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LEGAL TOOLS SUPPORTING THE HOUSEHOLD DEBT FINANCING IN HUNGARY

JUDIT GLAVANITS*

The spread of foreign currency based loans in Hungary

In the years between 2000 and 2008 the banking sector grew impressively in Hungary, aided by the government's generous housing loan interest rate subsidy scheme and the accommodative stance of regulators towards the dynamic spread of increasingly risky foreign currency based loans (hereafter: FX loans). In 2009 the depreciation of the domestic currency caused banks' credit portfolios to deteriorate at an alarming pace, prompting regulators to put an end to foreign currency lending and reverse the trend of dynamic but risky profit growth. Since the crisis, both retail and corporate loan volumes have been on the decline, led by the sharp drop in foreign exchange based financing, while bank profits suffered as a result of several government measures aimed to improve the financial position of household borrowers.

A study published by experts of National Bank of Poland in 2007 analyzed the monetary policy's effect on foreign currency based loans in Central Europe. Estimates based on a panel of quarterly data for the period 1997–2007 show that indeed domestic and foreign currency loans are close substitutes in the analysed countries: the Czech Republic, Poland and Hungary. Although, as expected, a rise in domestic interest rates affects , domestic currency lending negatively, it concurrently encourages credit expansion in foreign currency. Hence, consumers, facing higher borrowing costs in domestic currency simply turn to foreign credit. Simulations show that newly created foreign currency loans substitute a non-negligible part of the value of lost domestic currency loans after a monetary policy tightening. Nevertheless, there are substantial differences between the countries, as the ratio of newly created foreign to lost domestic currency loans amounts to 5–6% in the Czech Republic, 15–19% in Poland and 31–39% in Hungary in 2007.[1]

The stock of housing loans up to the year of 2011 can be seen on Figure 1, verifying the upper mentioned study's promise of the rising of foreign currency loans even after 2007. The number of these contracts reached its highest point in 2010, meaning about 2.7 million.

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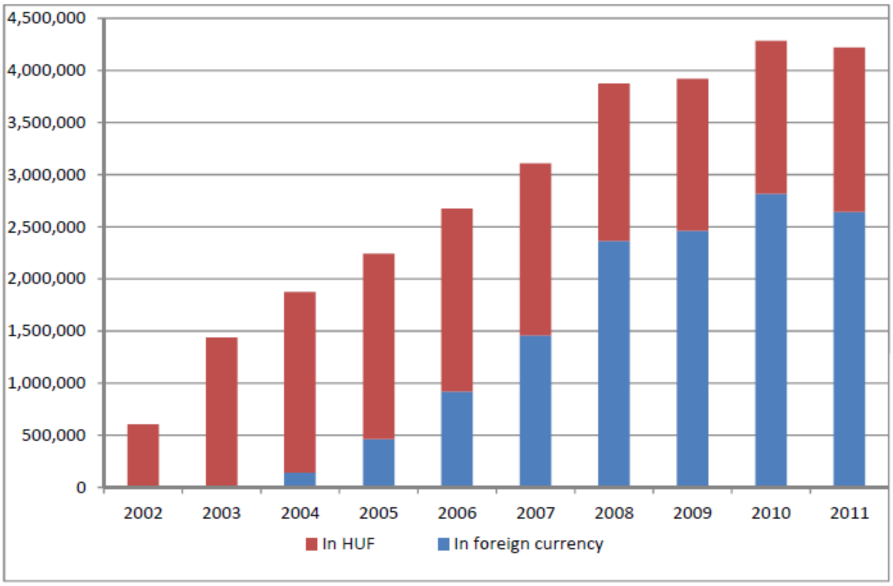
[1] Brzoza-Brzezina, Michal – Tomasz Chmielewski – Joanna Niedzwiedzinska (2007) Substitution between domestic and foreign currency loans in Central Europe. Do central banks matter? MPRA Paper No. 6879. Online available: http://mpra.ub.uni-muenchen.de/6879/

Figure 1. Stock of housing loans in Hungary. Source: Szikszai et al 2012.[2]



In an empirical study published in November 2009 by authors Pellényi and Bilek we can see that – Hungarian FX borrowers are not more financially literate, wealthy or risk-loving than their peers. Instead of borrower heterogeneity different forces may be at work: persistent interest rate differentials between local currency and FX loans, and the underestimation of currency risk due to backward-looking expectations.[3]

The attractiveness of FX loans may be attributed to two macroeconomic factors. First, interest rates on FX loans were considerably lower, even though disinflation lowered domestic interest rates. This gap was basically the consequence of a global liquidity glut on the one hand, and the significant Hungarian risk premium due to loose fiscal policy on the other hand. Second, the exchange rate was fairly stable against the euro (with some swings around the 250 value) and was gradually strengthening against the Swiss franc. This strengthening was due to the Swiss franc being a vehicle currency of carry trade and the forint being a main target for carry trade investors. In addition, economic theory predicts that long term real convergence results in real appreciation. Finally, Central and Eastern European currencies tended to overshoot in their depreciation following transition. The return to equilibrium levels coincided with the onset of financial deepening, creating a favorable environment for FX borrowing.[4]

[2] Szikszai, Szabolcs et al (2012): Financialization, Economy, Society and Sustainable Development – Studies in Financial Systems No. 8. Hungary. ISSN: 2052-8027. Online available: fessud.eu/wp-content/uploads/2012/08/Hungary-studies1.pdf

[3] Pellényi, Gábor – Bliek Péter (2013) Foreign Currency Borrowing: The Case of Hungary. In: Financial Systems, Efficiency and Stimulation of Sustainable Growth Working Paper FINESS.D.5.4. p. 14.

[4] Pellényi, Gábor – Bliek Péter (2013) Foreign Currency Borrowing: The Case of Hungary. In: Financial Systems, Efficiency and Stimulation of Sustainable Growth Working Paper FINESS.D.5.4. p. 6.

In the economic literature there is no common opinion on the real driving factor of the spread of FX loans. While Király et al.[5] points out that in the case of Hungary the combination of foreign-bank ownership and intense inter-bank competition was a key determinant of FX lending, results from a 20 country database analysis contradict the view that foreign-owned banks have been driving FX lending to unsuspecting retail clients throughout Eastern Europe as a result of easier access to cross-border wholesale funding. The cross-sectional results suggest that while foreign banks do lend more in FX to corporate clients, they do not do so to retail clients, and while foreign acquisition of a bank does lead to faster growth in FX lending to households, this is driven by faster growth in household lending per se, and not be a redirecting of household credit from domestic to foreign currency.[6]

In the Hungarian FX mortgage loan market the typical type of contract was the foreign exchange-based loan, which means that the obligation is recorded in FX, the installment is defined in FX but the loan is granted in HUF and the installment also has to be paid in HUF, depending on the exchange rate on the day it should be performed, and it was calculated on FX sell prize of the financial institution.

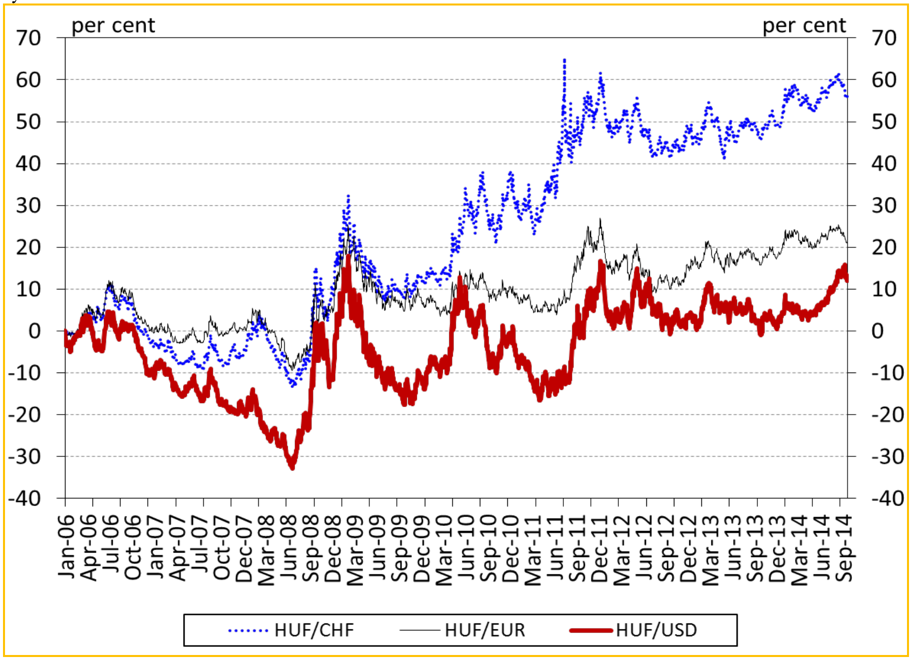
The effect of the crisis on exchange rates and installment

The financial crisis, however, fundamentally changed the situation in Hungary. As it can be seen in Figure 2., the exchange rates of both the EURO and Swiss Franc, which had been the most common basis of FX mortgage loans have sharply emerged, which meant a dramatic change in installments. As the concrete amount of monthly installments depends on the exchange rate, most households were facing the fact that installment aroused sharply, in many cases they even doubled in comparison with the time the contract was signed.

[5] Király, Júlia – Judit Antal – Márton Nagy – Viktor Szabó (2009): Retail credit expansion and external finance in Hungary: lessons from the recent past (1998–2007)', BIS Papers No. 4, Bank for International Settlements, Basel.

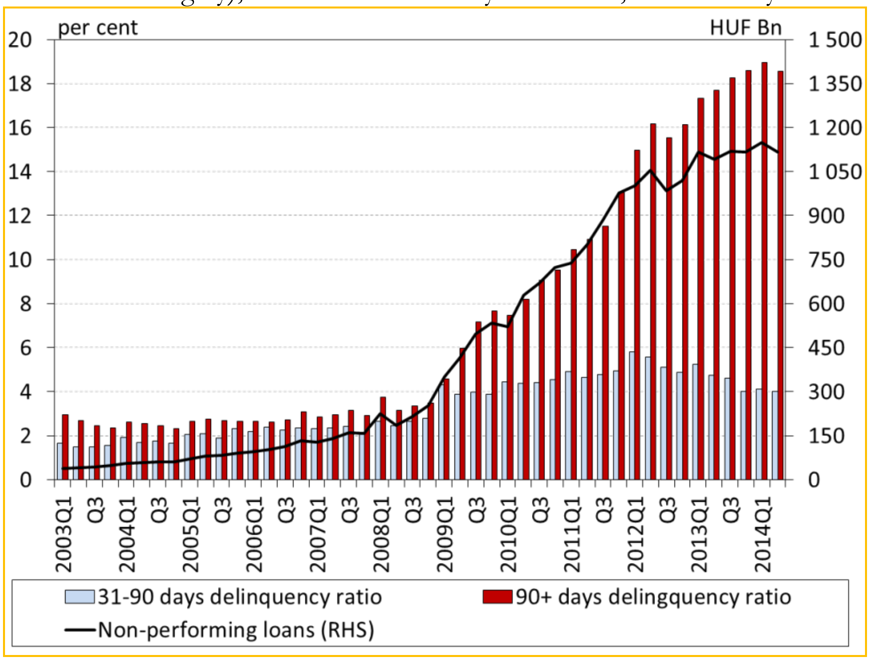
[6] Brown, Martin – Ralph De Haas (2012): Foreign Banks in Emerging Europe. Economic Policy, 2012/1. p. 85.

Figure 2. HUF/EUR, HUF/USD and HUF/CHF exchange rates compared to 2 January 2006. Source: Reuter



Not surprisingly, this caused an emergence of non-performing loans in the financial sector.

Figure 3. Share of non-performing household loans of the banking sector. Source: MNB (National Bank of Hungary), Note: Before 2010 by costumers, thereafter by contracts.



Governmental actions on restructuring foreign exchange based loans in the household sector

Final pay-off on preferential rates

The first tool to support household borrowers was the chance to pay-off the complete debt on fixed and – according to the spot rates – preferential exchange rates. By passing Act CXXI of 2011 on 26th September 2011, the Parliament enabled foreign exchange and foreign exchange based mortgage debtors to repay the full amount of their debt at a preferential, fixed exchange rate (180 HUF/CHF, 250 HUF/EUR and 2 HUF/JPY). Final repayment requests for those fulfilled the criteria could have been submitted between 30 September and 30 December 2011, and the full amount should have been repaid within 60 days after requesting submission, however, the availability of funding had to be proved by 31 January 2012. The closing of final repayment and final settlements took place until the end of February 2012.

As another step, amended on 28th June 2011, was Act LXXV of 2011 on fixing the exchange rate of FX loans and on the order of forced foreclosure of properties, financial institutions had to convert FX-mortgage loans past due for more than 90 days on 30 September 2011 into loans denominated in HUF at the average of the mid rates published by the MNB of the respective currencies provided that the value of the property did not exceed HUF 20 million at the moment of the conclusion of the contract. After the conversion creditors cancelled 25% of the debt. The conversion period closed on 31st August 2012.[7]

According to the official communication of Supervisory Authority of Financial Institutions (formal supervisory authority, now the MNB is responsible for supervision), 169.256 FX loan contracts have been paid off in the value of 1354,4 billion HUF, which meant a 23,3% decline in FX-based loans. The direct loss of the banking sector was 370,2 billion HUF, coming from the loss on the preferential exchange rates, but 30% of this loss could have been comprised in the tax.[8]

As from the financial institutions' point of view, besides the exchange rate losses, the upper program adversely impacted the quality of banks' loan portfolios, as it was mostly their wealthiest, most creditworthy clients who were able to repay the total debt. As a result, banks lost a great share of their lowest-risk clients, while retaining those who were barely able or unable to meet their monthly instalment obligations. From the point of view of the Hungarian National Bank (MNB), the program posed a significant threat to exchange rate stability. By nominally fixing the preferential conversion rates, the parliamentary ratification of the scheme, in a single legal act, changed the denomination of a significant portion of the banking system's assets from foreign currencies to the Hungarian forint, while leaving the denomination of the liabilities intact. As a result, the foreign currency position of credit institutions opened up well before the actual launch of the early repayment scheme, creating unintentional

[7] OECD: OECD Economic Surveys: Hungary. OECD 2012. p. 64.

[8] Pénzügyi Szervezetek Állami Felügyelete (2012): Gyorselemzés a végtörlesztésről. Online available: http://www.mnb.hu/letoltes/gyorselemzes-vegtorlesztes-120312j.pdf (08.09.2015)

exchange rate exposure for them. Banks thus needed to buy foreign currency – and sell forint – to eliminate their exposure.[9]

Home Protection Action Plan

The Home Protection Action Plan (HPAP) was announced by the Government on 30th May 2011, the Country Protection Action Plan was introduced in September 2011, allowing early repayment of FX loans at favorable exchange rates. Finally, in December 2011, the Government and the Banking Association agreed to introduce several changes to the earlier measures that ensured a fair burden sharing between banks and the state budget.

The Home Protection Action Plan introduced the elimination of the foreclosure and the eviction moratorium. The foreclosure moratorium was abolished for real estate properties valued above HUF 30 million (approximately EUR 100 000) and with an outstanding credit volume of more than HUF 20 million (approximately EUR 60 000) on 1st July 2011. In the case of loans and real estate properties of lower values, the moratorium was abolished on 1st October 2011. For these lower value real estate properties a foreclosure quota will be introduced amounting quarterly to 2% in 2011, 3% in 2012, 4% in 2013 and 5% in 2014, of the loans with instalments more than 90 days overdue. The abolition of the eviction moratorium took place as of 1st July 2011, nevertheless, it has had limited impact since then. First, because of low market activity in the property markets; second, for social reasons as another seasonal moratorium has been implemented according to which eviction in the winter months is prohibited.[10]

The main point of the Plan involves a temporary fixed exchange rate (around 20% below the HUF/CHF rate at the time of the announcement) applicable to the instalments of performing mortgage loan debtors. Only borrowers with no 90 days overdue instalments have the right to participate. The difference between the fixed exchange rate payment and the actual exchange rate is accumulated on the separate forint account bearing the three month BUBOR (Budapest Interbank Offered Rate) interest rate and banks are not allowed to charge any additional fees. After the expiration of the fixed exchange rate period at the end of 2014, borrowers had to repay the difference, meaning an increase in monthly instalments. The government provided a guarantee on 100% of the outstanding volume of the bridge loans during the fixation period until 31st December 2014, and 25% of the volume afterí the fixation period is over. For the guarantee banks pay a fee of 1.5% during the fixation period. The HPAP contains an extension of the exchange rate fixing program, available for duly performing FX mortgage debtors and those who are delinquent with a delay of less than 90 days.

Accordingly, exchange rates of instalments for participants in the program would be fixed until the end of end 2016 at HUF/CHF 180, HUF/EUR 250 and HUF/JPY 2.5 exchange rates; borrowers could apply for participation in the program until the end of end 2012. The difference between fixed and actual rates are shared by the borrower, the

[9] Balogh, Csaba – Áron Gereben – Ferenc Karvalits – György Pulai (2013): Foreign currency tenders in Hungary: a tailor-made instrument for a unique challenge. BIS Papers No.73. Bank for International Settlements, Basel. p. 159.

[10] OECD: OECD Economic Surveys: Hungary. OECD, 2012. p. 64.

state and the bank in a way that the principal part of the monthly instalment due burdens the borrower, whereas the interest rate portion of the instalment is paid by the state and the bank in a 50-50% proportion.

The Hungarian National Asset Management Inc. (HNAM) played and still plays a leading role in the HPAP system. The work of the Hungarian National Asset Management Inc., as a primary asset manager, allows a uniform framework for records on assets to be developed and also a professional, economic-efficiency-focused property management to be performed.

As the element of the HPAP, the National Asset Management company buys the houses of the borrowers, in which they can further stay as tenants, and the bank releases the loan of the borrower. There are strict rules for joining the program both for the property and for the borrower.

As for the property to be bought by the state:

- the value of the real estate may not reach 20 million HUF (about 60 000 EUR) by the time of the loan contract
- the amount of the loan had to be 25-80% of the market prize of the property
- the loan contract had to be made before 30th December 2009, and on 1st January 2013 the loan had to be non-performing for more than 180 days
- the property is registered as "house", "flat" or "farmstead"
- the cover of the FX loan is the solely the property to be bought

As for the borrower:

- he/she is indigent (social requirements, like nursing a family member, or being retired or having at least one children) and
- has only one immoveable estate, the object of the mortgage.

According to the data of the company published in August 2014, since its working period until August 2014, the HNAM has bought more than 22.000 real estates from indigent borrowers securing the living for more than 102.000 people effected by the financial crisis.

Restrictions on financial contracting

Act CXII of 1996 on the functioning of financial institutions, being in force at the time of the credit boom and still applicable at the beginning of the global financial crisis in 2008, specified in Article 210 (3)that interest rates, charges and other contract conditions may be unilaterally amended under the "conditions and circumstances established by the financial institutions" if the contract makes this explicitly possible in a separate clause. This provision was in effect until 8th August 2009. The situation only partially changed in 2009 with the adoption of the Code of Conduct that contains an exhaustive list of situations where credit institutions may unilaterally change repayment conditions. This is a soft law instrument (although, in case of noncompliance by the signatory banks the HFSA can impose sanctions) and only applies to agreements concluded after its entry into force. The Code of Conduct mentions three main groups of events and circumstances which justify unilateral amendment of the loan agreement by the creditor: a) changes in laws and regulations directly affecting contracts on financial services and those on the activity of the financial institutions; b) changes in the financial market, and c) changes in macro-economic environment and customers' risk rating.

The new rules introduced by Act LXXXVI of 2009 (in force as of January 1st, 2010) narrowed the far-reaching liberalism which existed before by limiting the possibility of unilateral amendment of loan agreements and financial leasing agreements to the interest rate, charges and costs. Amendment of other contract conditions, including the conditions on unilateral contract amendment is no longer allowed to the detriment of the debtor. However, creditors can only exercise their right to unilaterally amend the contract when the contract explicitly contains the objective circumstances of such amendment and subject that the creditor had previously established his pricing policy in written. However, the law does not detail what is meant by written form. Conditions of unilateral amendment of the interest rate were further detailed by Government Ordinance No. 275/2010. According to this, unfavourable changes in costs of the creditor connected to its financing sources may also justify unilateral amendment of the contract. Increase in the costs of the financing sources may mean an increase in the base interest rate of the National Bank of Hungary, in the inter-bank money market interest rates' loan rate, shift of the yield curve of the bonds issued by the Hungarian State or the creditor and the swap yield curve relative to each other and the provable increase of the costs of loan agreements concluded by the financial institution for re-financing the loan agreement.[11]

In early July 2014, the Hungarian Parliament adopted a new law on FX mortgage agreements (Act XXXVIII of 2014). The antecedent of this Act was Supreme Court decision 2/2014, Civil Law Decisions, which is examined later in this study. This law, among other things, enacted a statutory presumption that all provisions entitling banks to unilaterally modify costs in consumer mortgage agreements are unfair. This statutory presumption was extended to all general terms and conditions (GTC) used by banks between 2004 and 2014. Banks were given the option, if they wanted to protect the validity of their current or previous general terms and conditions, to file a legal action against the state. In this newly established court procedure banks bear the burden of proof that their GTC provisions are not unfair. Approximately 60 financial institutions filed such legal actions against the state. Ordinary courts are currently delivering the final judgements and banks are losing in these procedures.

A final step in leading out FX mortgages is the so called "forinting" of these agreements – an option to change the currency of debt according to Act LXXVII of 2014. The main object of the regulation is to turn back household borrowers to HUF currency based loans, and with applying the preferential rates guaranteed by the Act, stop the growth of FX denominated loans. The next Table summarizes the regulated fields of the Act LXXVII of 2014.

Table 1: Main points of Act LXXVII of 2014 – leading out household FX loans

Scope	Consumer loan agreements made after 1st May 2004 and still in effect on 1st February 2015, including loan or lease contracts. Not in scope: credit card contracts, loans connected to bank accounts and state-supported house-loans

[11] Domurath, Irina – Comparato, Guido – Micklitz, Hans-W. (eds) (2014) The Over-Indebtedness of European Consumers – A View from Six Countries. EUI working paper law 2014/10. p. 169-170.

