in unemployment rate, as well. Statistics show that in Poland still more women are unemployed than men. It is clearly

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[1] Cf. http://www.stat.gov.pl/gus/5840_1446_PLK_HTML.htm. Time of download: 6 August 2012.

one of the factors, highlighting why crisis has a greater impact on the social position of women.

Types of crisis impacts on women

In its report, the U.S. Agency for International Development distinguishes several categories of impact of the crisis on women.[2] To describe women's current situation in Poland, I am going to accept and use these categories as it helps in the systematisation of the phenomenon, categorizing them as the main symptoms in general relating to the situation of women in the time of crisis.

Higher unemployment among women is related to the crisis in demand for manufacturing goods.

As it was above-mentioned, in Poland more women are unemployed than men. However, because of the employment, women have a chance to take action in different areas of public life. Because of its absence, it is often difficult or even impossible to fully participate in social life. Often an unemployed or economically not active woman is economically dependent on her partner. During the crisis all cases of violence (psychological and physical) was escalated.

In addition, the average time during which women are unemployed is longer than it is in the case of men. Employers still prefer to employ men because of their higher availability and the lack of other commitments such as family or home.

However, as the employees' organisations have repeatedly stressed, the unemployment costs are much higher than the protection of jobs: lower tax revenues, lower insurance premia, the increase of social problems, etc. It is worth mentioning that the liberal state could try to pretend that these problems do not exist...until people, being in a state of despair, will come out to the streets.

In times of crisis violence against women increases

The loss or reduction of employment, rising food, fuel and goods prices, elevates the level of stress in the families, which is negatively reflected on women. Violence used against them takes various forms: aggression, humiliation, threats, economical, sexual and psychological violence. Due to the lack of assistance from the state, women are often left alone, in a situation when they feel too ashamed to seek any help. They start to blame themselves for their partners' violence and for the new, difficult situation; therefore, they cut themselves off from the society.

Heavier workload in greater number of hours, for the same wage

Due to the crisis, far more people were fired than it had previously been expected from official economic reports. Because of fear of dismissal, many workers agree to new employment's conditions. They agreed to freeze or significantly lower their wages or to alter

[2] Cf., *The Economic Crisis: The Impact on Women,* http://www.usaid.gov/our_work/cross-cutting-programs/wid.WID_FACT_SHEET_Gender_Economic_Crisis_v2.pdf (6 August 2012).

working hours. Still, employees agreed for new terms bearing the recent enormous, over 20% unemployment in mind.

Budgetary savings from the freezing of wages and the elimination of all perks also affected the public sector, where most of the employees are women. Fearing for being dismissed, many women agree to the new terms, hoping (and receiving the promise) that they will safely "survive" the times of crisis.

For the work overload mostly female workers are hired in large supermarkets complained, although, they only detain minimum wage. This is a result of the situation in which the number of clients increases all the time, but number of workers remains the same. Supermarket employees are mostly poor, having little knowledge of the law and their opportunities to complaints and other similar ways of remedies. They decide to work hard, because their minimum wage allows them to support their families. Work and labour duties should give them very important sense of stability.

Increased vulnerability to trafficking

As a consequence of losing a job in the home country and the necessity of maintaining the family, many women decide to emigrate in order to find work. Often, while they are no aware of the poor working conditions, they can become victims of human traffickers, directing them to labour camps or forcing them into prostitution.

Jobs in times of crisis are primarily directed to men

In times of crisis, most of the jobs are related to the infrastructure and the construction industry, in which men are preferred due to biological dispositions and human skills.

Bigger problems with obtaining a credit

Problems are primarily connected to women's lower earnings from which credit rating is conditioned. Women have more significant problems with getting a mortgage or cash loan which is sometimes crucial to maintain living standard (for example for the women with child). What is more, banks often require a woman to take a loan together with a man or an additional security. In this way, again, crisis makes and requires women being dependent on men.

Apart from U.S. Agency for International Development report, there are few more consequences of the crisis in Poland. Economic and labour market crises might indirectly influence fertility ratio and the number of births. Many women, especially well-off ones, were postponing the decision of having a child for years. Now, as it was written in Confederation of Polish Employers[3], more women escape from reduction to maternity. Unfortunately, at the same time impoverished women might more often decide on having a child, because of growing costs of raising their family, as abortion is illegal in Poland.