Enforcement	After 1st February, banks should modify their contracts according to the Act, and after 1st January 2015, FX-based installments should be calculated and payed on the official exchange rate of the Hungarian National Bank on 7th November 2014
Preferential exchange rates	256,5 HUF/CHF, 309 HUF/EUR and 2,16 HUF/JPY (MNB official exchange rates on 7th November, 2014)
Modifying the financial contract	3.§ (1) "The consumer loan contracts are modifying according to this Act" (2) "The financial institute should prepare the modified consumer loan contract and the connected security contract"
Turning the contract into HUF-based loans	According to 15 §, financial institutes shall exchange the amount of FX-based debt to HUF-based debt on 1st February 2015 on the upper mentioned exchange rates and shall inform borrowers on the fact of changing as well as on the amount concretely saved by the regulation of the Act and regulation of the Act of Clearing XL of 2014.
Opportunity to opt-out	12§ of the Act names the opportunity for the consumer to initiate the avoidance of changing in the FX contract *only IF* the consumer proves that he/she has incomes in the foreign currency of the FX loan 15 times more than the official minimum wage of Hungary, and the loans duration ends before 31st December 2020, and declaring to understand that the preferential rules will not be applicable any more for the contract.

As according to 21 § of the Act, preferential exchange rates came into effect on 1st January 2015 and households felt its positive effects almost immediately. On 15th January 2015, Switzerland's central bank declared discontinuing its currency "ceiling" of CHF 1.2 per EUR, introduced in the middle of the eurozone crisis and has significantly lowered interest rates, reducing the deposit rate to -0.75 per cent. Figure 4 shows the average exchange rates of CHF/HUF between 2007 and 2014. As a comparison, Figure 5 shows the exchange rates in January 2015.

Figure 4. Source: MNB

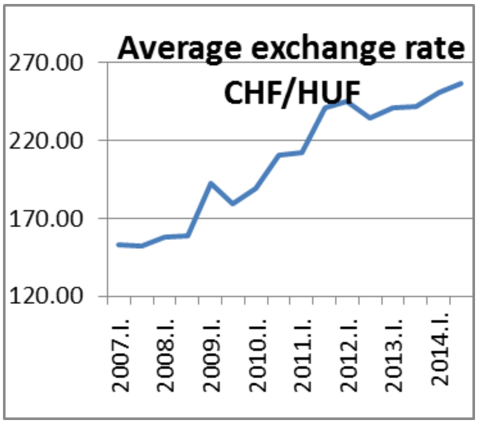
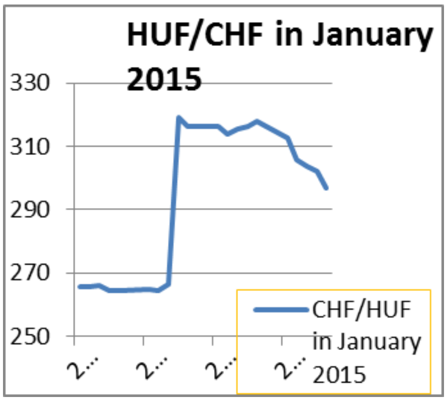


Figure 5. Exchange rates of HUF/CHF in January, 2015. Source: MNB



Experts at the MNB calculated that with the gate of exchange rates enforced by the Act LXXVII of 2014, Hungarian households saved 700 billion HUF of loan-growth just because of 15th January's event, which saving is equal to 2% of the Hungarian GDP.[12]

Significant change in jurisdiction on the subject of FX loans

A definitely new era has come in the Hungarian jurisdiction after judgement C-26/13 of the European Court of Justice. On 16th December 2013, the Hungarian Supreme Court made a decision of legal unity on FX loans declaring that FX loan agreements are not unfair on the basis that they locate the risk of exchange-rates' change merely on consumers/borrowers. These contracts are not barge into morality, are not usurer, are not tending to impossible service and are not pretended ones. The fact that the balance of services has changed (even dramatically, but not foreseeable) during the run, cannot be taken as a purpose of invalidity, as the cause of invalidity must occur in the time of contracting. Although, the decision of the Supreme Court declares that financial institutions should argumentatively prove that they informed borrowers about risks and the possibility of change in the exchange rates and its effects on installments.

After three years of court battles and under the pressure of more than ten thousand individual claims, the Hungarian Supreme Court issued a general statement in June (2/2014 Civil Law Cases) which admits that FX mortgage agreements are affected by a number of irregularities. Many of these irregularities would make FX mortgages void. The Supreme Court, however, is reluctant to apply this legal consequence, it claims that it would not be fair to consumers if courts would declare the FX mortgage agreements void because consumers would be obliged to repay the mortgage at once and this would exceed their financial capabilities. Judges of the Supreme Court openly called on the parliament to adopt a new law in order to restore the validity of FX mortgage agreements and stop consumers filing new claims against banks. Judges say that the high number of consumer claims is obstructing the work of the judiciary.

The Supreme Court also made decisions on the question of currency spread. In addition to the usual costs of a loan, foreign currency mortgage loans also involve costs of currency conversion. Costs relating to the currency conversion arise due to the difference between the bid and ask price for the foreign currency, known as exchange rate spread. The exchange rate spread is incurred in monthly repayment rates and is set according to the bank's own exchange rates ranging between 1% and 5% of the monthly instalments, or several thousand euros per loan agreement in actual terms. According to the EU Consumer Credit Directive as adopted into Hungarian law, loan contracts with consumers must state all costs of loan. Legal consequence if costs are not disclosed is, under Hungarian law, that such contracts are invalid. Between 2000 and 2010, most Hungarian banks failed to state the costs incurred by the exchange rate spread in foreign currency loan contracts.

Connecting to the legislative procedure against financial institutions, the Hungarian Constitutional Court made its position clear in 2014 declaring the following " (…) the

[12] MNB press release. See: http://www.mnb.hu/sajtoszoba/sajtokozlemenyek/2015-evi-sajtokozlemenyek/a-lakossagi-deviza-alapu-jelzaloghitelesek-torlesztoreszlete-mar-nem-emelkedhet (08.09.2015)

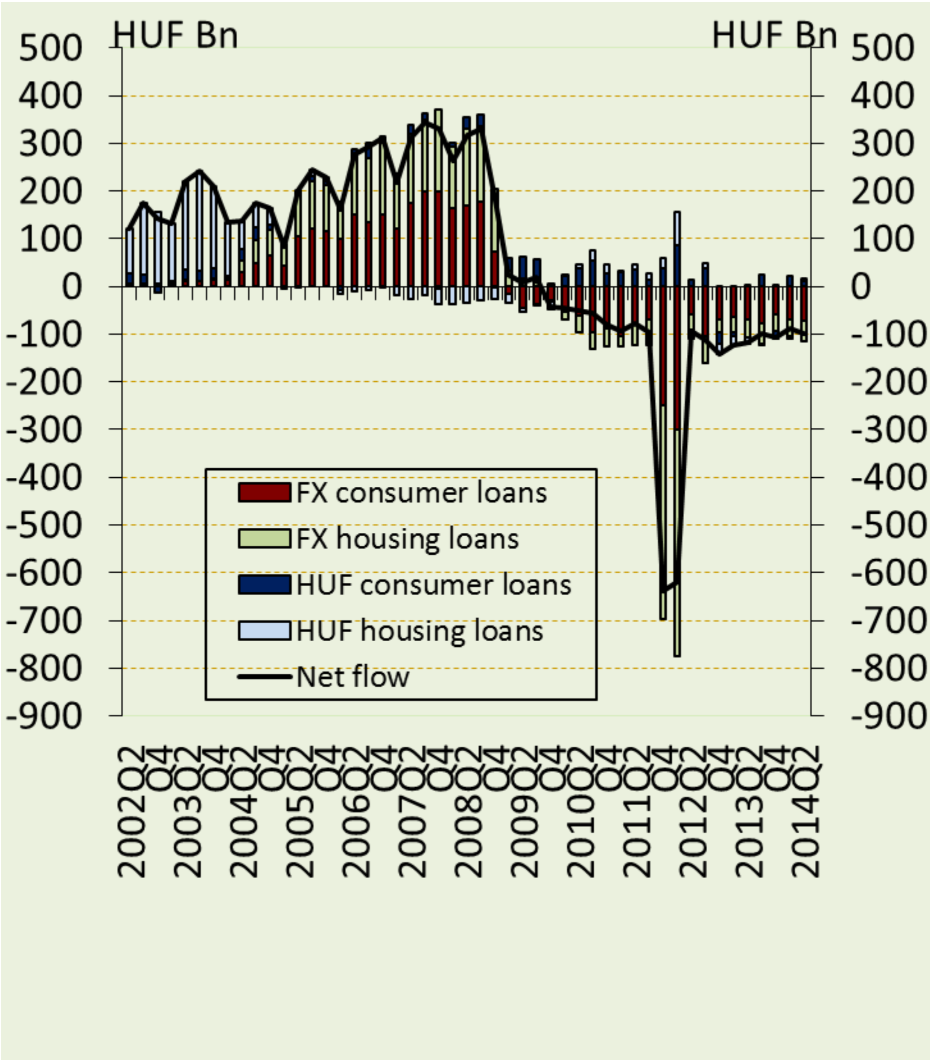
legislature – as well as the court – is entitled to amend existing long-term [private law] agreements if the agreement becomes inapplicable because of a fundamental change in circumstances has occurred after the conclusion of the agreement and adhering to the agreement would violate the substantial legal interest of any party, moreover, if the change in circumstances was not reasonably foreseeable and it goes beyond the ordinary risk of such change. An additional condition for intervention by an act of legislation is that the fundamental change in circumstances must affect the entire society, which means that a large number of agreements must be affected. Parliament has the sole discretion and at the same time obligation to assess when the entire society is affected and, therefore, when an intervention by an act of legislation is required".[13]

Concluding remarks

After the crisis on the Hungarian financial market started in late 2008, the formal regulation of consumer lending was not sustainable. As almost one-third of the nation was affected by FX-loans, basically in Swiss Franc, the main goal of the government was to save their voters – even with sacrificing the banking sector of Hungary, which already faced its darkest days in these years. Hungary had classical liberal democrat governance until 2010 but a turning point can be seen in April 2010: namely, right-sided but in actions socialist and nationalist government has been formed (and re-voted in 2014), facing with the challenge of multitudinous FX-based mortgage loans (with a growing ratio of non-performing ones). The government decided to end up the age of FX loans with relatively hard tools: as a summary we can say that almost all possible risks of FX loans has been turned from the borrowers to the lenders and the price between Hungarian Forint and FX loans has been (or is these days) forced to be paid by the banking sector. As a result of the efforts made by the government, the household debt growth stopped and most FX based loans were eliminated – as can be seen in Figure 6.

[13] 8/2014. Decision of the Hungarian Constitutional Court, point 90. Amended on 20th March, 2014.

Figure 6.: Net quarterly change of bank loan volumes of households by main products and currencies, adjusted for exchange rate changes. Source: MNB



Although it seems that the government's activity is a fairy tale so far, a very important question needs to be answered in the upcoming years: now, that Hungarian households are a bit "stressed away" from loans, how would it affect the inner demand? While the government successfully turned out FX loans and at the same time a strike a blew on the financial sector, with the cutback of personal income taxes hoped to increase the domestic consumption. However, as can be seen on Figure 7, it has not yet been so successful.

Figure 7: Use of household income as a ratio of disposable income. Source: MNB (Note: Disposable income is estimated by the MNB using household consumption, investment and financial savings data.)

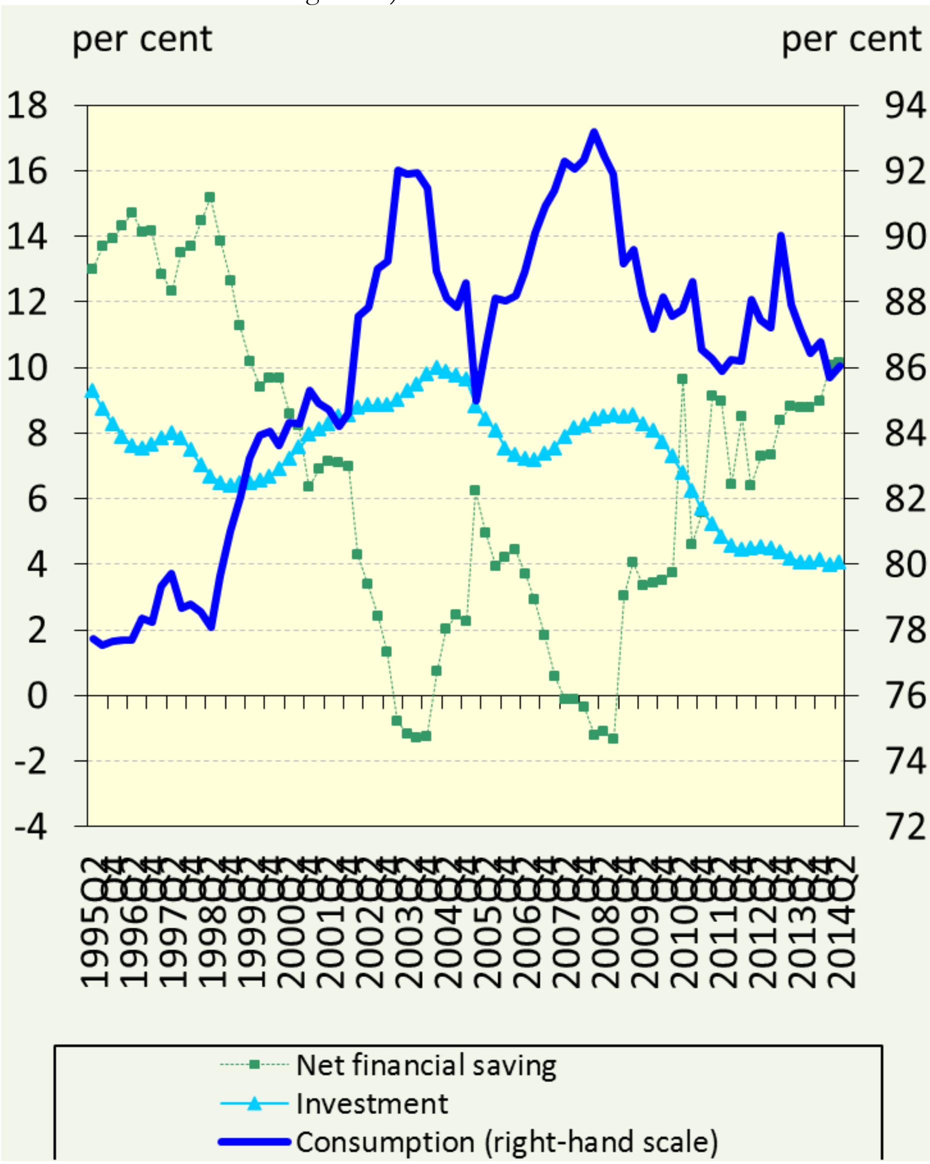


Figure 7 also shows a sharp increase in net financial savings. Sadly, the year of 2015 was also eventful in the financial intermediary sector: during the year 2 great broker and investor companies became under liquidation and the negative effects of these will be seen only in the Q4 of 2015. This also has effect on the Hungarian financial market as a whole: the government's communication is against financial companies since the crisis, and now it seen they were right.

The question of the future is how and when will households turn back to the financial sector both in the field of lending and on the field of savings.

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EXPLORING LINKS BETWEEN CIVIL SOCIETY AND TRANSITIONAL JUSTICE IN THE WESTERN BALKANS

WITH EMPHASIS ON BOSNIA AND HERZEGOVINA: A NEW PATH TOWARDS JUSTICE AND PEACE?

MAJA MIRKOVIĆ*

For the past few decades, civil society played a role of mighty tool for facilitating the process of transitional justice and it has helped societies affected by these atrocities to think critically and discuss past events. The main aim of this paper is to discuss the role of civil society in Bosnia and Herzegovina in creating culture of peace and building dialogue for the future, with a brief overview of the RECOM initiative.

Contextual background

The enormous suffering and absurdity of human casualties in World War II fostered an understanding that every person needs to be guaranteed a certain set of human rights and fundamental freedoms, which transcended the boundaries of sovereign states. These new ideas and concepts generated a new, substantial change in the general concept of international law. A new paradigm of international law, also known as the idealistic tendency, provides nation state growing, creating a supranational legal order by elevating citizens' rights from national to international level. The innovative core of this idea is the consistent transformation of international law, a new redesign of rights of states and rights of world citizens as rights of individuals.[1]

This lead to the establishment of the new system of collective security, as envisaged by Article 1, paragraph 1, of the Charter of the United Nations:

> "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

In this new system of international relations, the security question implies the ability of the national state to provide the highest possible level of social rights, political freedoms and quality of life to its own population, which stands for effective protection from both external and internal threats to national security and the safety of the

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[1] Posavec, Zvonko: *Dilemmas of International Law – between nationalism and cosmopolitism*, Political Thought, vol. 41, br 4, 2004, p. 115.

individual.[2]Although the provision of Article 2, paragraph 1 of UN Charter emphasizes that one of the basic UN principles is the principle of sovereign equality of all of its members, however, the advantage over individual interest has the protection of the general interest of the international society.

Unfortunately, two conflicts in the last decade of the twentieth century evoke the horrific images of the Holocaust. In the former Yugoslavia mass atrocities and most severe violations of international humanitarian law took place, followed by the implementation of an ethnic cleansing policy, in which genocide, mass murder, torture, systematic rape and many other atrocities have been directed at non-Serb nationalities.[3] On the other corner of the world, only thirteen weeks after the plane carrying President Habyarimana was shot down, at least half a million people perished in the Rwandan genocide, perhaps as many as three quarters of the Tutsi population.[4] This caused the United Nations to exercise its powers under the Chapter VII of the UN Charter entitled "Action with respect to threats to the peace, breaches of the peace, and acts of aggression",[5] which gave birth to ICTY and ICTR, the two very first modern international mechanisms of transitional justice.

[2] Bašić, Nedžad – Stoett, Peter: *Globalization and security*, Faculty of Law of University of Bihać, 2006, Bihać, p. 184.

[3] *War Crimes in Bosnia and Herzegovina*, Helsinki Watch, August 1992, available at: http://www.hrw.org/reports/pdfs/y/yugoslav/yugo.928/yugo928full.pdf [26.3.2015.]
On 6 October 1992 the UN Security Council unanimously adopted Resolution 780 which called for the establishment of an impartial 'Commission of Experts' to examine and analyse information related to "the violations of humanitarian law, including grave breaches of the Geneva Conventions being committed in the territory of the former Yugoslavia." The Commission faced a number of difficulties including lack of funding and states' reluctance to co-operate, but it nevertheless produced a report outlining the situation in the region, in which it "concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing", mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. See more: Birdsall, Andrea: *The International Politics of Judicial Intervention – Creating a More Just Order*, Routledge, London 2009.;: Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993*).

[4] Desforges, Alison*: Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, 1999, p. 6. The International Commission of Inquiry concerning Rwanda was established on 7 September 1995 in order to investigate reports relating to the sale or supply of arms and related material to the former Rwandese Government Forces in the Great Lakes region in violation of Council resolutions, and to recommend measures to end the illegal flow of arms in the region. The report was written on the basis of the final report of the Commission of Experts for the former Yugoslavia, but this report was missing the thoroughness of the report submitted by experts of the Commission for Yugoslavia. Report of the Commission for Rwanda was based on reports from other bodies on the situation in Rwanda and reports published by the mass media. Obradović, Konstantin *et al.:International Humanitarian Law,* Belgrade Center for Human Rights, Belgrade 2002, p. 346.

[5] In this sense, particularly Article 39 of the UN Charter: „The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

Transitional justice: general remarks

Around 2000, 'transitional justice' became a label under which non-governmental organizations (NGOs) and university courses have been working, establishing centres and institutes.[6] The meeting of the main transitional justice NGO, the International Center for Transitional Justice (ICTJ), took place in 2000.[7] In 2004, Kofi Annan, Secretary General of the United Nations stated that transitional justice represents

> „the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.“[8]

It is often mistaken that transitional justice implies some special form of justice. In fact, it is a whole set of activities that can be implemented in transitional societies, which generally lead to the establishment of justice and the rule of law.

There are four main mechanisms of transitional justice: criminal prosecutions (international or national) for mass atrocities and violations of humanitarian law, truth and reconciliation commissions, reparation programs, and various forms of institutional reforms.[9]

As stated above, the first two international mechanisms of transitional justice were ICTY and ICTR.[10] At first glance, many internationalists viewed the increased use of international criminal law as the last, best hope for stemming the tidal wave of atrocities that all too frequently have marked both international and internal armed conflicts.[11]

However, a few decades later, the enthusiasm about international criminal courts splashed;[12] instead of representing ideal form of cost-effective and streamlined judicial

[6] Bell, Christine: *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, The International Journal of Transitional Justice, Vol. 3, 2009, 5–27, p. 9.

[7] The International Center for Transitional Justice is an international non-profit organization specializing in the field of transitional justice. ICTJ works to help societies in transition to address legacies of massive human rights' violations and build civic trust in state institutions as protectors of human rights. See more: https://www.ictj.org/about [26.3.2015.]

[8] Report of the Secretary-General of United Nations: *The rule of law and transitional justice in conflict and post-conflict societies*, 2004, p. 4, available at: http://www.unrol.org/files/2004%20report.pdf [26.3.2015.]

[9] International Center for Transitional Justice, 2009., available at: https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf [28.4.2015.]

[10] On 25th May 1993, the Council of Security of the United Nations adopted Resolution no. 827, by which the International Criminal Tribunal for Former Yugoslavia was established. The Statute of International Criminal Tribunal for Rwanda was adopted one year later, on 8th November, withResolution no. 955. Both Resolutions pointed out almost the same reasons for establishing the tribunals: bringing to justice those who were responsible for violation of international humanitarian law, contributing to the restoration and the maintenance of peace and ensuring that such violations are halted and effectively redressed.

[11] Wippman, David: *Atrocities, Deterrence and the Limits of International Justice*, Fordham International Law Journal, Vol. 23, No.2, 1999, 473-488, p. 473

[12] Numerous authors and human rights advocates argue that the accomplishment of criminal trials is not only an option but also a moral and legal obligation of the state and (where its support is necessary) of the international community in order to avoid the impunity of persons committing serious violations of human rights and humanitarian law. See more: Kirs, Eszter: *Possible models for*

bodies, the two *ad hoc* tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars, equivalent to more than 15 per cents of the Organization's total regular budget.[13]

The role of civil society organizations in transitional justice

The competences of NGOs and other civil society actors justify a role in addressing human rights issues that arise in transitional settings. Some even make vital contributions to transitional justice processes.[14] The strength of civil society in any given country (how many and how well organized the nongovernmental advocacy, community-based, research, and other such organizations) will partly determine the success of any transitional justice initiative. Because of their information, contacts and

the regulation of Simultaneous Functioning of Truth Commissions and Criminal Courts, In: The Rules and Institutions of International Humanitarian Law put to Test in Recent Armed Conflicts. Brill Academic Publishers, La Haye, pp. 821-862. p. 821. For much of its first decade of operation, the ICTY did little to promote domestic development or to enhance the capacity of national judicial institutions in the region. In fact, the ICTY may well have frozen out judicial reform in Bosnia & Herzegovina in the years immediately following the war in the Balkans. Since approximately 2002, however, the ICTY's impact on domestic institutions has been much more positive. During this later period, the ICTY has encouraged the development of domestic courts in BiH and catalyzed the activation of domestic judicial institutions. Specifically, the ICTY has helped spur the establishment of the new State Court of Bosnia & Herzegovina with war crimes jurisdiction. See more: Burke-White, William: The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugslavia and the Creation of the State Court of Bosnia and Herzegovina, Columbia Journal of Transnational Law, 2007, pp.279-350, p. 280. However, the characteristics of the domestic legal system should be taken into consideration and be paid more respect in the case of the international intervention, which might have gone too far inthis specific case. Although the Bosnian legal system was in need of improvement for the proper management of war crime trials in order to meet international standards, the already existing inquisitorial system of the criminal procedure could have been a stronger basis for progressive changes. See more: Kirs, Eszter: Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestuc Legal System of Bosnia and Herzegovina, Goettingen Journal of International Law, Vol.3, 2011, No. 1, pp. 397-416, p. 416.

13 Report of the Secretary-General of United Nations: *The rule of law and transitional justice in conflict and post-conflict societies*, 2004, p. 14, available at:
http://www.unrol.org/files/2004%20report.pdf [26.3.2015.]
The latest type of international crimes courts, inter alia dubbed 'hybrid courts', has been welcomed with great expectations. The hybrid model that is characterized by a mix of national and international components is said to 'hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other. Dickinson, Laura: The Relationship between Hybrid Courts and International Courts: The Case of Kosovo', 2003 New England Law Review, pp. 1059-1072, p. 1060. Hybrid courts are thus assumed to combine the best two worlds, the purely domestic and the purely international prosecution of international crimes, and to transcend the shortcomings of each world taken separately. Nouwen, Sarah M.H.: 'Hybrid courts' The hybrid category of a new type of international crimes courts, Utrecht Law Review, Vol. 2, No. 2, December 2006, pp. 190-214, p.191.

14 Backer, David: *Civil society and transitional justice: possibilities, patterns and prospects*, Journal of Human Rights, Vol. 2, No. 3, 2003, 297-313, p. 297.

expertise in human rights issues, the contribution of nongovernmental organizations (NGOs) can be critical.[15]

Human rights NGOs are renowned for collecting data and compiling reports on various abuses. This information is also a valuable input for transitional justice processes for several reasons.[16] First, it creates a historical record that is concrete and specific and thus hard to dismiss as unsubstantiated. Second, when formal steps are actually undertaken, such contemporaneous evidence is indispensable given that memories fade and vital corroborating witnesses may no longer be available. Third, the information can permits analyses of patterns of violence and the relationships among cases and events.

A nation's civil society is often well suited to decide on and prioritise the ends of transitional justice as well as to design, implement, monitor and improve its various means. In particular, without a vigorous domestic civil society, backed on occasion by certain types of international civil society, new democracies are unlikely to establish effective truth commissions.[17]

In the post-conflict environment, a civil society continues to serve a vital role in attaining some form of justice for past human rights violations. NGOs have been able to survive or revive after conflicts, they can pressure the transitional government to investigate past human rights abuses and they do so in a robust way. They have not done so already, victims' groups often emerge in the context of transitions. They clearly have a strong interest in investigation and punishment and, in some instances, wield considerable influence.[18]

Lastly, civil society groups lead reconciliation efforts. Local populations often create organisations to support victims of war, provide trauma counselling and promote healing, forgiveness and reconciliation at community level.[19]

The prospect of transitional justice for past human rights abuses is also significantly influenced by transnational activist networks. In this sense, the most important ones are organizations such as Amnesty International and Human Rights Watch, which have prominent global presence in the system of modern international relations. For most of the global human rights movement, the ultimate to transitional justice is to punish those responsible for gross human rights violations. Aside from pressuring governments to act, international human rights activists increasingly serve an important

[15] Hayner, Priscilla: Responding to a Painful Past: The Role of Civil Society and the International Community, in: Bleeker, Mô – Sisson, Jonathan (eds.): Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy, KOFF Series Working Paper, Swiss Peace, Bern 2005., p. 45.

[16] Backer, David: *op. cit.*, str. 302.

[17] Crocker, A. David: Truth Commissions, Transitional Justice and Civil Society, in: Rotberg, Robert I. – Thompson, Dennis (eds.): Truth v. Justice: The Moral Efficacy of Truth Commissions: South Africa and Beyond, Princeton University Press, Princeton, NJ, 2000, p. 16.

[18] Brahm, Eric: Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies, International Journal of Not-for-Profit Law, Vol. 9, No. 4, 2007. "Mothers" groups, for example, have been a powerful response to many cases of widespread, systematic violence.

[19] Anderlini, Sanam Naraghi *et al.: Transitional Justice and Reconciliation*, p. 8, available at: http://www.international-alert.org/sites/default/files/library/TKTransitionalJustice.pdf [26.3.2015.]

role in facilitating the pursuit of human rights trials in other venues when domestic prosecution is not likely. Amnesties, judicial obstacles, or military intransigence may leave a few outlets for victims in the fragile post-conflict environment.[20]

Civil society and transitional justice in Bosnia and Herzegovina and the Western Balkans

Almost a decade of war and violence devastated the economic and political systems of countries of the former Yugoslavia and had a huge impact on the social fabric, leaving many people traumatised, displaced or still missing. Mutually excluding "truths" about committed war atrocities are making up a part of the national identities, reinforcing the fragmentation of post-war societies.[21] Dealing with the past in the region is influenced by several factors: the pressure from the ICTY on the government to comply with the agreement on cooperation, the degree of political will of governments and parliaments to face the past, the decision of civil society actors on when and how to deal with the past, the media reporting on war crimes, and the prosecution of members of the state army and paramilitary units in domestic courts.[22]

The main intention of the following paragraphs is to show the efforts that civil society actors have made so far in terms of dealing with the past events, building the dialogue for the future.

The post-Dayton atmosphere

Since the signing of the Dayton Peace Agreement in 1995[23] until today, there have been several initiatives to address many human rights violations committed between 1992 and 1995, and to facilitate access to justice for victims – citizens of Bosnia and Herzegovina, especially in terms of criminal prosecution of perpetrators, and mitigation residual division among people.

The efforts to remove injustice and enabling individuals to serve justice in Bosnia and Herzegovina can be classified into four areas: a) international and domestic prosecution of war criminals; b) the search for truth, which included the truth about missing persons and their destinies; c) material and symbolic reparations and the restitution of property, and d) institutional reforms focusing on the verification of candidates for public functions and lustration.[24]

[20] Brahm, Eric: *op. cit.*

[21] Zupan, Natascha, in: Fischer, Martina: (ed.) 2006. *Peacebuilding and Civil Society in Bosnia-Herzegovina. Ten Years after Dayton*. Münster: Lit Verlag, 327-342, p. 327.

[22] Petrović-Ziemer, Ljubinka in: Fischer, Martina and Petrović Ziemer, Ljubinka (eds.): *Dealing with past in the Western Balkans – Initiatives for Peacebuilding and Transitional Justice in Bosnia-Herzegovina*, Serbia and Croatia, Berghof Foundation Operations GmbH, Berghof Report No. 18, 2013, p. 48.

[23] The General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement,Dayton Accords, Paris Protocol or Dayton-Paris Agreement, is the peace agreement reached at Wright-Patterson Air Force Base near Dayton, Ohio, United States, in November 1995, and formally signed in Paris on 14 December 1995.

[24] Downloaded from: http://www.mhrr.gov.ba/ljudska_prava/tran_pravda/default.aspx?id=1801&langTag=bs-BA [25.3.2015]

In this sense, it is very important to mention two bodies, established in order to serve peace and justice in Bosnia and Herzegovina: The Human Rights Chamber for Bosnia and Herzegovina and the Institution of Ombudsman of Bosnia and Herzegovina. The Human Rights Chamber was a judicial body established under Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement). The Chamber had the mandate to consider alleged or apparent violations as well as discrimination of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and furthermore within the texts of 15 other international agreements listed in the Appendix to Annex 6. Particular priority was given to allegations of especially severe or systematic violations, as well as those founded on alleged discrimination on prohibited grounds.[25] The Human Rights Chamber in its composition also had an Office of the Human Rights Ombudsman, which had a substantial international function during the first 5 years of the Chamber's mandate. In 2000, the High Representative for Bosnia and Herzegovina issued a decision on the Law on Ombudsman for Human Rights in the entities. Therefore, Ombudsmen were elected in both the Federation of Bosnia and Herzegovina and the Republic of Srpska. Thanks to the efforts of the OSCE Mission to Bosnia and Herzegovina, three institutions were transformed into one, national institution. The Mission was closely involved in drafting the Working Plan for the transitional period, the setting up of an operational framework for the new unified institution, the appointment process of new Ombudsman and in following up the process of the enactment of legislation in both entities.[26]

Regardless of the invested material resources, and commitment of individuals, institutions and civil society organizations, planned results were not achieved.[27]

Efforts of civil society organisations in post-Dayton atmosphere

Civil society organizations in Bosnia and Herzegovina are generally recognized as organizations that fight against denial of crime by presenting facts to which they came by realization during their program activities, primarily research. The public of Bosnia and Herzegovina agrees that, without civil society actors, the process of documenting violations of human rights and war crimes would not exist.

The work of civil society organizations in Bosnia and Herzegovina has particularly been visible in means of advocating for specific forms of justice for past atrocities;

[25] The Chamber's mandate ended on 31 December 2003. Pursuant to an Agreement between the Parties pursuant to Article XIV of Annex 6, entered into on 22 and 25 September 2003 and in January 2005, the Human Rights Commission was created with a mandate to decide on applications received by the Chamber through 31 December 2003. See more: http://www.hrc.ba/ [17.7.2015.]

[26] The Ombudsman reform was finalized in 2010, and entity Ombudsman institutions have ceased to operate. See more:
http://www.oscebih.org/Default.aspx?id=52&lang=EN [17.7.2015.]

[27] As most often mentioned reasons that contributed to these results are: a) The partiality of activities, and separation from other transitional justice mechanisms; b) Regional restriction of initiatives and activities in the field of transitional justice; c) The lack of direct involvement of government officials in the intervention and d) he lack of a unified strategy at the state level.

three separate initiatives by local CSOs and IOs to establish a national Truth and Reconciliation Commission (TRC) have failed for various reasons but mainly for the lack of political consensus on its structure and objectives. Truth-seeking efforts have thus far been much better served by localized commissions of inquiry, multi-stakeholders community dialogues and local expert panels dealing with particular episodes of war. Apart from a whole network of local NGO initiatives in this area, there are two organizations that have been consistently active in regard to truth seeking on national level. In 2005, a Missing Persons Institute (MPI) of Bosnia and Herzegovina has been launched at the state level to facilitate the process of tracing missing persons. Formerly a federal institution, the Research and Documentation Centre in Sarajevo has turned into a national civil society organization, which is one of the key resources for war crimes documentation, monitoring trials and collecting oral history in Bosnia and Herzegovina.[28]A draft law was prepared in late 2000; further revisions were made in 2001 and were submitted to the Ministry for Human Rights and Refugees. No progress has been made since then, as the government rejects the initiative. Another reason for the failure of the idea is the non-inclusion of victim groups in the process.

The process of civil society development in Bosnia and Herzegovina reflects the top-down approach of the international community and donor agendas rather than authentic bottom-up initiatives and priorities. A vast amount of the civil society assistance has been channelled to NGOs providing service delivery, effectively taking on functions of the state. Most beneficiaries of donor funding are professionalized NGOs in urban centres, some of which have even been created in response to available funding schemes. By contrast, civic associations and interest groups have largely been ignored both as interlocutors and beneficiaries of international donors. This has diminished the space for autonomous civil society actors, necessary to build an accountable and responsive state. Such organizations have been marginalized because they are seen as politicized and often have not been able to professionalize. Victims associations illustrate this point. On the one hand, they are usually perceived as too political and exclusivist. On the other hand, these are often rural associations that lack the skills to draft complicated proposals and cannot fit their demands within donor priorities.[29]

Civil society has been a key agent of public debate regarding issues of war crimes and justice in Bosnia and Herzegovina with individual intellectuals, journalists and civil society activists often taking the lead on these sensitive subjects. Documentaries, films and art projects have provided alternative avenues for stimulating public debate on dealing with the past.[30]

Civil society actors have put much effort in peace-building and reconciliation. There are dozens of CSOs that have been trying to overcome entrenched ethno-religious

[28] Access to justice – Facing the Past and Building Confidence for the Future, UNDP Project Document 2009-2011, p. 8.

[29] Rangelov, Iavor – Theros, Marika: Maintaining the Process in Bosnia and Herzegovina – Coherence and Complementarity of EU Institutions and Civil Society in the Field of Transitional Justice, International conference Building a Future on Peace and Justice, Nuremberg, 25-27 June 2007, p. 7.

[30] *Ibid.,* p. 9.

divisions: for example, Youth Initiative for Human Rights (YIHR) tries build bridges among young people through seminars and trainings; on the other hand, organizations such as the Association of the Alumni of the Center for Interdisciplinary and Post-graduate Studies for Sarajevo have contributed to academic research and debate.

International assistance to civil society has been much more forthcoming in areas such as legal aid and socio-economic aspects of refugee return and reintegration, i.e. activities related to service delivery. Donors have mostly avoided supporting civil society work on sensitive and politicized issues of transitional justice. Furthermore, it is in the nature of transitional justice to focus on advocacy and the broader political process rather than the measurable outcomes and deliverables preferred by the donor community.[31]

However, one of the main reasons why the process activities have done in the field of correcting mistakes committed in the past have not resulted in enormous changes is the fact that the majority of interventions to were carried out by civil society organizations and international organizations (such as establishing National Truth and Reconciliation Commission), without direct participation of government representatives.[32] Also, it is important to note that civil society organizations implement their activities in the field of transitional justice without any strategy.[33] In fact, most of them implement short-term projects and only focus on certain population's groups, in terms of status, gender and ethnicity.[34] Finally, it is important to point out that the general environment in which these projects take place is consisted of distrust between actors of the political processes in Bosnia and Herzegovina, insufficient cooperation among mere civil society organizations, general politicization of one part of the civil society and unsustainability of their programs due to limited funds.[35]

Strategy for transitional justice in Bosnia and Herzegovina for the period 2012-2016

Understanding that facing the past is one of the key preconditions for building stable future in Bosnia and Herzegovina, and realizing the need for approaching the past in a systematic and comprehensive way, the Council of Ministers of Bosnia and Herzegovina decided to launch the process of drafting a Transitional Justice Strategy.

The decision to launch the drafting process is based on one of the recommendations from the Report on Consultations, which the Council of Ministers of Bosnia and Herzegovina adopted at its 87th meeting held on 14 May, 2009. Prior to the decision, the Ministry for Human Rights and Refugees of Bosnia and Herzegovina and the Ministry of Justice of Bosnia and Herzegovina, in cooperation with the United Nations Development Programme (UNDP), held over the course of several months a series of consultations within which the representatives of the government institutions, organisations and individuals from the civil society and the representatives of the associations and families of victims exchanged in a direct interaction, for the first time

[31] *Ibid.,* p. 10.

[32] Access to justice – Facing the Past and Building Confidence for the Future, UNDP Project Document 2009-2011, p. 8.

[33] Transitional Justice Guide Bosnia and Herzegovina, UNDP, 2007, p. 137.

[34] Ibid.

[35] Ibid.

after the end of the war, their views on transitional justice issues. It was during those discussions that they defined the need for approaching issues of the past in a new, systemic and inclusive way, through the drafting of a national Transitional Justice Strategy.

Together with related strategies – such as the War Crimes Strategy, the Gender Action Plan, and the Dayton Agreement – the Strategy represents a comprehensive plan to combat impunity, provide redress for injustice, establishes facts about the past, regains trust of citizens towards institutions and deters future human rights violations.

Civil society efforts in the region of the Western Balkans: The RECOM Initiative

The Coalition for RECOM is a non-political gathering of civil society organizations. It consists of a network of more than 1900 non-governmental organizations, associations and individuals who represent and promote the initiative for RECOM towards the establishment of a Regional Commission Tasked with establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia in the period from 1991-2001 (RECOM).[36]

The Documenta Center (Zagreb), the Research and Documentation Centre (Sarajevo) and the Humanitarian Law Center (Belgrade) established cross-border cooperation on dealing with the past in 2004. In 2006, they initiated a campaign to establish a regional fact-finding mechanism for the countries of the former Yugoslavia. After a two-year consultation process (with regional forums held in Sarajevo, Zagreb, Belgrade and Prishtina), 108 local CSOs and 77 individuals from various countries signed an agreement in October 2008.[37]

The establishment of a regional commission by national governments in the Western Balkans would significantly contribute to fulfilling the goals set by the European Commission in the stabilization and association process for each of the EU aspirant states of the Western Balkans. RECOM would directly promote democratization goals – by giving marginalized groups a voice in the transition process.

The support it has received from the international community, including considerable funds, has by far been bigger than any other restorative-justice initiative ever received in the Western Balkans.[38] Proponents of the establishment of RECOM have stated that a commission's principal goals include: creating an accurate record of the past abuses; debunking prevailing myths and exaggerations in the interpretation of the past in the region; helping to resolve the fate of the missing persons; assisting efforts of the judiciaries to bring justice to victims; providing a public platform for victims to be heard and to be acknowledged by others; and promoting tolerance and building solidarity with the victims, irrespective of their ethnic affiliation.[39]

[36] See more: http://www.zarekom.org/The-Coalition-for-RECOM.en.html [26.3.2015.]

[37] Fischer, Martina, in: Fischer, Martina and Petrović Ziemer, Ljubinka (eds.): *op. cit.,* p.14.

[38] Kisić, Izabela: Transitional Justice in the Western Balkans – The Core Elements at the First Level – Truth, Reconciliation and Compensation, in: Kisić, Izabela et al.: Transitional Justice – Experiences from Africa and the Western Balkans, Landesverteidigungsakademie (LVAk) / Institut für Friedenssicherung und Konfliktmanagement (IFK), Vienna 2013, p. 58.

[39] *Submission to the Universal Periodic Review Of the UN Human Rights Council Seventh Session: February 2010,* International Center for Transitional Justice, 2009, p. 9,

Three years later in March 2011, a statute proposal was agreed by members of the coalition that proposes the establishment of a "Regional Commission for Establishing the Facts about War Crimes and other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia in the period of 1991-2001).[40] As the main principles of functioning of the Commission, Article 10 of the RECOM Statute proposal outlines: (a) Respect for human dignity; (b) Independence and impartiality; (c) Dedication to truth; (d) Equality and the respect for human rights and freedoms;(e) Accountability, accessibility, and openness; (f) Rigorous inquiry and procedural fairness; (g) Integrity, resoluteness, and the maintenance of the highest standards of professional ethics; (h) Special care in providing protection for victims of sexual violence as well as persons who were underage during the period within the mandate of the Commission; and (i) Protection of confidentiality.

The RECOM would publicize its report within the period of 2 years – including findings about war crimes and recommendations for reparations – and pledging "no more" to war crimes. The planned regional commission would open its archives to the general public. Some 500,000 persons (out of the planned 1 million) from all ex-Yugoslav republics put their signature under the initiative. Copies of the petition were handed over to the Presidents of Croatia and Montenegro, the Presidency of Bosnia and Herzegovina and Slovenian authorities.[41]

This regional commission gradually loses support in the region, criticized for its operations and concept even by civil society organizations – primarily those from Kosovo, Bosnia and Croatia. As for conceptual differences, according to the Helsinki Committee for Human Rights in Serbia, civil society representatives also hold that the proposed regional approach for RECOM is inadequate and does not give an insight into the context, causes and main culprits of the war in former Yugoslavia.[42] They advocate that is very important to cover a much broader context, political, cultural and social context on the eve of the war.[43]

Conclusion: How can civil society serve justice and peace in Bosnia and Herzegovina?

https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Bosnia-Review-2009-English.pdf [26.3.2015.]

[40] Article 13 of the proposed RECOM Statute outlines the following purposes, which aim to be achieved: a) To establish the facts about war crimes and other gross violations of human rights committed on the territory of the former SFRJ in the period from January 1, 1991 until December 31, 2001, the political and societal circumstances that led to the commission of these acts, and the consequences of the crimes and human rights violations; b) To acknowledge injustices inflicted upon victims in order to help create a culture of compassion and solidarity with victims; c) To contribute to the fulfilment of victims' rights; d) To help political elites and society in Parties to the Agreement to accept the facts about war crimes and other gross violations of human rights; e) To help clarify the fate of the missing persons; and, f) To help prevent the recurrence of war crimes and other gross violations of human rights.

[41] Kisić, Izabela in, Kisić, Izabela *et al.: op. cit.*, str. 58.

[42] Helsinki Committee for Human Rights in Serbia Report, cited according to: Kisić, Izabela in: Kisić, Izabela *et al.: op. cit.* str. 58.

[43] Kisić, Izabela in: Kisić, Izabela *et al.: op. cit.*, p. 58.

Ever since the war in Bosnia and Herzegovina ended, a number of national and international transnational initiatives have been launched. Although it is widely accepted that, without ICTY, it would not be able to prosecute those who are responsible for harsh violations of international humanitarian law on the territory of former Yugoslavia, and that criminal prosecution is the best mechanism for dealing with past mass atrocities, it soon became clear that the success of the process of transition depends in a great deal on involvement of non-judicial actors.

However, despite being one of the rare countries in the region which launched the process of drafting a Transitional Justice Strategy, which is owned in a great deal to efforts of victims' associations and civil society organizations, the politics and culture of memory in Bosnia and Herzegovina is still being politicized through a one-sided view of past events.