[3] http://www.kpp.org.pl/ (7 August 2012).

2. Crisis as an Opportunity?

The current crisis shows that the neoliberal system, creating large economic disparities and social inequalities, does not work as it was previously expected. To eliminate inequalities which cause social discontent, state intervention is necessary. It should be remembered that the primary duty of the state is to respect and protect human rights and to ensure the welfare of its citizens.

The state must also take care of the weakest and poorest citizens, including women whose position in times of crisis is much stronger denied than men's. However, no state aid exists for women, who, due to the crisis, are in a difficult situation, regarding not only themselves but also their family and – worst of all – their children.

For a young generation, growing up in an atmosphere of hopelessness where it is normal that a woman is dependent on her husband, we instilled gender stereotypes in our children (recently so much reduced). In the name of neoliberal ideas, we also condemn them to life without perspectives, creating another generation of people benefiting from social assistance via state intervention.

The 1948 Universal Declaration of Human Rights and several binding international treaties clearly show that the state is obliged to create a system providing basic services and social security for its citizens. In these documents it is stressed that the most important is not only to give emergency assistance to those who are in need but also to create mechanisms that would protect citizens, and would also ensure the fulfilment of long-term economic growth. For many years non-governmental organisations, including feminist organisations emphasised the need to create an equal, accountable and democratic, national and international system, as well. Human rights and the care for sustainable (economic) development should stand in its centre. Human rights require governmental intervention in order to create the necessary conditions for the complete use of these rights by the whole society. It is worth mentioning as well as highlighting an important first generation human right (anti-discrimination), by the way, that in this sense the stimulus package cannot be discriminative, which is – it has to be stated – a reality and current danger. Discriminatory practices should be eliminated from the law: from common law to its everyday practice, as well.

Feminist organisations stress that in times of crisis the Polish government should pay special attention to guarantee health care, food and housing aid, access to free education and labour market, and most importantly, to provide the ability to protect individual human (fundamental) rights. Priority should be given to protect the injured, the weak and the excluded citizens.

A few days ago the media informed the people about the remarkable success of the authorities of Warsaw: „the next two successful evictions." Families, due to the city authorities' current policy, will not find place in the shelter (which is eliminated) and will get only few months of social assistance, because it is too limited. The result is clear: marginalised, lonely. Are they still the citizens of our country? A country, whose citizens pay one of the highest tax rates? A country that will pay high bonuses to officials rather than to help its citizens. Or should we still pretend, that in Poland the problem of extreme poverty does not exist?

Long lasting and worsening economic situation might also cause many social and political conflicts. Economic polarisation, the increase of unemployment, collapse of financial markets and public budget might be followed by the rise of radical, conservative, right-wing attitudes. movements and parties. The rise of conservatism might promote traditional, patriarchal lifestyle, destroying hard-earned, pro equality achievements. Critics of economic liberalism, which, by many is considered as the main source of the crisis, might easily be transferred into new gender rights problems. New, non-traditional position of women might be considered as the easiest way to eliminate the source of crisis. At the same time, as we can see it today, much more important economic issues might dominate and cause the marginalization of social and gender issues.

If we want to overcome the crisis, the economic policy has to be socially responsible. The whole society must be involved in the process of its creation. Also, the process should be more transparent and should take different voices and alternatives into consideration.

The current economic crisis should, therefore, have good effects on women. Society has to promote women's knowledge and skills. It has to promote them because as it comes from international studies, women having lower positions than men often have much greater abilities to perform the role.

Higher economic activity of women would also increase their security, allowing them to defend themselves against further crises. Women, due to the creation of the opportunity to participate in economic processes, through promotion in the labour market and among decision-makers in the financial sector, by parity on electoral lists, were given opportunity to take part in the formation, implementation and evaluation of macroeconomic policies, helping them to develop skills that might be helpful after the crisis. Policies shall address the needs of all layers and members of society and not just the most privileged ones. A system and philosophy for the sake of giving them hope that in the future it will be based on the respect of human rights, assuming the participation of many voices and will be responsible for long-term, sustainable development.