Although civil society organizations are recognized as the driving force and pioneers in the fight for protection of victims' rights, it is clear that they lack a vision of strategic implementation of their goals in the field of transitional justice. This is also a result of lack of in-depth knowledge of transitional justice that would help them to consolidate their position as defenders of transitional justice and creators of peace dialogue.

There are four elements necessary for building a better Bosnia and Herzegovina, where rule of law is an imperative and not a dead letter: responsible government representatives, responsible representatives of civil society, responsible representatives of international community and appropriate expertise. What does this mean for civil society organizations? First of all, civil society organizations must inform themselves about activities of other CSOs in this area, in order to build a network for easier work and functioning. This is linked to another failure of civil society organizations – they must show a greater readiness to cooperate with government institutions, which was not the case until now. This means that civil society actors, along with their partners, should systematically monitor the work of the state institutions and point out to problems and controversies in order to be resolved. And, finally, being better equipped with information on institutions' activities, they can better help their beneficiaries in terms of realization of their fundamental rights and, thus, helping create a more just order in Bosnia and Herzegovina.

UKRAINE – A FREEZING OR A FROZEN CONFLICT?

OR: "RUSSIANS ARE ALREADY IN THE CUPBOARD?" *

ZSOLT SPINDLER**

As events in Syria and Europe are painting an increasingly dark future of the region and the multilateral dimensions of the political ties between East and West, the conflict in Ukraine seems to lose its importance. There was a time when more publications appeared on this topic, but now the situation in Ukraine looks like a new frozen conflict– or at least a conflict in a process of freezing. One of the key elements of long term conflict resolution is the better understanding of opposite sides. Most of the articles available in English are focusing on the Ukrainian "network" of dimensions or exclusively western opinions and sources. If we want to find a longer term resolution, we may also need to understand the Russian dimension of the problem. According to the old saying: *"if you want to understand a man, walk a mile in his shoes"*. The writer of this study invites the reader for a walk in Russian "valenkis"[1] towards a better understanding of the on-going conflict in Eastern Europe.

Thesis, aims and method

Thesis: According to Leopold Pospisil (1971) "*law should be studied as an integral part of the cultural whole, not regarded as an autonomous institution.*"[2] If we take a closer look at the roots of the Ukrainian crisis we can declare that one of the main problems is the same geo-economic orientation of the European Union and the Russian Federation towards Ukraine.[3] If we analyse the problem a bit deeper, we can also see the shade of the geopolitical interests of the United States of America in the background. Washington cannot show direct impact on Ukraine, but if Kiev forms a more EU-friendly political direction it means that it moves closer to the United States as well ("my friend's friend is my friend").

The Ukrainian crisis has been one of the most dangerous situations in Europe's history since the end of the 80's because it could lead to a second cold war.[4] However, if we consider the fact that since 2008 the economic situation (global economic crisis) has been really

* „Fragment from the famous Hungarian movie „A tizedes meg a többiek" ('The Corporal and Co.', 1965) directed by KELETI Márton (MAFILM-3). (*Az oroszok már a spájzban vannak."*)

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[1] Traditional Russian winter footwear.

[2] Leopold POSPISIL: Anthropolgy of Law – A Comparative Theory (Harper & Row 1971) p. 10.

[3] Дмитрий ТРЕНИН: *Украина и новый раскол* (Московский Центр Карнеги, июль 2014) p.1.

[4] Dmitri TRENIN: The Crisis in Crimea Could Lead the World into a Second Cold War (March 2, 2014, Guardian). See also: FARKAS Ádám: Észrevételek és javaslatok a fegyveres védelem egyes szabályozási kérdéseihez az ukrán válság és a nemzetközi terrorizmus legújabb kihívásai tükrében http://blszk.sze.hu/images/Dokumentumok/diskurzus/2015/farkas.pdf

familiar to the situation at the beginning of the 20th century just before the First World War, we can make not only a bad, but an even worse case scenario.[5]

Aims: The aims of the research were to define the most likely results of the Ukrainian conflict and find an acceptable Hungarian perspective for the *ius post bellum* period.

Method: The applied research method was the analysis of the Russian-Ukrainian-EU connections in the mirror of the paradigms of cultural anthropology, anthropology of law and history of law.

Energy and economy as key factors

The European Union as an economic and political organization of sovereign countries and Hungary as a member state of the European Union and a sovereign country have long term energetic and economic goals with the Russian Federation. Hungary and Ukraine are neighbouring countries, so it is true: Russians are already in the cupboard. The question is the folloing: is it a problem for us or not? A conflict in a neighbouring country definitely has its negative effects. But we must consider that "these Russians" are not the "same Russians" as they were about 60 years ago. We have to keep distance from the well-known anti-Russian stereotypes based on the communist Soviet Union's heritage. Russia brings something useful that we are not able to buy on a rentable price from anywhere else. An impressive part of natural gas for Hungary and for the European Union is coming from the Russian Federation. At least 60% (more realistically 70%) of the total amount of Hungarian and 30% of European natural gas are coming from Russia and it seems that we need to cooperate with Russia on a long term.[6] The Russian Federation can sell useful natural gas for us but we have to be careful with the price we pay for this energy source.

The question to be asked has three parts:

- is the relatively cheap gas worth the deeper political interdependence, or
- should we pay a bit more and follow our own way, or
- should we diversify our sources as much as we can?

Quoting president Putin's favourite phrase when he talks about the Russian foreign and security policy: we must be pragmatic. Before the Ukrainian crises, the price of natural gas for Ukrainian "brothers" had been around 283 USD/1000 m^3, right after the escalation of the crisis "Gazprom" raised prices by more than 30%. In comparison: Lithuania, who first "betrayed" the Soviet Union, payed 370 USD/1000 m^3. That is why the arrivals of the "Independence" LNG terminal to the port of Klaipeda was an important step towards political and energy independence for Lithuania.[7] However, the

[5] TÓTH Benedek: *A jog és a gazdaság megváltozó viszonyrendszere* (In: Európai Jog, 2013/5. szám, pp. 1-16.)

[6] More about this topic: *Roadmap – EU-Russia Energy Cooperation until 2050* (March 2013) http://ec.europa.eu/energy/sites/ener/files/documents/2013_03_eu_russia_roadmap_2050_signed.pdf

[7] Keith JOHNSON: *Lithuania Chers 'Indpendence'* (27th October, 2014)

terminal, which was constructed by a Lithuanian – Norwegian – South-Korean cooperation and can cover the 20% of the Baltic States annual gas needs (more optimistic voices say 90% or more), cannot solve Lithuania's entire energy problem but it can help to take a deep breath. (Lithuania is not able to finance the terminal and other states from the Baltic are not eager to join to the project. Estonia and Finland decided to build an LNG-terminal for themselves. Latvia does not comment the Lithuanian LNG terminal.)

Not only the traditional Russian oil and gas supply places are doing well, new sources are also discovered. However, because of the low oil prices and the strong ties between the Russian GDP and the oil-incomes, the Russian economy is in a slow but unstoppable decline. At the Arctic zone the Russian Rosnyeft's and the American Exxon Mobil's common project successfully found a new oil and natural gas field under the sea (around 450 billion cubic meters gas and 100 million tons of oil). It makes the Moscow-Washington relations more painful for the Americans. Sanctions were introduced against Russia because of the Kreml's Ukrainian involvement, the sanctions also targeting Rosnyeft, so Exxon declared withdrawal from the project, which means that they were sharing the research costs and they were not able to see any incomes because of their own decision.[8]

Russia seems to be a large marketplace for European states where one can easily sell its quality products (especially if it is quality food or electronic high tech that Russians cannot produce on a rentable price). So Russia is, or more precisely was an excellent market for EU before the sanctions[9] and the embargo, which have double characteristics. These Janus-faced sanctions (as humanitarian interventions)[10] and embargo have at least as many disadvantages for the EU countries as for Russia.[11] As the Hungarian foreign affairs and trade minister declared in an interview to the Financial Times, the sanctions against Russia have problematic side effects; they did not change Moscow's behaviour, while Central European export is suffering the

http://foreignpolicy.com/2014/10/27/lithuania-cheers-independence/ (downloaded: 12th November, 2015) See also: Обзор (independent Lithuanian weekly journal), (30th October – 5th November 2014) p. 2.

[8] JAKUS Ibolya főszerk.: *Sarkvidéki fúrássiker* (In: HVG, 2014. október 4.) p.71.

[9] Statement by the President of the European Council Herman Van Rompuyon further EU restrictive measures against Russia http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/144839.pdf. See also: Note of 16 December 2014 (C(2014)9950 final) See also: Commission Guidance note on the implementation of certain provisions of Regulation (EU) No 833/2014 (25th of September 2015) http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm

[10] SULYOK Gábor: *A humanitárius intervenció elmélete és gyakorlata* (PhD dissertation, Miskolc, 2003) p. 30. http://193.6.1.94:9080/JaDoX_Portlets/documents/document_5742_section_992.pdf

[11] Hungary loses 50 million forints (around 170 000 EUR)/day because of the sanctions against Russia. Russia was the third biggest economic partner of Hungary (now it is about on the thirteenth place). Hungary lost 12% of its export to Russia and CIS in 2014. Just a short example: Hungarian farmers who are involved in apple business are knocked out by the sanctions against Russia, while Russia can buy agricultural products from Uzbekistan and Azerbaijan and several other places. 13% of the Lithuanian GDP is coming from logistics – basically export and import from and to Russia. After the Lithuanian president misfortunate speech about "Russia, the terrorist state", Russians strengthened the custom control on the Russian-Lithuanian border causing 4% GDP fall to the Lithuanians.

consequences. The same concerns appeared in the German, Czech, Slovak government, while Poland and Baltic States are supporting the hard line policy.[12] However, it is questionable how hard this hard line policy is. Even the ambassador of the European Union, Vigaudas Ushackas stated that although the sanctions against Russia are not pointless and endless, their role is to help to stabilize the situation in Ukraine and they see some positive effects but the sanctions themselves are not able to solve the conflict.[13] On the other hand: it seems quite unwise to develop economic embargos against Russia, if the main aim of the EU extension towards the Ukraine is gaining a "market place". EU loses more than it can ever get.

The sanctions and the embargo have their negative effects on the Russian economy: the production of the Russian Federation in the first 9 months of 2015 fell by 5,2%, compared with the same period of the previous year.[14] The import substitution mechanism of the Russian authorities is not effective and it is questionable whether it will ever work and whether Russia can lower its own import-dependence.[15]

Production index (comparison of first 9 months of 2014 and 2015)

Production Index of the Russian Federation (first 9 months of 2015 compared with the same interval of 2014)	
General	-5,2%
Food	+1,9%
Textile	-13,3%
Leather and shoes	-13,7%
Wood and wooden materials	-2,9%
Rubber and plastic	-3,4%
Automobile and mechanical instruments	-13,4%
Transportation instruments	-15,6%
Electric energy, gas and water	-0,6%
Real estate	-7%
Agriculture	+2,4%

It is necessary to ask a couple questions about the Ukraine – Russia – EU triangle, such as:

- What can the EU offer to Ukraine?
- What can Russia offer to Ukraine?
- What can Russia offer to the EU?

In order to answer these questions, first of all, we must consider the cultural, anthropological, legal and historical heritage of this region.

[12] Andrew BYRNE: *Hungary Questions EU Sanctions on Russia* (Financial Times, 16th October, 2014) http://www.ft.com/cms/s/0/3af681ee-550f-11e4-b616-00144feab7de.html#axzz3GNsvfD43

[13] Полина ХИМШИАШВИЛИ: *Санкциями конфликтам не решить* (In: Литовский Курьеръ, No. 44 (1027) 30 октября – 5 ноября 2014) p. 10.

[14] http://realnovremya.ru/analytics/16227 (Downloaded: 27th of October, 2015)

[15] http://www.janes.com/article/51989/russian-naval-production-has-idled-admits-rogozin

States of the ex-Soviet Union

It is a generally accepted view that CIS countries have different cultural and social heritage than European countries. Some parts of Russia geographically belong to Europe, but the culture, society, everyday life, andlocal habits of the Russian Federation rather form an Asian empire (like India, or China) than a European state. The number of population, the federal structure, the non-nation-state character also endorses this statement. The European cultural border on the East was almost the same as the border of the Roman Empire, the line of the Danube, the *limes.* Huntington (1993) takes this border a little bit eastern; according to him, it was somewhere in the western part of current Ukraine, indicating that the roots of the current conflict are deeper.[16] It is also generally accepted that Europe grew on the base of the Western Roman Empire and the religious inheritance of Rome and the Catholic Christianity, while Russia followed the way of the Eastern Roman or Byzantine Empire and Orthodox Christianity.[17]

Generally, the Soviet leadership was conscious about separatist ideas. As was the case with the British Empire and its treatment of colonial countries – one can plea that the Soviet Union formed the borderlines of its republics randomly, without any real ethnic, religious, cultural or geographical conception, just using a map, a liner, an eager administrator and the work was done, but when we conduct a research on the post-Soviet states we can see that most member states of the Soviet Union were designed for a federalist state organization. They have to make concerted efforts to be self-sufficient: they have to build their own infrastructure and deal with issues like the lack of different natural resources which were common in the Soviet Union.

The structure of some subjects of the Soviet Union did not support the independence. This state of affairs does not take the oil-rich Azerbaijan, Kazakhstan or the agricultural stronghold Georgia with its sea and hills into consideration. This situation rather refers to the fact that Armenia has its weaknesses – lack of carbo-hydrates, problematic relations with Azerbaijan and Turkey, etc. – which can be neutralized by Russian help. In Central Asia Kyrgyzstan and Tajikistan have water but they do not have natural gas. Uzbekistan and Turkmenistan have gas but they do not have water. Kazakhstan has a special character from this point of view because it was the first Central Asian country under Russian protectorate and it happened quite early, at the end of the 18th century, at least 80 years earlier than anywhere else in the region. It is probably one of the factors why there were not any anti-Russian campaigns even in the '90-s, when the whole Soviet Union was loud of independence movements.[18] The situation is familiar with the always loyal Belarus. Moldova is gradually splitting into two parts: Tiraspol follows the Russian way, while Chisinau – with the help of the Romanian EU passports – lives from its worker migrants. Ukraine has its special character also, not because of its direct economic possibilities but because of its geopolitical dislocation: it is between the EU and Russia, and some of the most important gas supply routes go through its territory.

[16] Samuel P. HUNTINGTON: *The Clash of Civilizations?* Foreign Affairs Summer 1993 pp. 22-46., p.30. https://www.foreignaffairs.com/articles/united-states/1993-06-01/clash-civilizations (downloaded: 16th November, 2015)

[17] More about this topic: GECSE Géza: *Bizánctól Bizáncig – Az orosz birodalmi gondolat* (Nemzeti Tankönyvkiadó, Budapest, 2007 ISBN: 9789631959062)

[18] Bradley MAYHEW (et all.): *Central Asia* (Lonely Planet Publications Pty Ltd., 2010) pp. 34-45.

After the collapse of the Soviet Union an onslaught of regional problems occurred around Russia: the Nagorno-Karabah conflict between Armenia and Azerbaijan, South-Ossetian and Abkhaz conflict in Georgia, Transnistrian conflict in Moldova, water, gas, border, ethic and HPP problems all around in Central Asia and the Colour Revolutions. It can be the topic of another study investigating which of these conflicts were internal armed conflicts and which were international armed conflicts.[19] The roots of these conflicts have cultural, religious, ethnic, legal and historical background but the Soviet Union as a centralized state was able if not to solve but at least to handle these problems before its collapse. It seemed that Kazakhstan, Belarus and Ukraine are the most stable allies of Russia.

Russia, Ukraine And The Crimean-Peninsula And Why Is It So Important? Or: "Brothers In Arms"

The Crimean-peninsula has strategic importance for the Russian Federation. The current Russian leadership vocalized its opinion several times regarding that the collapse of the Soviet Union was the greatest geopolitical catastrophe of the 20th century.[20] (Note: they vocalize it several times but it is not sure whether they really mean it. It is not sure whether Russia lost or gained more with the loss of almost failed-states like Tajikistan or Kyrgyzstan, the always problematic Fergana-valley and other "dead weights".) At the beginning of the Ukrainian conflict, Russia had quite a minor chance to reoccupy the Crimean-peninsula so it seemed that it had only one possibility to stop the Eastern expansion of NATO and EU: it must have helped to cut Ukraine into two parts, like it happened with Moldova. The Crimean-peninsula gained its "individual" state status, or at least real territorial autonomy, and then on its own decision, it became a subject of the Russian Federation as the Republic of Crimea, together with the federal city of Sevastopol.[21] Russia would not be afraid any more of the future of its naval base.[22] We can agree with Isaszegi: the main question has been the naval base and the free access of the Russian Navy to the Black-Sea and the Mediterranean.[23]

[19] SULYOK Gábor: *A humanitárius intervenció elmélete és gyakorlata* (PhD dissertation, Miskolc, 2003) p. 47.
http://193.6.1.94:9080/JaDoX_Portlets/documents/document_5742_section_992.pdf (downloaded: 27th of October, 2015)

[20] Ирина ВОЙЦЕВ: *Зачем Путину Крым?* http://www.utro.ru/articles/2014/03/03/1179445.shtml (3. марта 2014.)

[21] 18th of March, 2014.
http://en.kremlin.ru/events/president/news/20604

[22] ibid

[23] ISASZEGI János (ret.gen.): *Ukrajna és a régió válsága, érdekek csatája* (In.: Honvédségi Szemle 142. évfolyam 2014/4. szám) p. 55.

Turkish Game[24] – The History of the Crimea

The Crimean-peninsula with its rich cultural foment and semitropical climate has been fought over by the Greeks, Khazars, Tatars, Mongols, Huns, Genoese, Ottomans, Russians, French and British over centuries. In the ancient times the peninsula was inhabited by Greeks and Scythians but the main political problems occurred when Turkic and Slavic people fought for its control. In 1240, Mongols arrived as they shattered the Kyivian Rus and their descendants, the Crimean Tatars formed a khanate there. Later the khanate became a fairly autonomous vassal state of the Ottoman Empire. In 1783, Russians arrived and began a campaign of revenge for the Tatars' slave-trading raids into Russia. Because of this, four to five million Crimean Tatars fled to Turkey, while Russians, Ukrainians, Bulgarians and Germans were invited to resettle Crimea, however, as we mentioned, Catherina the Great annexed the Crimean-peninsula to the Russian Empire at the end of the 18th century.

Since 1783, the Russian Black Sea Fleet has been dislocating in the Crimea.[25] Russia wanted to take over the faltering Ottoman Empire, so Tsar Nicholas I sent troops to the Ottoman province of Moldavia in 1854. The British and the French assembled in Varna to protect Istanbul's interests. In the 19th century Ukraine was the most developed part of Russia and the independent Ukrainian Republic was established in 1917, but five years later it became the part of the Soviet Union. In 1928-1933, millions of locals starved to death in the territory of the same Ukraine, where a couple decades ago the most grain had grown in Europe.[26]

The Crimean area became a part of Ukraine as a "special gift" from Nikita Hrustsov in 1954 and after the collapse of the Soviet Union it remained as a part of Ukraine, but the Russian Black Sea Fleet – according to a contract between Russia and Ukraine – remained in Sevastopol. Here, we have to declare that the "gifting procedure" was not adequate with Soviet legal standards. The author of this study have not found any legally binding document declaring that the Presidium of the Supreme Soviet of the Russian Soviet Federative Socialist Republic had the right to solve territorial disputes among member states inside the Soviet Union.[27] I found a "secondary source" which even declared that from 27 members of the whole Presidium of the Supreme Soviet of the Russian Soviet Federative Socialist Republic only 13 attended and voted "by common consent" about taking the Crimea from Russia and giving it to Ukraine.[28] But nevertheless, on 19 February 1954, the Presidium made its decision: the Crimean-region

[24] The title is taken from the famous novel of Boris AKUNYIN: The Turkish Game (First Published: Zaharov,1998, ISBN 5-8159-0045-1)

[25]Хронология трех веков Российского Флота
http://flot.com/history/kron.htm (12nd November, 2015)

[26] ISASZEGI, op.cit. p.50.

[27] http://flot.com/news/dayinhistory/index.php?ELEMENT_ID=5275
„В апреле 1783 года по указу Екатерины II полуостров Крым был взят под юрисдикцию Российской империи…В феврале 1954 года Крымская область передана из состава РСФСР в состав УССР, что было произведено с нарушением действующих конституций РСФСР и СССР."

[28] Николай СТАРИКОВ–Дмитрий БЕЛЯЕВ: *Россия Крым История* (Питер, Санкт-Петербург, 2015) сс. 78-91.

went out of bounds of the Russian Soviet Federative Social Republic and became part of the Ukrainian Soviet Socialist Republic.[29]

The contract between Russia and Ukraine about the dislocation of the Russian Black Sea Fleet in the Crimea was renewed in 2010 and it made an opportunity for Moscow to rent the naval base until 2042.[30] The Black Sea Fleet was involved in several special operations like the Russian-Georgian conflict in 2008, international anti-pirate patrols at Somalia, etc.

The Russian population of the Crimean-peninsula is significantly bigger than the number of population of any other nations in the region. According to the census of 2001, the number of ethnic Russians in Crimea was 1 450 400, while Ukrainians counted 576 600 people. The number of Crimean Tatars was 245 200, in addition, some Belorussians (35 000) and Armenians (10 000) lived on the peninsula. It means that the 58,5% of the population were Russians, 24,4% Ukrainians, 12,1% Crimean Tatars, 1,5% Belorussians, 0,4% Armenians.[31] Russians were in majority, Ukrainians in minority and even some of the Ukrainians prefer to join Russia because of pragmatic economic thinking. Between 26 -7 March 2014, all 193 barracks located in the Crimean became under Russian control. More than 15 000 soldiers of the Ukrainian Army declared that they want to serve in the Russian Army instead of the Ukrainian.[32]

"Терем –Теремок"[33] or, the tale about the Huge Bear who wanted to live in the cosy but tiny cottage

According to the Russian point of view, the European Union is in a deadlock: Bruxelles cannot cooperate with Moscow as it happened earlier but it does not have the tools to change its policies. The sanctions aim to influence the Russian economy but inside Russia they seem as a clear reason *"to wage a battle against foreign influences"*.[34] The Ukrainian crisis has changed the political relations between the European Union and Russia. The *Partnership and Cooperation Agreement* signed in June 1994 was a promising start, even the *Agreement on a Common Strategy Towards Russia in 1999* was desirable with its general terms like *"stable, democratic and prosperous Russia (...) is essential to lasting peace on the continent."* As Utkin (2014) says: *"however banal, the strategy's goal still seems valid and appropriate for both the EU and Russia."*[35] In 2003, the EU-Russia Summit in St Petersburg

[29] Указ Президума Верховного Совета СССР »О передаче Крымской области из состава РСФСР в состав УССР» Москва, Кремль, 19 февраля 1954 г. In: Николай СТАРИКОВ– Дмитрий БЕЛЯЕВ: *Россия Крым История* (Питер, Санкт-Петербург, 2015) с. 235.

[30] Соглашение между Украиной и Российской Федерацией по вопросам пребывания Черноморского флота Российской Федерации на территории Украины http://likbez.org.ua/yanukovych-and-medvedev-agreement-on-black-sea-fleet-of-the-russian-federation-until-2042.html. See also: Федеральный закон Российской Федерации от 29 апреля 2010 г. N 67-ФЗ http://www.rg.ru/2010/05/04/flot-dok.html See also: ISASZEGI, op. cit., p.56.

[31] http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea/

[32] ISASZEGI, op.cit., p.55.

[33] The first words of a famous Russian tale.

[34] Sergey UTKIN: *A Partnership Gone Wild* (In.: New Eastern Europe, No 4 (XIII)/2014, The Jan Nowak-Jezioranski College of Eastern Europe in Wroclaw), p. 15.

[35] op.cit., p.16.

brought the idea of *"common spaces"*: a space of economy, security, research and education, etc. Unfortunately, the lack of practical steps slowed down the movement. The Kremlin wanted more than just meetings under the umbrella of *"strategic partnership"*. Moscow wanted a common space which would unite Russia and the EU, where decisions had taken by consensus, and rules planned and adapted together as equal partners instead of the mere adaptation of EU law and regulations. This is story is quite the same as the famous Russian folk tale, when the Tiny-tiny Mouse finds a small cottage (EU) and he moves in. After a while comes the Jumping Frog who also wants to live there, so they share the cottage. Then comes the Runner Rabbit who also wants to live there and because there is enough place, they all share the house. Then comes the Cat, the Fox and the Wolf and they live happily but once the Bear arrives also wanting to live together with the other animals, so he presses its huge body into the cottage which collapses. Here, I would like to cite Utkin (2014) again, who sees this problem very well: *"The mainstream analysis suggested that a country of 140 million people could hardly fit in the EU institutions in any foreseeable future. Thus, Russia could either submissively accommodate itself to norms it would probably never have right to set, or find ways to make its voice heard or listened to, even from outside the EU."*[36]

The project of Eurasian integration was chosen by Russia as an instrument to vocalize its interests. If the EU has a "take it or leave it" approach towards Russia and tries to "occupy" the post-Soviet step by step, the CIS states could build an advantage from "coming together and building a competitive block which could then negotiate with the EU much more successfully."[37] The idea is not new: from one point of view, Russia followed the same method when it constructed Collective Security Treaty Organization (CSTO) and tried to make it acceptable as an equal-right counterpart of NATO. From another point of view, the idea is also a "second hand one", since it is bounded to the Eurasianism, Aleksander Dugin's International Eurasian Movement and Neo-Eurasianism, too.[38] The problem is that according to Dugin, there is an irresolvable confrontation between the Atlanticist world and Eurasia,[39] this kind of being a paraphrase of Samuel Huntington and his theory about the clash of civilizations. For DUGIN, the Berlin-Moscow axis is crucial in creating a Euroasian Empire, where the two capitals are the symbols of two geopolitical centres of power.[40] "Moscow is the centre of the Russia-dominated space that would include Russia, countries of Northern Balkan Peninsula, Moldova, Ukraine (excluding Western Ukraine), Eastern Belarus, Central Asia and Mongolia. Berlin is the centre of a Germany-dominated space called "Mitteleuropa" that would include Germany, Italy and most of the territories of the former Austro-Hungarian Empire."[41]

[36] op.cit., p. 21.
[37] op.cit., p. 22.
[38] Anton SHEKHOVTSON: *Putin's Brain?* (In.: New Eastern Europe, No. 4 (XIII)/2014) p. 72.
See also: http://www.evrazia.info/article/1915
and: http://eurasia.com.ru/english.html
[39] op.cit., 73.o.
[40] More about this topic: Alexander DUGIN: The Fourth Political Theory (2012, Arktos)
ISBN 978-1-907166-65-5
[41] Shekhovtson, ibid

The realistic future of Ukraine or, the Moldovan and Georgian example

The realistic future of Ukraine is similar to Moldova and Georgia: the territory we previously knew as Ukraine would exist in two or three different parts. There will be a Western-oriented Western-Ukraine, from where people will immigrate to different EU countries, or they just became worker-migrants. The Crimean-peninsula will stay as it is: a Russian stronghold and a place for the Black Sea Fleet. And probably there will be an Eastern-Ukraine with a strong Russian influence and secondary importance (a negotiable part in the Russian-Western dialogue).[42]Three countries of the common neighbourhood of Russia (Georgia, Moldova and recently Ukraine) have already declared their willingness to integrate the EU and it can easily happen that Russia ends up alone, facing the realm where the EU determines the rules,[43] however, the results today are the followings: Moldova split into two: the pro-Western part with the capital of Chisinau and the pro-Russian Transnistria with Tiraspol as a central town. People from the pro-Western part are using their Romanian (EU) passports (a result of Romanian-Moldovan double citizenship) to challenge their luck in Germany, Austria, Hungary, Ireland, etc. People from the Transnistrian part are counting on the Russian business. Georgia fell apart: although Abkhazia and South-Ossetia are recognized only by a couple pro-Russian countries (Venezuela, Nicaragua, Nauru, etc.), they are *de facto* out of the control of Tbilisi. Ukraine fell apart and the Crimean-peninsula is part of the Russian Federation.

Questions as conclusions

Is Ukraine an almost frozen conflict? It will be frozen because of the lack of understanding. It will be frozen because Russia will never give up its naval base in the Crimean-peninsula and Ukraine will always fight for its so called territorial integrity.[44] And it will be frozen because of the lack of Russian gas. And I hope that only the conflict will be frozen and not people in Ukraine, or Hungary or even Europe because of the lack of Russian gas. Although European countries try to diversify their resource supply routes, these efforts are hardly cost-effective and only can produce results years from now. The quickest (and least cost effective) possible solution would be building LNG terminals, like the 58 already existing ones in Europe. But the decrease in interdependency

[42] TÁLAS Péter: *Az ukrán válság értelmezési kereteiről és az ukrán választásokról* (In: Nemzet és Biztonság, 2014/5. szám) pp. 111-123.
„Egy ilyen helyzetben ugyanis Moszkvának a kelet-ukrán területek – az úgynevezett Dnyeszter-menti Köztársasághoz hasonlatos – befagyasztott konfliktussá alakítása lehet a leghatékonyabb kártyája. Kérdés ugyanakkor, hogy mi lesz a Donyeck-medence újjáépítésével, aligha valószínű ugyanis, hogy Kijev hajlandó lesz egy olyan területet konszolidálni, amelyet továbbra is az oroszok által támogatott szeparatisták birtokolnak, miként kérdéses az is, hogy Moszkva – a fegyveres és politikai támogatáson túl – hajlandó lesz-e forrásokat áldozni a terület újjáépítésére."

[43] UTKIN, op.cit., p. 22.

[44] Anton BEBLER: *Crimea and the Russian-Ukrainian Conflict* (In: Romanian Journal of European Affairs, Vol. 15. No. 1. March 2015) pp. 35-54.
„The political and legal stand-off between Ukraine and the Russian Federation will undoubtedly continue creating an additional "frozen" conflict in Europe." p. 53.

between the EU and Russia strengthens the Russian Eurosceptic hardliners. We can agree with Utkin (2014): "The only realistic goals in the view for the coming years are limiting the damage and getting ready for the next political era in the long term. Exchanging punches, on the contrary, makes the damage grow. European institutions have to listen to the companies and business associations that work with Russia. They create and multiply the basic ties between the EU and Russia."[45] My opinion does not represent any official point of view, it is based on my knowledge of the events; my judgement can also be mistaken but I have the right of free speech and this right is also an obligation: I take my side.

- First of all, the most important factor is that we have to *keep on the dialogue*. A frozen conflict in our neighbourhood can lead to a new cold war.
- Russia is not our direct neighbour. But Russia was or neighbour, Russia is our neighbour, Russia will be our neighbour. And a country is not the same as an apartment: we cannot grab all of our stuffs and just move to another place. *We have to live together in peace.*
- *Political connections are on low point.* As an effect, economic relations are also falling down. So we must strengthen other ties on other spheres: we must build a strong cultural bridge. Russian ballet, theatre, literature...these are valuable thing in any circumstances. Just because of the political divergence, we do not have to divest ourselves of these. Sports and scientific relations are also important, like tourism: Russians love our spas and who once saw the miracle of the white nights in Saint Petersburg, or the collection of Hermitage, Tsarskoye Selo will never forget it.

When I think about the Russian-Ukrainian conflict I have to admit: I prefer the song "Follow the Moscow, down to Gorky Park, listen to the wind of changes"[46] than the other one, about "brothers in arms"[47]. But anyway, being pragmatic: I do not want more war. Hot or cold, it doesn't matter.

[45] UTKIN,op.cit., p. 24.
[46] Scorpions: Wind of Change (https://www.youtube.com/watch?v=n4RjJKxsamQ)
[47] Dire Straits: Brothers in Arms (https://www.youtube.com/watch?v=jhdFe3evXpk)

TRANSFIGURING INDONESIAN PATENT LAW ENFORCEMENT BY CONSIDERING DEVELOPMENT OF PATENT PROTECTION SYSTEM IN THE EUROPEAN UNION AND IN THE UNITED STATES

DODIK SETIAWAN NUR HERIYANTO*

Contextually, patent granted by the government for inventors is an exclusive right, it can especially be considered as a freedom of inventors in order to be able to restrict others from producing, trading, and/or using their invention.[1] The rapid growth of technology and information increased the need for patent protection. The ideal patent protection will increase the competitiveness of the country,[2] besides, it is given with the intention of rewarding new inventions, incenting innovation[3] and being a stimulus for future inventions.

In general, Indonesian Patent Law's content is based on the 'first-to-file' system just like most states in the world, except the United States (before 2013) and the Philippines (prior to 1997).[4] From historical point of view, this law substitutes the old patent law (Patent Law No. 6 of 1989 amended by Law No 13 of 1997 mainly because of the espousal to Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – Law No. 7 of 1994 proved the true willingness of Indonesia to adopt the basic provisions of Uruguay Round Agreement: TRIPS.[5]

In response to the ratification, Indonesian Patent Law affirmed five strategic national efforts, such as: revising previous patent law systems by harmonizing standards regulated under TRIPS, reforming patent management system, improving bilateral and multilateral cooperation, spreading public awareness on economic and social benefit of patents, and providing law enforcement to protect the exclusiveness of patent right.[6]

After more than a decade of implementation, current Indonesian Patent Law still has some inefficiencies: low level of pro-activeness toward domestic modest innovations, uncertainty to grant protection for original inventors, and less spirit to

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[1] Patent is one of the intellectual property rights. It is a kind of propertization of "creativity" or "talent". Hughes, Justin: The Philosophy of Intellectual Property. 77 *George Town Law Journal* 287 (1988-1989)*,* p.291.

[2] Zekos, Georgius I.: The Influence of Patents, Copyright, Trademarks, and Competition on GDP Growth, Trade and FDI. *The IUP Journal of Management Research,* Vol.XIII, No.4 (2014), pp.7-8.

[3] Boone, J: Intensity of Competition and the Incentive to Innovate. *International Journal of Industrial Organization*, Vol. 19, No. 5, (2001), pp. 705-709.

[4] Dunner: First-to-file: Should Our Interference System Be Abolished?. 68 *Journal of the Patent and Trademark Office Society* 561 (1986), p.561.

[5] Law No. 7 Year 1994 concerning Ratification of Agreement Establishing the World Trade Organization.

[6] Lindsey, Tim., *et.al.*: *Hak Kekayan Intelektual: Suatu Pengantar.* Asian Law Group Pty. Ltd. & PT. Alumni, Bandung, 2006. p.26.

challenge regional competition. If we compare the Indonesian Copyright Law[7] – also enacted after the ratification of TRIPS – with this one, we can see that this law was revised in 2014, adopting a new methods to solve past and future challenges of globalization. This law was revised in 2014 under national and global development circumstances of that time in order to solve existing problems. Such copyright law development is now included in the new Indonesian Copyright law:[8] determination of all rights enjoyed by creators,[9] longer period of protection compared to the previous law,[10] creation of Collective Management Institution,[11] effective dispute settlement mechanisms,[12] as well as other substantial changes.

By comparative study approach, this paper elaborates the progressive development of global patent protection, especially in the European Union and in the United States. This paper then investigates significant development to complete the gap or uncertainty regarding measures of protection based on the current Indonesian Patent Law. Furthermore, this paper also presents some recommendations to effectively enforce Indonesian Patent Law and give more favorable environment for inventors.

Recent Development of Patent's Protection System in the European Union and the United States

This paper analyzes current development of the patent protection system within the European Union and the United States. Based on further investigation, both of them introduce the latest practices on patent protection system.

To intensify the economic integration within the European Union, intellectual property rights were also taken into consideration for setting the common union goals. Intention to regulate intellectual property rights in the community is basically delegated from article 118 of the Treaty of the Functioning of the European Union (TFEU).[13]

[7] Law No. 28 Year 2014 about Copyright. This law changed the previous Law No. 19 Year 2002 about Copyright.

[8] *Ibid.*

[9] *Ibid.* This new law is now giving more details about the rights of creators such as the moral right (article 5-7) and the economic right (article 8-19).

[10] *Ibid*, art.58. The period of copyright is protected during the live of creators and 70 years after his/her death.

[11] *Ibid,* arts.87-93. Collective Management Institution (*Lembaga Manajemen Kolektif*) is profitable legal entity duly authorized by the creators, the owner of copyright, and/or the owner of related right to carry out their economic rights in the form of gathering and collecting the royalty.

[12] *Ibid*, arts.95-105.

[13] Article 118 of TFEU stated that "…, the European Parliament and the Council, … shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, coordination and supervision arrangements." Other provision of TFEU, such as article 207 on the uniform principles implemented in the commercial aspects of the intellectual property" and article 262 that affirms "the Council authority to adopt provisions to confer jurisdiction to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights."

Inspired by such provision, the European Patent Convention (EPC) set up in 1977[14] has been successfully realizing the harmonization of substantive and procedural patent system, though this treaty is separate from the EU treaties. This Convention is now ratified by 38 member states in March 2015.[15] Its effectiveness is proved by the growing number of patent registration every year.[16]

The direct regulation from the Union Law was Community Patent Convention (CPC).[17] It was signed in Luxembourg on 15 December 1975 but never entered into force as the minimum number of ratifications was not completed.[18] The failure of CPC resulted in that EPC was the only existing patent instrument binding for all contracting parties, including EU member states. However, the ECJ can also use CPC and EPC as sources of interpretation of Community Law, especially meaning article 36 of the TFEU.[19] Both treaties also influenced the adoption of the some generally accepted provisions regarding the national patent laws of EU member states.

On 17 December 2012, both the European Commission and the European Parliament legislated the unitary effect of the European Patent. With true ambitious endeavour, this unitary system, including the creation of the Unified Patent Court, will be realized in 2015. The new concept of 'unitary effect' shall be the tool to achieve the three main community intentions:

- To fix common problems arising in the present European Patent system, such as: each patentee will only have to disburse one renewal fee and the use one additional language other than the languages recognized by the European Patent Office[20] but could be accessed by the EU member states except Croatia, Italy, and Spain.[21]
- To provide unitary protection and equal legal effect of patent grants for member states;
- To establish a single Unified Patent Court for the litigation of European patents. This court shall have exclusive jurisdiction over patent infringement.[22]

[14] Convention on the Grant of European Patents 1973 (hereinafter EPC).

[15] European Patent Office: List of Contracting States Sorted According to the Date of Accession, *available at* http://www.epo.org/about-us/organisation/member-states/date.html (March 23rd, 2015).

[16] In 2014, the number of patent fillings increased +3,1% from the year before or total number 274,174 registrations. European Patent Office: Annual Report 2014, *available at* http://www.epo.org/about-us/annual-reports-statistics/annual-report/2014.html (March 23rd, 2015).

[17] Community Patent Convention 1975 (CPC), art.93. Furthermore, based on article 5 of this Convention, the Court of Justice has the jurisdiction in respect of the provisions of the Convention.

[18] *Ibid*, art.98.

[19] In Duijnstee v. Goderbauer, the Court highlighted that although the two treaties are applicable to the case but in fact those treaties can be use as the source of interpretation of the Community Law. *Case 288/82 Duijnstee v. Goderbauer – Judgment (Fourth Chamber), 15 November 1983,* p.3677.

[20] European Patent Office is patent granting authority of Europe established under EPC.

[21] These four states still not ratify the Agreement on Unified Patent Court, Brussels, 19 February 2013.

[22] Agreement on Establishing Unified Patent Court was signed on 19 February 2013. This agreement established the Unified Patent Court but still not entry into force and open for ratification.

The United States, in brave effort, significantly changed the patent system from 'first-to-invent' to 'first-to-file' in 2013. During the first-to-invent regime, the first and the true person inventing a product or a process gets the patent rights.[23] The original invention could be protected by showing that no application process has been done by the inventor in the early stage of the invention.[24] Attempts to change the first-to-file system remained unsuccessful, even though such an attempt also came from the World Intellectual Property Organization (WIPO) in 1990, while its basic proposal required the United States to switch to first-to-file system.[25] The rejection of the harmonization by the United States then raised debates among scholars regarding pro and contra of the first-to-file system. One interesting debate can be read from Pravel's (1990-1992) response to Conley's opposition, saying that such harmonization would not increase the United States' access to foreign markets:

> "Mr. Conley misconceives the purpose of harmonization and its effect on foreign markets. Although United States' citizens will have no greater access to foreign markets because of harmonization, obtaining patents in foreign markets would be an advantage because they would provide exclusive rights there…. More uniform procedures and substantive laws should reduce the cost for international protection of inventions… In short, harmonization would increase market potential for U.S. citizens and the rest of the world…."[26]

Surprisingly, after the long history of defending the first-to-invent system, on 16 September 2011, President Barack Obama signed the America Invents Act (AIA) that applies the first-to-file system after 16 March 2013.[27] The new law works with the term "first-inventor-to-file" in order to avoid disproportionate practices on the protection of stolen ideas. The AIA has 20 provisions and strengthens the US Patent and Trademark Office (USPTO) to help setting up enforceability the issued patents.[28] These provisions have three main purposes: enabling a patent applicant to have greater certainty in patent rights, preventing and/or removing low quality patents on the patent system, and establishing the 21st century patent office.[29] The new system has some substantial changes; the following picture describes the system prior to the AIA, post AIA, and current European system well:[30]

[23] Jackman, Peter A.: Adoption of First-to-File Patent System: A Proposal. 26 *The University of Baltimore Law Review* 67 (1997), p.71.

[24] Teva Pharm. Indus. Ltd. V. AstraZeneca Pharm. LP, 661 F.3d 1378 (Fed. Cir. 2011). p. 1384.

[25] *Ibid.* pp.79-80.

[26] Pravel, Bernarr R.: Why the United States Should Adopt the First-To-File System for Patents. 22 St. Mary's Law Journal 797 (1990-1992), p. 813.

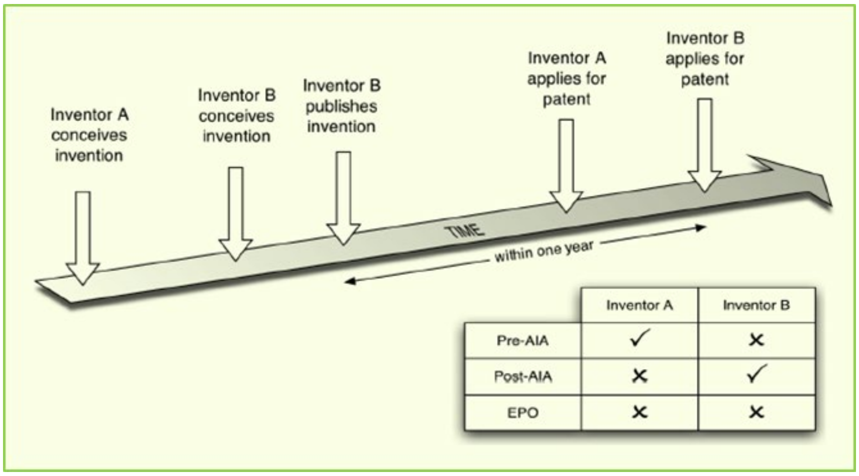
[27] This law is well-known as Leahy-Smith America Invents Act, H.R. 1249, 112th Cong., 1st Sess. (2011). U.S. Patent and Trademark Office: America Invents Act: Effective Dates, *available at* http://www.uspto.gov/sites/default/files/aia_implementation/aia-effective-dates.pdf (March 27th, 2015).

[28] Gongola, Janet: The America Invents Act: Reforming the US Patent Law for the 21st Century, *Inventors' Digest*, Vol. 28, No. 9 (2012), p. 26.

[29] Ibid.

[30] Sherman, Cherie Ann and Anderson, Philip M.: What Students and Independents Inventors Need to Know About the America Invents Act. *Southern Law Journal*, Vol. 23, No. 2 (2013), pp.215-216.

Picture 1: Patent Protection System in Pre-AIA, Post-AIA, and EPO[31]



Sherman and Anderson (2013) affirm that determining which inventor receives a patent grant depends on when and where the inventor requests.[32] Prior to AIA, in order to obtain patent right, an invention is required an inventive step and its potential practical application.[33] As theoretical case regarding first-to-invent: if it was A who conceived the invention in January, but B was the first one to reduce the same invention to practice on March, though B conceived the invention after A, only A's invention is protected if A can reveal the reduction to practice's date prior to B's. Now, first-to-invent system is not used by any states in the world. Using the term 'first-inventor-to-file' under the post AIA, it can be illustrated under this example: If A invented the invention in January and later in the same month A disclosed the invention in publication then filed the patent application in April, but B conceived the same invention in February then filed the patent application in March, A's invention would be awarded the patent since A had disclosed the invention to public[34] before B proceeded the application.

The procedural steps in the European Patent Office (EPO) seem as a simplified first-to-file system. If A filed an invention that is patentable[35] in January and B a filed similar invention in January but conceived the invention prior to A, A will be awarded patent by the EPO simply based on the filling date. In contrast with the post AIA, if

[31] *Ibid.* p.216.

[32] *Ibid.*

[33] The pre-AIA regime the first person to invent a product or process gets the patent rights. Barrett, Margreth: Intellectual Property. Aspen Publishers Online, 2008, p.40. *See* also Miller, Roger and Jentz, Gaylord: *Business Law Today: The Essential*, Cengage Learning, 2007, pp. 151-154.

[34] 35 U.S.C. § 102 (2011).

[35] To be patentable, an invention must be novel and involve an inventive step. EPC, art.52.

the invention has become publicly available in any way before the patent application was filed, the application will be rejected.[36]

Effective Enforcement of Indonesian Patent Law: A Domestic and Regional Step Ahead

Indonesian Patent Law contains 139 articles and most of them reflect the core harmonization contents found in TRIPS.[37] Under this law, an invention is granted patent right for novelty, inventive step, and capability to reduce it in industrial practices.[38] This law also affirms the usage of first-to-file system[39] where available publication to be made before filling the application prevents the inventor from patent protection.[40]

Though Indonesian Patent Law has comprehensive patent protection regulating contents, in fact, it is still far from the main goals of this law regarding stimulation of new invention and generating citizen's prosperity. This paper recommends that there is no need to amend the law, however, gives three different argumentations in strengthening the current Indonesian Patent Law: first, building pro-new invention policy; second, legal enforcement assurance; and third, explication of patent access to and from ASEAN member states.

Pro-new invention policy;

- There is no doubt that Indonesia is also a source of industrial creativity.[41] The majority ofinventions, let them be simple or higher quality, are created by creative, young Indonesian inventors. The vast majority of natural resources, the increasing number of population, the high level of poverty, and unequal job opportunities are key factors in influencing the rise of stringent competition. It is true that this kind of competition could not be positioned parallel with the stride competition in developed countries. However, the factual situation of competition raised in the society stimulates creative invention with local character i.e. some inventions are patented in the agricultural area.[42]
- Even though competition dominantly exists in the modern Indonesian society, the number of patent applications still inconsiderable. There were only 7.032 patents granted in 2012, however, it increased by 14,71% from 6.130 patents in

[36] *Ibid.*, art.54.
[37] Indonesia is also party to international treaties relating patent beside TRIPS, such as: Paris Convention for the Protection of Industrial Property (1883) succeeded from Netherland, and Patent Cooperation Treaty (1970) in 1997.
[38] Indonesian Patent Act, art. 2 (1).
[39] *Ibid,* art. 20.
[40] There is no grace period for available publication under Indonesian Patent Law. *Ibid,* art.3.
[41] Sumotarto, Untung: Industri Kreatif Berbasis Sumber Daya Alam. *Paper Proceeding,* Simposium Nasional 2010: Menuju Purworejo Dinamis dan Kreatif (2010), pp.2-9.
[42] For example: Agricultural cutting machine (mesin potong pertanian) registered under Patent No.877 (2007), Bioorganic fertilizer formula from latex waste and specific microbe (formula pupuk bioorganik dari limbah lateks dan microba pengaya) registered under No. 1350 (2014), and etc.

2011.[43] From those numbers of patents, only few were patented under WIPO: less than 20 in 2010.[44] Starting from this factual basis, it shows that the Indonesian government needs to evaluate their work and shall focus on boosting the number of patent applications. The government must revise the policy of pro-patent environment in order to create public awareness on how important to protect their invention is. Not only altering citizen mindset, the government should also modify their current policy and should be friendlier with new inventions, such as: decrease or even erase the annual cost of patent's safeguard,[45] support new inventions with potential commercial benefit,[46] and synergize work between government institutions to support new invention that contributes more benefits for the country.

Legal enforcement assurance;

- There is no need to change the patent system as it currently exists in the USA. The first-inventor-to-file solution is suitable for U.S. conditions where vast commercial competition occurred at any time with different level of complexities. By using the simple system of first-to-file, the Indonesian patent system is perfectly suited with the country's situation.

Again, there is no need to amend the Indonesian Patent Law because this law is not broken and still fits to establish the patent mechanism. However, to affirm the enforcement of the law, there are some Government Regulations (*Peraturan Pemerintah*) that need to be enacted to bring certainty, to provide examples: specific law regulating guideline for license agreement[47] and application of simple patent or petty patent.[48]

To be effective, Indonesian Patent Law shall not discriminate inventions, either. The *Tukirin v PT. BISI*[49] case shows that patent awareness and the protection of simple invention has not been in the government's centre of attention. Tukirin, being a farmer who found the cross planting technique and lacking IPR's understanding, filed a criminal complaint against the company getting monetary loss from his experience. As we learned from the United States' practice, even though there are some limited

[43] Directorate General of IPR, Indonesian Ministry of Law and Human Rights: Statistik Paten 2012, *available at* http://www.dgip.go.id/statistik-paten (April 1st, 2015).

[44] Yuliyanto, Iwan: Prestasi Indonesia dalam Jumlah Paten Internasional, *available at* http://iwanyuliyanto.co/2012/02/12/dalam-jumlah-paten-internasional-indonesia-pun-sangat-jauh-tertinggal/ (April 1st, 2015).

[45] The annual cost imposed for safeguarding the patent protection but failing this obligation will result the null and void of the patent's approval. This regulation is not supporting the simple patent. In 2013, around 2.800 patents threaten by its cancelation from government approval because of their failure to meet the annual cost obligation. Indonesian Patent Law, art. 115 (1). *See* also Paten Indonesia: Ribuan Paten Terancam Dibatalkan, *available at* http://www.patenindonesia.com/?p=685 (April 1st, 2015).

[46] There are a lot of new invention competition holds by the government and once the committee selected the winner then no specific support to register those invention.

[47] Indonesian Patent Law, art.73.

[48] *Ibid*, art.87.

[49] Walhi: Paten Benih Menyeret Petani Jagung ke Meja Hijau, *available at* http://www.walhi.or.id/kampanye/psda/050928_benihjagung_cu/ (April 2nd, 2015).

exceptions, the AIA does not intend to discriminate among categories of inventions or certain industries for the purpose of providing incentive for the innovation across various industries.

Regional enforcement access to ASEAN member states

Most importantly, as an influential member of the Association of South East Asian Nations (ASEAN), Indonesia had the opportunity to propose the unitary ASEAN patent agreement in order to build the ASEAN Patent Office and the ASEAN Patent Court to carry out post ASEAN Economic Community 2015 implementation. These regional efforts have been initiated since the signing the ASEAN Framework Agreement on Intellectual Property Rights Cooperation in 1995.[50] This Agreement has not entered into force yet, however, member states have already begun to build the ASEAN Patent Examination Co-operation (ASPEC) launched in 2009 as the first regional patent work-sharing programme among nine participating ASEAN Member States.[51]

With the implementation of AEC 2015, the unitary system of ASEAN patent law is necessary to make a balance based on the increase in the borderless movement of people, goods, services, and capitals among member states. All member states signed and ratified the TRIPS and changed the patent protection system (especially for Philippine prior the Republic Law No. 8293)[52] to the first-to-file system. Existing national laws in each member state are currently moving forward to face global challenges. Cultural and political considerations were not barriers to build comprehensive regional patent system proven from the community intention to implement the AEC 2015. The establishment of the ASEAN Patent Office and ASEAN Patent Court will enhance its regional patent application and protection. Particularly, the Patent Office will systematically improve the quality of granting authorities, remaining efficiency, overcoming dynamical regional problems and strengthening regional cooperation to support more regional inventions and new inventors as well. Granted patents under the ASEAN Patent Office are having unitary effect providing unitary protection in all member states.[53] Furthermore, in light of the establishment of Unified Patent Court, future ASEAN Patent Court will ensure the enforcement of patents granted under unitary ASEAN patent law.

[50] ASEAN Framework Agreement on Intellectual Property Cooperation signed in Bangkok, Thailand, December 15th, 1995.

[51] All ASEAN Member States joint the work-sharing programme except Myanmar. ASEAN Intellectual Property Portal: ASEAN Patent Examination Cooperation, *available at* https://www.aseanip.org/Services/ASEAN-Patent-Examination-Co-operation-ASPEC (April 2nd, 2015).

[52] In 1997, Philippine switched the system from first-to-invent to first-to-file system. Philippine Republic Act No. 8293, Chapter III, section 29.

[53] Bently, Lionel and Sherman, Brad: *Intellectual Property Law*, Oxford University Press, 2014. p. 295.

Conclusion

Indonesian Patent Law is a comprehensive national patent law tailored to the general situation of the country. However, the implementation is out far from the expectations: only a small number of patents is granted in the international patent office such as WIPO. Considering the current development of patent protection concept in the United States and in the European Union, this study affirmed that there is no stumblein the Indonesian Patent Law. However, to come up with the goals of this law, there should be three main efforts: first, the Indonesian government must ensure their policy with domestic inventions by giving true assistance to get patent recognition and support the reduction of their invention for commercial benefits. Second, assuring legal certainty by providing the needed regulation the most important consideration is to present non-discrimination undertakings. Third, proposing the unitary ASEAN patent law system by building the ASEAN Patent office and ASEAN Patent Court to develop regional inventions and to enhance regional protection.

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THOUGHTS ON STATE COMMUNICATION

A BRIEF AND GENERAL OVERVIEW

GYŐZŐ LÁSZLÓ*

Communication tasks of the state – theoretical establishment of principles

Researchers have not achieved a uniform definition of the notion, role, tasks and main content elements of 'state' so far. However, basically it can be stated that the appearance of the notion of the state is necessarily entailed by a higher-level organisation of living together in a society. It is clear that the state – as an independent entity – cannot be viable without the existence of subjects, i.e. citizens living in the territory of the state in question and the existence of its sovereign power above them. Thus, the state is an abstract notion; it is a "construction" of tasks existing to create rules of living together in a community, providing community functions that are created for state members in their interest.

This definition is also supported by the examination of the operating mechanisms of the state. The state is composed of citizens, optimally, the intention of the state is to represent the whole community – and based on that, to establish and maintain the system of rules and institutions, protect community member, ensure their rights both among themselves as well as people and groups outside the given state. It goes without saying that this definition would be too idyllic, the principle of the majority intention is only the product of the new age and the appearance or disappearance of the classical Greek model primarily had to ensure the possibility for ruling – privileged – social groups to exercise their power for long centuries.[1] However, it should be admitted, that the reason for malfunctions of the state, i.e. abuse of state power, development of distorted systems can never only be connected to the state itself but rather to individuals or groups of individuals being part of the state, having been assigned to exercise state power.

After having stated above that the state is never an "efficient" formation in itself, it should be examined how it can fulfil one of its basic tasks, namely, how it can regulate and influence life relations of members of the state to the necessary extent. With this thought we have arrived to the examination of the subject matter of the communication of the state. State norms, decisions and community policies can be ascertained successfully only if they can be delivered to addressees and they can influence life relations in question in the way it is specified in the "message". In

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[1] See Mezey Barna (ed.) *Magyar Alkotmánytörténet* (The History of the Hungarian Constitution), Osiris Kiadó, Budapest 2000 v. Gönczi -Horváth –Révész-Stipta-Zslinszky: *Egyetemes jogtörténet* I-II (The universal history of laws), Nemzeti Tankönyvkiadó, Budapest 2000.

consideration of the communication activity of the state, laws of mass communication[2] take effect, however, in a rather abstract, complex form.

It will be seen that the importance of state communication is at least as important on the area of enforcement as it is important on the area of publishing the norms, because fulfilling the norms does not take place via internal identification and conviction but as a consequence of being afraid of sanctions. Thus, the task of state communication is double-fold: it transmits some intention and at the same time, it also shows what sanctions can be expected by those that violate the rules. This has to maintain the order, the rules of living together, or, finally, the state itself. It goes without saying that the communication functions of the state cannot be limited to such areas, such functions can appear in innumerable other areas as well. The modern state fulfils important requirements emerged from public wealth, welfare and well-being, their implementation, accomplishment cannot be imagined without the correct usage of communication channels.

In this paper the author would only like to survey the most important communication channels of the State, rule of law (or Rechtstaat), by underlining some of their pecularities and presenting their effect mechanism as well as their implementation areas. When examining such areas, the general model of communication flow is set out within the text.

The legal system as a communication channel – a general overview

The primary area of state functioning is the totality of rules accurately defining life conditions, rights and liabilities of individuals and companies, moreover, the state itself carries a kind of a message and in addition to each legal regulation, this legal system is completely affected by a uniform, comprehensive system of basic views (e.g.: principles of the constitution).[3] The legal system imperatively prescribes methods of behaviour in some areas and it allows methods of behaviour in a dispositive way in other areas, thus, it establishes the frames of social living together. In the sense of communication this means that the state "communicates" its members[4] which forms of behaviour are allowed and which ones are sanctioned or prohibited by the state via its public power.

It is worth mentioning that the current legal system of a state in question – which is a constantly changing, dynamical medium – always reflects a certain political attitude to some extent, which is defined by the governing political group at that given time. Beyond, the legal system as a communication channel is not merely a "one-way street" from the state to the individual but it also provides members of the state with the opportunity to communicate with the state. What do I mean by this statement that can be interpreted with difficulties at first? A modern state's system may not function in an

[2] See: Griffin, Em: *Bevezetés a kommunikációs elméletbe,* (Introduction to Communication Theory), part IV. Harmath Kiadó, Budapest 2001.

[3] The so-called theory of Sólyom László, the „invisible constitution" is built on this logic as well.

[4] The present study intentionally does not use the term "citizen" because in the modern state, especially in the European Union, there are not only citizens but there are economic companies and other entities getting relevant focus from the side of the state and state communication, as well

omnipotent way. Due to the filtration of its malfunctions the state does not consider itself as a formation standing above the subjects but as an equal-rank partner. In this spirit, the state limits the area of movement not only for addressees or beneficiaries of norms but also for itself, it stipulates where, at what depth and in what way it can intervene into state interests and for the public's sake. It is under the aegis of the above mentioned sequence of thoughts that became possible for the state to undertake financial liability in certain legal relations, that the state can be brought into court and, where the state should avoid of its liabilitiesobligations, or should exceed its competence, for instace by means of paying compensation for damages to the individual/special entities.

The public administration as the primary form of state communication

In general, it can be stated that the existence of public administration, successful or not, the malfunction character of its functioning is definitive. Public administration is nothing but the primary contact surface between the state power and citizens of the state, the daily-level appearance of the executive power therefore, its professional and smooth functioning is extremely important. It goes without saying that the public administration organisation of a state in question cannot be interpreted by taking it off from the societal system and then by illustrating it.;

The state system of public administration is the form of communication channels having developed much earlier and it had been generated earlier compared to when the currently known legal systems were established. Public administration or, the executive power in other words, is the primary platform of interactions between the state and its members. It is very important to remark that also citizens work in public administration but the position of the private individual and the position of the officer representing the intention of the public power are remarkably separated[5].

Public administration operates based on criteria specified in legal statutes, however, it exceeds them in most cases. The system of public administration provides the state and its members with the primary communication platform and this communication channel is more bilateral than the legal system in itself, presented above. On the other hand, public administration actually realises the everyday state functioning and it also fulfils supervisory and co-ordinating tasks. It is important, though, that the quality of public administration includes significant pieces of information which allow for us also to draw accurate conclusions on the totality of the state's functioning. The fast and accurate administration as well as the functioning compliant to the legal regulations are the indispensable conditions of the modern state aiming to achieve success and societal benefits. The question of corruption within the system of organisation accurately reflects the power of the state and the condition of its public relations. The condition of the state can be measured via the actual functioning of public administration from many aspects. To what extent does the administration serve the interests of citizens, to

[5] The Constitutional Court also covered the collision questions of protecting the private individual's personal rights and judging on the merits the activities of public actors: See: Decision 36/1994 (IV 24) of the Constitutional Court

what extent is it autotelic and to what extent does it actually ensure the achievement of the goals of the state and the community in question?

In addition to the classical state administration areas, the law enforcement organisations and agencies possessing the assets of public power also play an important part, just like the organisation system of prosecution and court systems. The appearance and ever extensive development of modern media are the necessary catalysers of the above processes, in addition to the active activity of certain right-protecting organisations, initiating trial processes, which widen the communication platform further among the actors. Trends, intentions of our era show that communication channels between the state and the public will be further widened in the future, the information society vindicates the right to get acquainted with the functioning of the public administration.[6]

PR as the targeted communication of the state

There are only a few communication areas which would divide experts and politicians to such an extent as the question of the state PR.[7] The task of state PR is double: providing information and raising the interest on the first hand, and presentation of the current condition of the state on the other hand. Regarding the direction of PR, there are several different areas: internal communication is aimed at members of the state and external communication aimed at other states, foreign investors, other stakeholders, etc. It also has multiple tools: whether these are targeted, so-called "traditional" PR tools (announcements, advertisements) but it can be realised via codification (granting tax allowances to foreign investors), moreover, via individual decisions (e.g.: efficient actions against criminals).

Symbolic decisions, communication actions (that often appear as non-verbal) may be under-evaluated and are not so spectacular but they have at least important effects . The actions of the state are not directly governed by PR considerations but almost all actions of the state have a certain PR context. It is just one reason why this activity continuously constitutes the subject matter of debates and is targeted. The competitive political battles naturally involve that parties participating in the battle have different views on the situation, condition of the state, moreover, they want to make them see differently by citizens entitled to participate in elections. The state PR – that is indispensable otherwise from the aspects of economic policy and societal organisation – is often accused of being only an activity that serves the interests of the political grouping standing on top of the state priorities. State PR, however, is much more than that: when examining its communication reflection, it can be said that it also means a kind of feedback, an orientation on what status the implementation of the set targets is in, in what condition the totality of the state is, moreover, the announcement and making the newly set targets of the state acknowledged also belong to this scope. The

[6] Such flows widen the frames of political publicness and allow that it should be known. See: Halmai Gábor: *Kommunikációs Jogok* (Communication Rights, pp. 26-37), Új Mandátum könyvkiadó, Budapest, 2002.

[7] At the start of the 1990's it was one reason why the establishment of an independent media structure was targeted. See: Decision 37/1992 (IV 10) of the Constitutional Court

necessity of the development of state PR was a direct consequence of the appearance of mass communication tools and their wide spread.[8] Before, decisions of the state could not be questioned and could not be acknowledged in public, however, owing to the development of mass media, they became the subject matters of debates and evaluation for everyday people as well. Thus, the state itself entered into a competitive situation where "it was compelled to" interpret its own actions, functioning because if the state neglected this, it was done by others instead of the state. In sum, the state PR completely fulfils its role if it is able to create an authentic image for the addressee o the beneficiary of the message either on the totality of the country or on a given question by providing correct information. It goes without saying that, as with the judgement of all kinds of communication actions, it brings subjective elements in itself but on the whole, it is not misleading information that is based on facts, the conscious building of the character of a community is a useful and positive activity both internally and externally.

Public service media as indirect communication channel of the state

In a modern legal state media enjoys appropriate autonomy.[9] Might the state support its functioning (state television and radio channels), however, it is independent on the current players that exercise state power. In our country it is realised in a way that public service broadcasting providers operate under societal supervision via the media advisory boards operated by various political parties and civil organizations. This organisational structure is the necessary companion of the democratic development of the state where activities of the state can be evaluated and judged, by fulfilling a sort of control function. It is not by chance that certain experts consider the media as the fourths, separated branch of the power.

The area is so autonomous that the state does not vindicate the right to itself to exactly define the notion of public service character; it only refers to its content (at least in Hungary).[10] Regarding its content, the valid Hungarian law on media provides the opportunity to any broadcasting service provider to undertake the criterions of public service medium (however, it must be admitted, that at this time it will not be called public service broadcasting provider but it will be called public broadcasting provider). The aspect is not unimportant regarding that such broadcasting providers are exempt of the broadcasting service fee payable to the state. Why can a structure like this one that is independent of the state be called a certain kind of communication channel? It

[8] The interesting aspect of these flows are examined by Császi Lajos: in his study entitled: "A rituális kommunikáció neodurkheimi elmélete és a média" (The Neodurkheim theory of Ritual communication and the media) In: *Szociológiai Szemle* 2001/2 pp. 3-15

[9] On this scope of questions, in summarising character, see: Sári János: *Alapjogok* (Fundamental rights), chapter 11, Osiris Kiadó, Budapest, 2000.

[10] Terestyényi Tamás defined also the content element as the primary criterion of public services (however, he defined the financing questions as the opposite. See Terestyéni Tamás: *A közszolgálatiság értelmezése a tudományos kutatás szemszögéből* (Interpretation of public service character from the aspect of scientific research). [online] http://www.akti.hu/tanulmany/dok/terestyeni_02.doc Alkalmazott Kommunikációtudományi Intézet

can be admitted that in this area the state can only play a topic-providing, co-ordinating role and it is achieved by defining the notion of the public service programme. such programmes are therefore: programmes serving the listeners', viewers' information-acquiring, cultural, citizenship needs, their needs in the way of living broadcast in the receiving zone of the broadcasting provider (country-wide, regional, local) such programmes are broadcasting universal, Hungarian culture and that of national and ethnic minorities living in Hungary, culture of minorities in the form of information, with educational, training purposes, information on scientific activities and results, programmes serving the implementation of the freedom of religion and programmes presenting the activities of churches and religious life, programmes for children and the youth, programmes assisting the everyday life, the information-acquisition of citizens in the areas of law and public life and programmes providing news services.

It can be clearly seen that these areas do not constitute the world of the "classical" profit-oriented commercial media. Why do we need a strong public service medium? Why does the state prefer it and what is its message? Nowadays, the competition situation has become sharper among both the commercial players and competitive political forces which puts serious challenges to the media and within that, the public service content providing. It is an important question that in our faster world where values and media-based preferencies have changed and are being changed so heavily, the state shallestablish and maintain legal institutions, which are of static character, which transmit constant and general values, which can operate independently of the influences of both the market and politics. In this dynamical medium that changes day by day, the original intention of the legislator can be preserved and implemented only via accurate and detailed legal regulations and the consequential application of the laws.[11]

It can be seen from the list of examples that this channel (and that is why this study uses this indirect notion) does not transmit the actual message but it transmits the principles to the receiving party. The task of programmes with public service topics is to deepen the legal conscience of the citizens via broadcasting consciously selected and defined values. It is well-known that the freedom of communication is also one of our constitutional basic rights but both the individual and the state must not forget the following: „The freedom of communication – should it be our important right – is not absolute".[12]

But what are these principles actually, and where can they be found? The fundamental principles of the Hungarian public media services are determined in Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter: Media Act). Another important source is the Code of Public Media Service (hereinafter: Code). This document is not a source of law, it is a fundamental guide to refine and explain the features and objectives defined in the Media Act. As the Media Act, also the Code

[11] An example can be the requirement of the balanced service where the rules are so strict that it was attacked (true, only partly) in front of the Constitutional Court, see: Decision 1/2007 (I 18) of the Constitutional Court

[12] See Halmai Gábor: *Kommunikációs Jogok* (Communication rights, p. 99), Új Mandátum könyvkiadó, Budapest, 2002.

determines and describes the fundamental principles and explains them in details. Let's take a quick look at the actual principles:[13]

- The fundamental principles of independence from political parties and political organizations.
- The principles regarding diversity, objectivity and balanced nature of news and timely, current political programmes, the presentation of disputed issues and the diversity of opinions and views.
- The criteria for supporting and sustaining the mother-tongue culture.
- The principles of presenting the culture and life of national and ethnic minorities in Hungary.
- The principles of presenting cultural, scientific, ideological and religious diversity.
- The principles of performing tasks with regard to the protection of minors.
- Tasks in the field of education.
- Tasks in the field of the coverage of sports.
- The respect for personal and human rights.
- Programming principles related to people with disabilities.
- The promotion of environmental and health consciousness.
- Provision of regional and local content.
- The principles of keeping members of the Hungarian nation living outside its borders appropriately informed and also of providing appropriate information about them.
- The principles relating to the extent and guarantees of the autonomy and responsibility of producers and programmers employed by the public media service system and to the guarantees of their participation in defining the principles of programme production, ordering and editing.
- The principles of formulating basic rules of conflicts of interest, other than those provided for by law, applying to staff members, with special regard to those employed in relation to news and political programmes.
- The principles relating to ethical norms governing the broadcasting of commercial communications and advertising activities.
- The principles of publishing public service announcements and political advertisements.
- Communications with viewers and listeners.

Summary

The study has sought to present the communication tools and general communication considerations of the state in an exemplificative basis. The selection of the systemising principle and the direction of the examination have been subjective, of course, the selected structures based on their communicative function and not on their primary content. It goes without saying that each topic could be explored in details via dozens of exciting and analytical studies but neither the objective nor the task of this writing was that. Media science, the examination of its legal regulation and the examination of

[13] Based on the listing in the Code of Public Media Service 15-27.

its implementation in the society are interesting and challenging tasks at the same time. This dynamical and constantly – ever accelerating – changing medium hides several problems and opportunities. Our contemporary world becomes more and more complex as time goes by, sometimes it is impossible to follow it, although, it can be learnt better owing to the perfection of informational society and communication can provide indispensable and inestimable help to that, which is one of the sciences that develop in a very the fast way.

OCHLOCRACY IN THE PRACTICES OF CIVIL SOCIETY: A THREAT FOR DEMOCRACY?

JASMIN HASANOVIĆ*

Any reference to *democracy* today is usually connected with the concept of *civil society*, as something natural, something that derives from it by itself. As such, civil society in its ideal-typical definitions is presented as the *protagonist of democracy*, or as *a shining example of democratic practice*. However, the question regarding which relation are democracy and civil society standing, both through theory and practice, will show whether civil society today contributes, or limits democracy. In this context, it can be seen how civil society — by using democratic principles and masking it democratic potential through ochlocratic practices — can easily turn into its opposite. In other words, whether is it democracy as such, or is it its lack that produces ochlocracy through the practices of civil society?

One of the challenges is simultaneously a question to be answered: can such produced *ochlocracy* lead to a new type of *totalitarianism*, or it just *maintains the existing order*. Is civil society capable of acting the role of a shining *example of democratic practice* and how can it misuse it?

Hence, it is necessary to compare *civil society* and *ochlocracy* as the phenomena of *democracy* to see how civil society can turn into ochlocracy as the direct rule of the mob or mass, and to demystify the role of ochlocracy in democratic societies. Finally, there is a question about the political consequences of possible ochlocracy dimensions of civil society.

Democracy and civil society

In order to clarify that the terms of *democracy*, *civil society* and *ochlocracy* are connected in a way that the lacks of democracy can turn civil society into ochlocracy, theoretical and conceptual interpretation of all three phenomena is need to be given.

As well as many other political terms, the origin of the term *democracy (δημοκρατία)* goes back to the ancient Greece. Thus, "the word democracy is derived from two ancient Greek words: demos[1] (the people) and kratos (strength)."[2] Therefore, taken democracy *means the rule of demos*. From this it is clear that democracy connects power with people, although this relationship can take many forms.

But, who makes *the people*? Haywood, for example, states that *people* can be considered as a "single body connected by common or collective interests."[3] Since divisions and disagreements exist in all communities, under the term '*people*' one may also mean *majority*. In that case, democracy means the strict use of the principle of *majority rule*, in which the will of majority is above the will of minorities. However, it is

[1] Although *demos* refers to „people", the Greeks used this term to denote „the poor" or „mob".
[2] Robertson, David: *The Routledge Dictionary of Politics*. Routledge, London, 2004. p.136.
[3] Hejvud, Endru [Haywood, Andrew]: *Politika* [Politics]. Clio, Beograd, 2004. p.134.

clear that most conceptions of democracy are based on the principle of *the rule of people*. Therefore, democracy can only exist by people who are actively participating in political and social activities.[4] This participation appears in many forms.

Affirmative political maxims like *Voluntas populis suprema lex esto* (Let the will of people be the highest law), or *Vox populi, vox dei* (Voice of the people is the voice of God) originated from Roman times show the importance of people in political decision-making. However, later, with the emergence of *European citizenship* as a new and carrying actor of social shaping of history, the rule of the will of people becomes the *highest political idea*. From the sovereign will of people "*originates and relies* (…) *the government, so the regime and* (…) *the state*."[5] With this will people are on the highest throne of political values.

The people and their will, hence, are inseparable from *politics* as "*an activity through which people create, maintain and change the rules by which they live*."[6] Therefore, as Gabriel Almond and Sindey Verba identified, *political culture* in a democratic order is vital. In order to be so, the connection is clear between people and their will, democracy and politics in *civil society*, as they can be regarded as a fuel for democratic practice. But, what is the will of the people, or in other words, out of what is the will of the people made? Here, I would like to emphasize what theories usually miss to identify; i.e. that the will of people in a particular community primarily depends on the political culture of the same community, and often represents its reflection – sometimes confirming it, sometimes referring to problems that the society and the government don't deal with.

It is not easy to have a discussion on *civil society* as a political or social term. As a vision and wish of all democratic societies, civil society today is a concept of establishing and fulfilling individual freedoms, but also a tool reflecting the will of people.

A modern discussion about civil society can be started from Jürgen Habermas, who emphasized the change of the Hegelian concept of *civilian society* into *civil society*. Starting from the dichotomy of civilian society and the state, Habermas showed that the *public sphere* is being establishing between the state and civilian society, in which private people, members of educated citizens leave their privacy to discuss *public issues*.[7] Public sphere appears as a link between society and the state as separate spheres, in fact showing that the *common interest* is the connective tissue.

In the late eighties, the concept of civil society has experienced an *impressive renaissance*, becoming a critical concept in socialist societies. Civil society, conceived this way, is seen as "*the opposite of a totalitarian state, where the request for the establishment of civil society becomes a program of liberal and democratic transformation of these countries*."[8] Therefore, in

[4] Abraham Lincoln determined the democracy as *government of the people, by the people, for the people*. However it seemed clear, this implies different types of *government of the people*. *Government by the people* includes the idea of popular participation in government, while *government for the people* implies that the government must act in the public interest.

[5] Zgodić, Esad: *Multiverzum vlasti* [Multiverse of the government]. Fakultet političkih naukva Univerziteta u Sarajevu, Sarajevo, 2009. p.371.

[6] *Ibid.* 12.

[7] See: Habermas, Jürgen: *Javno mnenje* [Public opinion]. Kultura, Beograd, 1969.

[8] Ravlić, Slaven and Čepo, Dario: *Uvod u političku znanost* [Introduction to Political Science]. Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2014. p.194.

post-socialist societies, civil society means a special sphere of life in which "*various associations operate autonomously and beyond the reach of the state trying to raise civic awareness and activity of citizens, and to influence on the government.*"[9]

Finally, how can civil society be defined? Habermas argues that the institutional core of civil society consists of „more or less spontaneously formed associations, organizations and movements that take the echo of problematic social conditions found in private life areas, condensing it and with increased emphasis forwarding to the political public."[10] Hence, civil society is considered as "set of various registered humanitarian, educational, cultural intellectual-political and other associations which constitute a separate sector (civil sector) out of the state."[11] More specifically, civil society is consisted of non-profit, non-governmental and non-political organizations which were founded by citizens or legal persons, whose wish to act derived by the same interests, motives and aims.

According to current political theories where civil society is defined as a *social space* (including institutions and interaction in the field of culture, science, education, economy and civic initiatives), civil society is in contrast with the classical definitions. It is also an area where "there are new ideas, interests, institutions and initiatives for the overall development and progress of society."[12] As such, civil society nowadays became a vision and wish of all democratic societies, as a concept of establishing and fulfilling individual freedoms, which core is now not only made up by a system of associations, but also *interest groups*.[13] In this context, I want to introduce the dual concept of relations based on the model of bad state vs. good civic. Therefore, it is necessary to deal with this phenomenon and show that in practice civil society is not always the good and ideal-type of democratic segment. Liberal democracy, which will be discussed in the next chapter, failed to solve some problems, throwing them on the shoulders of civil society, which currently has too much power and responsibilities. Civil society began to get another, anti-democratic reflection which is not a nice, social movement, but its complete opposite.

The other side of the coin

[9] Ibid.

[10] Habermas, Jürgen: *Faktizität und Geltung* [Facts and Norms]. VS Verlan für Sozialwissenschaften, Frankfurt am Main, 1992. p.443.

[11] Ibid.

[12] http://www.enciklopedija.hr/Natuknica.aspx?ID=12023 (26 April 2015.)

[13] Before it comes to the formation of organizations of civil society, it is necessary that there is a specific common interest in the public sphere, which society share about a certain problem. Therefore, that individuals could raise civic awareness and activities to influence on the government, it is necessary that the aforementioned interest is specified through informal movements and groups, which can later the form of formal and registered organizations of civil society later. So, there is no objection that *interest groups* and *social movements* are seen as a part of civil society. In modern societies, *interest groups* are the most important connection between those who rule and those being ruled, becoming the most important in the mediation between the state and divided society.

However, this kind of citizen participation in civil society raises another question; when does civil become political again? In other words, "how are we to distinguish between political associations per se and the political activities of groups in civil society, from interest groups to religious bodies, which are intermittently mobilized in pursuit of political goals?"[14] Here, we have to deal with two challenges; first, with the lack of democracy, secondly, with the abuse of the role of civil society. Therefore, it seems that these two challenges are closely connected, one deriving from the other.

If we briefly return to Habermas and his concept of the importance of public sphere between society and the state, through which the *common interest is summarized* as a connective tissue, o basis of civil society, economic and structural changes today are leading to the fact that the public sphere is weakening. What does it mean? A key element of the public – *rational discussion of interested individuals* is being replaces by the world of mass media that support *leisure* and *political apathy*, striving to create public where it does not exist. The public sphere begins to serve as the 'hidden politics of interest groups'.

On the other hand, today's democracy, theoretically understood as *liberal democracy,*[15] beginning to develop again after the end of World War II, following the period of sustained expansion throughout the 20th century after the fall of communism, became the *predominant* political system of the world. The current crisis of democracy as liberal democracy, led by the ideological matrix of *neoliberalism*, is the crisis of its conceptual determination in the practical realization. Democracy and liberalism are not synonymous at all.[16]

Therefore, democracies need civil societies that use their democratic right to act *as the corrective of democratic system* and, in that way, show the flaws of the system. At the end of 1989, with the emergence of postmodernity, "*the arrival of the democracy of human rights indicated the rising influence of liberalism over democracy*."[17] Greater role and presence of civil society in fact demonstrates the inability of democratic institutions to deal with the spectrum of civil needs. As De Benoist alleges, the nation-state turned out to be increasingly ineffective in facing contemporary challenges, progressively losing all its *majestic values*, while a massive launch of a process of *individualization* in all arenas took

[14] Foley, Michael W. and Edwards, Bob: The Paradox of Civil Society. *Journal of Democracy*, Vol. 7 (1996), No 3., 38-52.

[15] Andrew Haywood in *Politics* outlined three main characteristics in the understanding of liberal democracy as the predominant political system of the world. *The first* one is that the liberal democracy is direct and representative form of democracy, because the political positions are gained through success at the regular elections based on formal political equality. *The second* bases of liberal democracy are the competition and ability to choose. They are achieved by political pluralism, tolerance to a wide range of different beliefs and by the actions of conflicting social philosophies and opposed political movements and parties. *Third*, in a liberal democracy the distinction between the state and civil society is set clear. It maintains by the existence of autonomous groups and interests, so on the market, or the capitalist organization of economic life.

[16] For example, in relation to ancient democracy, modern liberal democracy is based not so much on citizen participation in public affairs than on the universal rights of individuals and, in addition, that is no longer foreign, in its historical manifestation, to the ideology of progress. Democracy remains classically defined as consecrating the power of the people, but in reality, it is nothing more than the political regime since it became liberal and purely representative, consecrating the rise of the modern individual and the primacy of civil society over political authority.

[17] De Benosit, Alain: The Current Crisis of Democracy. *Telos*, Vol. 2011 (2011), No.156., 7-23.

place. The touchstone is no longer the sovereignty of people, but the sovereignty of the individual, defined by the ultimate possibility to cancel, collective power if necessary. This phenomenon corresponds to what Marchel Gauchet calls *the turn of democracy against itself.*

The state's inability is now being blamed by the very regime that actually led to the limitation of its role. Namely, the (post)modern era as the era of globalization now queries everything what is national, including sovereignty, making the economy transnational. *On the one hand*, the political sphere, together with all other dimensions of contemporary life is now a subject of economic rationality. Therefore, not only man is exclusively defined as *homo economicus*, but also all dimensions of human life are defined through market rationality, where the state openly responds to the needs of the market. Neoliberal rationality is extended to the state, and reflects the success of the state towards its ability to maintain and feed the market, binding the legitimacy of the state to the success of the market. *On the other hand*, the neoconservative rhetoric seeks to limit the role of the state and suppress it, where the crisis of the nation-state is evident, and whose role of providing protection to the citizens is now neglected through its primary engagement in the economy. Democracy is therefore limited by harsh economic logic and calculations, where great role and responsibility now lies in the hands of *civil society* being able to contribute, as a space where individuals act by the same interests, motives and aims.

Civil society, privileged as never before, became the motor of a new phase of the autonomous organization of social life. Paradoxically, the sovereignty of the people as a *collective body*, redirects to civil society as a *set of individuals,* which is nothing but an undefined form of collective body, although its nature is defined as "*a mobilized participant citizenry juxtaposed to dominant economic and state power.*"[18]

However, can civil society really deal with such challenges and responsibilities? Is not civil society *a shining example of democratic practice* and only a collective body that can easily turn into its *opposite?* In practice, civil society can also limit democracy because of its flaws. Civil society can act extremely undemocratic, referring to the failed democratic practices, also reflecting discontent against problems arising due to the consequences on the global market such as migrants, economic crisis, debt crisis, unemployment, poverty, etc., which can lead to the re-awakening of the ideals of racism, nationalism, chauvinism and radicalism. The accumulated problems of society that nobody cares about can go in two directions: either they can be directly linked to the will of the masses, or, through the will of the populists, it will become their will as well.

Therefore, on the following pages, the ways and circumstances will be identified under which civil society can be shaped by ochlocratic practices, and *vice versa*, when the practices of civil society become ochlocratic. Greater role and presence of civil society in fact demonstrates the inability of democratic institutions to deal with the spectrum of civil needs, which gives to the civil society greater powers, but also, greater impact of masses and the will of people on their activities.

Between demos and ochlos

[18] Cox, Robert W: Civil society and the turn of the millenium: prospects for an alternative world order. *Review of International studies*, Vol.25 (1999), No.1., 3-28.

There are also figuring other determinants of the *role of the people* and its will in their participation in decision-making process. The people are being looked upon with disdain, understood as unreasonable Vulgus.[19] Therefore, a special term was coined "to express contempt for the rule of vulgus: ochlocracy."[20] Ochlocracy is the term to describe "the direct rule of the mob or mass, or, perhaps, its effective ability to indirectly – but crucial – influences on the government."[21]

In the absence of democracy and the engagement of its actors, ochlocracy mimics itself in a willingness to appear as a democracy. Relying on demagogues and dictators, ochlocracy contains *democratic illusion*, where the *ochlos* (scum) is trying to show up like *demos* (political people). The notorious and homogeneous *people's will* between *demos* and *ochlos* is now put into question. The problem lies in the essence of democracy itself. Government by the people is an abstraction that basically means that the government is created by the will of the majority of people. But, does the will of the people really exist, or do only individuals have the will? In the discussion about ochlocracy, Zgodić states that "*there is no such* thing as the will of the people: since only individuals, persons, personalities, individuals, or human beings do, think, feel, dream"[22] and therefore there is "no such thing as a social individual, as a real social person which would possess the will and the collective prospective will, and produce a common spirit manifested, among other things, in the people's will."[23] Therefore, there is a thin line between the will of people as a democratic postulate, and unreasonable Vulgus, defined through ochlocracy, where his will is despicable.

Democracy or better said its lack therefore can produce ochlocracy and ochlocratic practices which exists at the same time with democracy. It must be noted that ochlocracy is not democracy. Demagogues use the democracy, and its lack to mobilize masses. Therefore, it is necessary here to examine two cases in which ochlocratic principles can be implemented and find their basis through civil society, and whether this phenomenon represents a threat for democracy. In the first case, the lack of democracy produces ochlocracy as civil society and civil society as ochlocracy. In the second case, lack of democracy leads to a new form of totalitarianism in the context of civil society and ochlocratic practices.

Ochlocracy as civil society

Since ancient time, wise people have said that the threat of democracy is *mob ruled*, or in other words, *ochlocracy*. Because of *the mass* that makes civil society, it should therefore not be seen as a *complete*, *clean*, *innocent* and *perfect* example of democracy, but with caution of influence of demagogues. It is especially convenient due to the fact that in liberal democracies civil society has big competencies and responsibilities. As an area where citizens are actively and free involved in all spheres of social actions, civil society can be closely related to ochlocracy, the direct rule of the mob or mass, or, perhaps, its

[19] Latin word for „the masses“
[20] Zgodić, 2009. p.371.
[21] Ibid.
[22] Ibid. 372.
[23] Zgodić, 2009. p.372.

effective ability to indirectly – but crucial – influences on the government. This is especially supported by the fact that the civil society is usually taken as a "political space where voluntary associations explicitly seek to shape the rules (…) that govern one or other aspect of social life"[24] seeking "radical transformations of the prevailing order."[25] Through democratic deficits, it is understandable that increasing number of citizens have considered civil society as a way to enhance public participation, consultation, transparency and accountability in global governance. As mentioned before, can civil society that uses its democratic right to act as the corrective of democratic system deal with such challenges and responsibilities?

Viewed as *a fuel for democratic practice,* civil society uses the power of mass media to create *the public* where it does not exist. A key element of the public – *the rational discussion of interested individuals* is being so replaced by *leisure* and *political apathy*. The inability of democratic institution to solve various problems of society, and mass media creating the public where it does not exist is beginning to serve to *the hidden politics of civil society*, and not as a link between society and the state where the *common interest* is the connective tissue. Here is a danger of civil society not only *becoming political,* but also *suitable to ochlocratic practices*.

Civil society as such, in its practices, has space for *undemocratic actions*, through which ochlocratic tendencies can find fertile ground for their realization. After all, why civil society that experiences success in the implementation of their goals in some areas by civil self-organization would not spread further their requests? The *will of people*, through civil society understood in this way, is now somewhat *infamous*; it is a *totalitarian fetish,* "*a demagogic excuse for autocracy and tyranny*."[26] Unlike *populous like demos* – the political community, vulgus is an illiterate political mass liable to demagogues.[27] Hence, ochlocracy as the rule of the general populace is democracy as the rule of the people spoiled by demagoguery, tyranny of the majority, and the rule of passion over reason. Ochlocracy is therefore a type of tyranny, held by crypto-practices, corruption, mediocrities etc.

Using the forms and methods of civil society, the mass as an *angry crowd* is trying to *deceive democracy*, using their principles to act undemocratically. On the other hand, the lack of democracy does not only make it impossible to *prevent the undemocratic practices*, but also allows demagogues and populists to *use civil society* that in the absence of democracy masquerade as democrats, speaking *in the name of people* what the people want to hear, but is overridden by arrogant elites or corrupt politicians.

Civil society as ochlocracy

Therefore, although various theoretical schools and courses tend to see the good side and the power on the side of democracy and freedom in civil society, researchers such

[24] Scholte, Ian Aart: "Civil Society and Democracy in Global Governance" CSGR Working Paper No. 65/01. January, 2001., p.6.

[25] Ibid.

[26] Zgodić, 2009. p.371.

[27] The term *vulgus*, as a pejorative for *majoritarianism*, is akin to the Latin phrase *mobile vulgus* meaning *the fickle crowd*, from which the English term *mob* was originally derived.

as Simon Chambers warns that "a large part of contemporary theory, however, fails to see the dangers that civil society can put to democracy."[28] Indeed, if civil society is an enough safe bridgehead to combat again nondemocratic regimes, what prevents it from being used for undermining democracy? Voluntary associations of civil society do not *ipso facto* have the promotion of democracy on their agenda. For example, some civic associations can employ underhanded tactics in the pursuit of special privileges of *private interests*. Other destructive groups such as racists, ultra-nationalist and religious fundamentalists can seek to suppress the democratic rights of others. But, that are not the only threats of civil society that can easily turn into its opposite.

Returning back to the discussion regarding the existence of *the will of the people*, in the context of civil society, democracy provides space and its lack the realization of "many civic initiatives which are motivated by some levels of intolerance, mistrust, xenophobia, hatred and readiness to use violence."[29] Therefore, a reference to civil society as a "basic element of the health of democracy, certainly cannot be used if there is no social consensus about basic values in order to harmonize the conflicting individual and group interests."[30] Well-ordered and successful democratic order depends not only on social relations established through civil society, but also by the *constitutional engagement* and activities of political and legal institutions. Keith Whittington therefore argues that "*civil society can for democratic institutions represent a threat as same as support*."[31]

The absence of social consensus about basic values civil society can act ochlocratic, misused and guided by unarticulated masses or demagogues and populists. Reese-Schäfer critically objects civil society, believing that the concept of civil society is in any case not unproblematic, making it in such circumstances possible to "*achieve full civil-social blockage of necessary reforms*."[32] With this comes the authoritarian internal structure of their actors. Therefore, excessive antistatic can certainly lead to "alienation from the political system, and thus, of political activity at all – in favour of a short-termed (…) engagement."[33]

Civil society activists are always the spokespersons *of the people*. With such practices of civil society, as a vision and wish of all democratic societies, their leaders masquerade as democrats speaking in the name of the will of people, although "*true democrats never use the term will of the people*".[34] By the will of the people, as a *totalitarian fetish*, demagogues use democracy and its lack to mobilize the masses: "populists see themselves as true

[28] Chambers, Simone and Kymlicka, Will: *Alternative Conceptions of Civil Society.* Princeton Univeristy Press, Princeton, 2002., p.101.

[29] Pavlović, Vukašin: *Civilno društvo i demokratija* [Civil Society and Democracy]. Udruženje za političke nauke Srbije i Crne Gore, Čigoja štampa, Beograd (2004) p.139.

[30] Ibid. 140.

[31] Whittington, Keith: Revisiting Tocqueville's America: Society, Politics, and Association in the Nineteenth Century. 21-32. In: Edwards, Bob – Foley, Michael W. – Diani, Mario (eds.): *Civil Society and the Social Capital Debate.* Tufts University, Hanover and London, 2001. p.23.

[32] Windfuhr, Michael: Der Einfluß der NGOs auf die Demokratie [The Influence of NGOs on Democracy]. 520-548. In: Merkel, Wolfgang – Busch Andreas (eds.): *Demokratie in Ost und West. Für Klaus von Beyme* [Democracy in East and West. For Klaus von Beyme]. Suhrkamp, 1999. p.542.

[33] Reese-Schäfer, Walter: Civilno društvo i demokracija [Civil Society and Democracy]. *Politička misao*, Vol. 41 (2004.), No.3, 65-79.

[34] Zgodić, 2009. p.371.

democrats, voicing popular grievances and opinions systematically ignored by the governments, mainstream parties and the media. Many of them favour direct democracy – political decision making by referendum and popular initiative."[35] Therefore, civil society through democratic system becomes ochlocratic, and subject to the *demagogues* and *populists*. Mobilizing the masses ochlocracy through civil society makes civil society ochlocratic.

A new type of totalitarianism?

Through civil society, ochlocracy as a form of tyranny "in the arrangements of its actors always mimics (…) to appear as a democracy."[36] Podunavac claims that it is in such nature "to ochlos (scum) represents as demos, and ochlocracy as democracy."[37] Manipulated civil society most likely "found in those transitional states that have previously functioned under centralized state bureaucratic rule but are currently taking steps to join the global community of democracies and are expected to demonstrate an active commitment to developing civil society."[38] Further, this means that civil society is losing their democratic potential; it is mimicked by particular interests, which are represented as common.

In modern democratic societies, populism is best seen as an appeal to *the people* against both the established structure of power and the dominant ideas and values of the society. This structural feature in turn dictates populism's characteristic legitimating framework, political style and mood. But, "anti-system mobilization is not enough by itself to identify populist politics, for that description would also take in the new social movements."[39]

Therefore, populists through the actors of civil society claim legitimacy on the grounds that they speak for the people, for the silent majority of ordinary, decent people, claiming to represent the democratic sovereign and not a sectional interest, "whose interests and opinions are (they claim) regular overridden by arrogant elites, corrupt politicians and strident minorities."[40] They appeals to the people in a style that is democratic in the sense of being aimed at ordinary people priding themselves on simplicity and directness. Such an ochlocratic phenomenon is seen through vulgus who "does not hide, is always displayed and shows the way it is (…) wants to be obvious and available to anyone."[41] And knowing that the power of the crowd is fickle and destructive, ochlocracy is therefore forced to operate and maintain through demagoguery and populist actions.

[35] Canovan, Margaret: Trust the People! Populism and the Two Faces of Democracy. *Political studies*, Vol.42 (1999), No.1, 2-16 p.2.
[36] Zgodić, 2009. p.376.
[37] Ibid.
[38] Miller, Chris, Howard, Joanna, Mateeva, Antoaneta, Petrov, Rumen, Serra, Luis and Marilyn, Taylor: Toward a Typology of Civil Society. 71-103. In: Enjolaras, Bernard – Sivesind, Karl Henik (eds.): *Civil Society in Comparative Perspective*. Emerald Group, Bingley, 2009. p.87.
[39] Canovan, 1999. p.3.
[40] Ibid. 5.
[41] Zgodić, 2009. p.372.

The experience of totalitarianism in the period between the two world wars affected the mass society theorists like Erich Fromm and Hannah Arendt look extremely negative towards the social movements. According to their view, "social movements reflect an escape from freedom and the attempt of alienated individuals to achieve security and identity by fanatical commitment to a target and obedience to the leader (mostly fascist)."[42] However, the mass through civil society can not only be mobilized towards undemocratic and dangerous ideologies, but it can focus its attention to other, irrelevant things for the common interests, actually legitimizing the existing order. Making some phenomena in society popular and attractive, masses through civil society and vice versa are creating attitudes and values, and the impact on public opinion. Ochlocracy is so omnipresent by the fact that the views of the masses are generally accepted as the dominant values of the society. Civil society therefore, through the ochlocratic practice is leading to the tyranny of majority as another type of totalitarianism.

Although there are such tendencies, ideologies of liberal democracies see *no threat in ochlocracy*, ignoring the threats of the rule of mindless masses, mobs, crowds, vulgus, comparing ochlocracy with political apathy, claiming that it is impossible that "citizens undergo large mobilizations and be transformed into a destructive power and rule of vulgus, mass, crowd etc."[43] What happens when the political apathy gets face in the form of a party, or political movement, or the ochlocratic aspirations subsume civil society? It is supported by the rise of populism in the Europe in the last few years, which has its final outcome in brining radical right-wing parties to power in several European countries. Here we also must not forget the indisputable fact that their support, among others came by local civil society.

Therefore, it is important to recognize *ochlocratic moments* in the society, preventing that civil society becomes an ochlocratic, populist apparatus, when democracy can very easily turn into its opposite.

Conclusion

After all, it can be concluded how the challenges that arise due *the lack of democracy* and *the abuse of the role of civil society* are not only closely connected, but also deriving one from the other. With the emergence of postmodernity, democracy is reduced and limited through *technocracy*, *bureaucracy* and *neoliberal rationality* in favor of harsh economic logic and calculations. Such an order, in which all dimensions of contemporary life are subject of economical rationality, is unquestionably *totalitarian by itself*. The total dominance of economic interests over the interests of the people is more and more evident. Thus, the democratic role of the people has been reduced mainly to the electoral process, where they are no longer able to discuss and make important political decisions in accordance to the common interest as before. In an order where liberal democracies failed to solve some problems of the postmodern era, they were now thrown on the shoulders of *civil society* which role is to contribute democracy. But although the great role and responsibility that now lies in his hands, there is often the

[42] Hejvud, 2004. p.533.
[43] Zgodić, 2009. p.378.

case where civil society by itself replaces the political activity of the people by passivity, leisure and political apathy, using the power of mass media to create *the public* where it does not exist, focusing the attention of the people to other, irrelevant things.

On the other hand, there is the challenge in which the will of the people is the reflection of a certain political atmosphere, confirming or negating it, while the civil society is understood as a tool which reflects the will of the people. Observed in this way, the role of civil society is to return the democratic role to the people, while on the other hand it can act extremely undemocratic, referring to the failed democratic practices. Because of *the mass* that makes civil society, it should therefore not be seen as a *complete*, *clean*, *innocent* and *perfect* example of democracy, but an anti-democratic reflection in which civil society is not anymore this nice, social movement, but the opposite, with caution of influence of demagogues. Civil society can now be closely related to ochlocracy, the direct rule of the mob or mass, where the accumulated problems of society that nobody cares about can go in two directions: either they can be *directly linked* to the will of the masses, or*, through the will of the populists*, which will become their will as well. The lack of democracy now does not only lead to totalitarian elements by itself, but it provides a space for demagogues and populists to masquerade as the promoters of democracy, this way carrying out undemocratic, ochlocratic practices. Civil society therefore, can also limit democracy because of its lacks, through the ochlocratic practice leading to the tyranny of majority as *another type of totalitarianism*.

Hence, political apathy together with ochlocratic aspirations can in the end have three outcomes. In the first one, it just *maintains the existing order*. In the second one, while pointing out that they are against arrogant elites and corrupt politicians, manipulated civil society through ochlocratic practices also helps *bringing populist elites to the power*. In the third one, ochlocratic practices through civil society can *bring radical right-wing parties to power*. In a such vicious circle, ochlocracy in democratic practices through civil society, is not as insignificant as liberal democracies says, seeing there no threat and comparing ochlocracy with political apathy, claiming that a mass mobilization of the mob is not possible.

Between two of those totaliratianisms, the one that occurs through the lack of democracy in the existing order, and the other that can arise as a consequence of the ochlocratic practices of civil society, the only solution is *true struggle for democracy*. But, one should be very careful at this point. To begin, we must underline the importance of recognizing ochlocratic moments and its forms, together with demagoguery and populism in the society, hence preventing that civil society becomes an ochlocratic, populist apparatus, where democracy can very easily turn into its opposite. Thereby, one should work on the return of civil decision-making in public social and political processes of the common interest by democratizing the existing order. Its mere democratization will actually restore the democratic role of the civil society, reducing its role and the possibility of its ochlocratic practices.

OVERVIEW OF THE CHANGES IN THE NEW CZECH CIVIL CODE

CONCERNING THE DEPRIVATION OF LEGAL CAPACITY

STAVINOHA VLASTISLAV*

Historical development of civil law in the Czech Republic

The new Czech Civil Code 89/2012 Sb.[1] ("CC") which is strongly influenced by the ABGB (Austrian Civil Code),[2] went into effect in the Czech Republic on 1st January 2014. This codex has been used in the Austrian part of the Austro-Hungarian Empire since 1812 and in Austria it is still (but with many amendments) in force. In the Kingdom of Hungary the ABGB was prevailed only indirectly and just near the Austrian border. However, in 1853 it came into effect in the whole country for almost 10 years.[3] In the Czech Republic this codex was invalidated and replaced by "the Middle Code of Civil Law"[4] in 1950. This followed the political change in Czechoslovakia in 1948, when the Communists' party became the main political power. In addition to social, political and cultural changes, the law was also created in compliance with the Communists' regime.

After the revolution of 1989, the main principles in civil law were changed.[5] The most important amendment No. 509/1991 Sb. claimed in § 1 paragraph 1 that "regulation of civil legal relationships shall contribute to the realisation of civil rights and freedoms, in particular to the protection of personhood and inviolability of ownership."[6] This principle gives an aim to civil law and makes it a tool to achieve higher purposes, thus, regulations of civil law cannot be self-serving any more.

If you take a look at civil laws in eastern post-socialist countries, you can see that there are still a lot of similarities resulting from socialism which controlled peoples' daily lives and limited their personal privacy. This is the reason why the Communists' government made a lot of changes in this field of law to support its power.

Deprivation of people of their legal capacity in the past

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1 Act No. 89/2012 Sb., Civil Code as amended. Accessible at: http://www.zakonyprolidi.cz/cs/2012-89

2 Act No. 946/1811 JGS., Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)

3 NESCHWARA, Christian. Geltung und Ausstrahlung des österreichischen ABGB im CEE-Raum. *Jus-alumni Magazin – 200 Jahre ABGB* [online]. 2011, no. 1, p. 15 [cit. 26. 8. 2015]. Accesible at: http://www.jus-alumni.at/media/jusa_1300084433.pdf

4 Act No. 141/1950 Sb., Civil Code

5 HURDÍK, Jan et al. *Občanské Právo Hmotné, Obecná část, Absolutní Majetková Práva.* 1st ed. Plzeň: Vydavatelství a Nakladatelství Aleš Čeněk, 2013.p. 26. 308 p. ISBN 978-80-7380-377-3.

6 § 1para 1 Act No. 509/1991 Sb.

First of all, I would like to to mention that during the Communists' era it was very often used to deprive people of their legal capacity. It means that all legal acts of people were invalid. Even buying an ice-cream or a loaf of bread was a legally wrongful act. § 10 paragraph 1 of the previous Civil Code said: "If an individual is completely unable to perform legal acts due to a permanent mental illness, the court shall deprive him or her of the capacity to act legally."[7] All legal acts were performed by the guardian instead of being performed by disabled people.[8] If the person performed a legal act, it was absolutely invalid and permission from the guardian afterwards was impossible. The Highest Court in decision R 7/1979 claimed that the person whose legal capacity was limited was able to enter into everyday contracts because those contracts did not endanger him and his rights and it was impossible for these contracts to be performed by other people (e. g. guardian).[9] The new Civil Code confirmed it. According to § 65 of the CC, such a legal act is only invalid if it causes harm to a person. The Czech organization League of Human Rights, which protects rights of people, estimates that before 2014 there were over 35 thousand people deprived of their legal capacity.[10]

The official reason was due to mental disease and to the desire to protect those disabled people from con artists. This mental disease does not have to be only temporary caused for example by drug or alcohol abuse.[11] In many cases the judge's decision was based on correct expert opinions because these people were really ill. But there were also some people who were unwanted or who fought against the regime. The deprivation of their legal capacity was the best way to punish them. It actually means that the civil law was politically abused.[12] After the fall of the Communists' regime we have had rule of law again, so nobody is deprived of his legal capacity for political reasons. Nevertheless, we also have to consider the rights of mentally disabled people. They are still people living in our society who have the right to a peaceful life. To be independent in basic contract law, in my opinion, is part of this right. It is incredible that this is still possible in many eastern countries, for example in Slovakia.[13] The Czech Republic and Slovakia used to be one country (Czechoslovakia) with a common legislative body. After the break-up in 1993 many laws have remained in force but both countries have had the right to modify them. The Civil Code from 1964 was in fact the same codex in both countries also containing mostly the same socialist principles. In Slovakia this Civil Code No. 40/1964 Z. z. is still in force.

The new legal adjustment

[7] § 10 para 1 Act No. 40/1964 Sb., Civil Code

[8] ŠVESTKA, Jiří et al. *Občanský Zákoník, Komentář*. 10th ed. Prague: C. H. Beck, 2006. p. 91. 1465 p.

[9] LAVICKÝ, Petr et al. Občanský zákoník: komentář. 1st ed. Prague: C.H. Beck, 2014, p. 290, 2380 p. ISBN 9788074005299.

[10] Soudy musí vyřešit více než 35 tisíc případů lidí, kteří v minulosti přišli o svéprávnost. In: *llp.cz* [online]. [cit. 27. 4. 2015]. Accessible at: http://llp.cz/2014/01/soudy-musi-vyresit-vice-nez-35-tisic-pripadu-lidi-kteri-v-minulosti-prisli-o-svepravnost/

[11] Lavicky et al.: op. cit. p. 289.

[12] Svestka et al.: op. cit. p. 91.

[13] § 10 para 1 Act No. 40/1964 Z. z., Civil Code.

Nowadays, according to § 55 paragraph 1 of the CC, only the limitation of legal capacity is possible and the explanatory memorandum highlights the temporariness of this legal restriction (no more than 3 years but extension is possible).[14] When something changes, i.e. the seriousness of the illness, the judge must revise his decision immediately.[15] It must only be made in the interests of the concerned person and with full recognition of his personal rights. It is an extraordinary provision and it can only be used when milder and less restrictive measure would not be enough. The milder measure could be for example assistance with decision making (§ 45 CC) or representation by a household member (§ 49 CC). However, this instrument should only be used in cases concerning the ordinary daily matters of the concerned person (for example utility payments). In more difficult cases the guardian named by the court must act.[16]

The guardian should be a person, who is a close relative or someone who is interested in the well-being of the disabled person.[17] The court cannot issue the decision regarding to the limitation of the legal capacity before naming the guardian for this person. The Communists' regime did not do this because it was a very useful instrument for restraining political opponents.[18] The guardian has the duty to inform the disabled person in due time of intended important measures relating to himself or his assets and also has to comment in relation to such measures as well as to other measures within a reasonable period of time.[19]

Only courts are authorized to limit the legal capacity of people considering their opinion. The CC also changed that the expert´s opinion is not enough and the judge should "see the person", for example via interrogation. Although the expert´s opinion is really important evidence in legal proceedings regarding the limitation of a person´s legal capacity, it cannot be the only evidence and shall not replace facts.[20] In addition, it is also necessary to become familiar with the behaviour of the person in question regarding how he lives, how he cares for his property, etc.[21]

The judge can decide about the limitation of legal capacity using negative enumeration. In this case the judge may specify which legal acts performed by this person are legally invalid. The performance of other legal acts by this person is not limited. It means that if the court does not specify anything concerning the entering into marriage, the person has full freedom to use this right.[22] It is forbidden to respect the so called lucidum intervallum, which is the situation, when the person is temporarily given the capacity to decide sensibly because his mental disease has some gap.[23]

[14]Důvodová zpráva k zákonu č. 89/2012 Sb. p. 59, 598 p. Accessible at: http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf

[15] § 60 Act No. 89/2012 Sb., Civil Code

[16] Lavicky et al.: op. cit. p. 277.

[17] Svestka et al.: op. cit. p. 250.

[18]Judgement of the Czech Constitutional Court from 7. 12. 2005 Nr. IV. ÚS 412/04. Accessible at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=48373&pos=1&cnt=1&typ=result.

[19] § 466 Act No. 89/2012 Sb., Civil Code

[20]Judgement of the Czech Constitutional Court from 18. 8. 2009 Nr. I. ÚS 557/09. Accessible at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=63411&pos=1&cnt=1&typ=result.

[21] Svestka et al.: op. cit. p 90.

[22] Lavicky et al.: op. cit. p. 291.

[23] Svestka et al.: op. cit. p. 238.

Because of the Communists' legal history of abusing limitation of legal capacity and human rights, the limitation of personal legal capacity is a very controversial encroachment on human integrity. Fundamentally, the aim of this legal institution is to help people, not to limit them. It is created for people with deficiencies, in comparison with healthy people. Therefore, the law compliments this deficiency with guardianship in order to safely take part in civil law relations, instead of leaving them alone and vulnerable.

The Czech Constitutional Court ("CCC") declared that it can only be used considering human rights, especially Article 1 of the Universal Declaration of Human Rights:" All human beings are born free and equal in dignity and rights."[24] The CCC highlighted that the focus of the Czech legal system is the individual and the state should protect his rights and especially his dignity. The Czech Republic was founded on respect for human rights and on principles of civil society.[25] According to Art. 10 paragraph 2 of the Charter of fundamental rights and freedoms, everyone has the right to be protected from any unauthorized intrusion into her private and family life.[26] The most important thing, which has influence on the decision, is the interest of the person.[27]

Legal acts which can be made with or without guardians, with the example of judgments in courts of the Czech Republic

Decision No. IV.ÚS 1499/13 (The Constitutional Court)[28] – avoiding material and financial harm

The limitation of legal capacity is allowed if the main purpose is to avoid material and financial harm caused to a disabled person. Ms. Landštofová was a pensioner with mild cognitive impairment. She spent a lot of money and although her pension was about 12.000 CZK (≈ 444 EUR), her debts were more than 230.000 CZK (≈ 8.518 EUR). Because of these reasons the court limited her legal capacity with the specified amount of 1.500 CZK (55 EUR) a week. However, her other private and public rights were not affected by this decision. Therefore, she could for example take part in the elections or get married without permission issued by a guardian.

Decision No. IV. ÚS 3102/08 (The Constitutional Court)[29]- suffrage of people deprived of their legal capacity

[24]Article 1 of the Universal Declaration of Human Rights. Accessible at: http://www.un.org/en/documents/udhr/#atop

[25] Judgement of the Czech Constitutional Court from 7. 12. 2005 No. IV. ÚS 412/04. Accessible at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=48373&pos=1&cnt=1&typ=result.

[26] Art. 10 paragraph 2 RESOLUTION of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a part of the constitutional order of the Czech Republic No. 2/1993 Coll. Accessible at: http://www.usoud.cz/en/charter-of-fundamental-rights-and-freedoms/

[27] Lavicky et al.: op. cit. p. 275.

[28] Judgement of the Czech Constitutional Court from 23. 7. 2013 No. IV. ÚS 1499/13. Accessible at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=80046&pos=1&cnt=1&typ=result.

A plaintiff deprived of his legal capacity was complaining that all people in his position did not have suffrage. It is the basic human right to vote for our representatives and to be voted for. According to his opinion, it is unjust when all people deprived of their legal capacity are in general unable to take part in elections, although the plaintiff has been interested in politics for a long time and he regularly reads newspapers.

The Constitutional Court claimed that it is necessary to guarantee electors with the ability to understand the meaning, purpose and impact of elections and the capacity to make an intellectual decision. On the other hand, there were over 23 000 people deprived of their legal capacity in 2007 but only 3 900 were limited. It shows the sweeping decision making by courts. The Constitutional Court summarized that the deprivation of legal capacity is still a legal reason for deprivation of suffrage, however, courts should use this instrument less frequently and the limitation of legal capacity should be preferred.

Decision No. 9 Ads 23/2014 (The Supreme Administrative Court)[30]- obligatory legal guardianship for doing some procedural acts

According to § 3032 CC, all people who were deprived of their legal capacity before 2014, now have, without any judicial decision, i.e. ex lege, the capacity of doing everyday legal acts. However, the old age pension is mostly the only source of money that pensioners have, although, it is not a large amount of money. Dealing with that is not an everyday legal act and disabled people need to have legal guardian to do procedural acts and start the proceeding against the provider of their old age pension.

Conclusion

To ensure rights of disabled people and avoid nonsense in legal theory, § 64 of the CC was adopted, claiming that the decision to limit the legal capacity of a person does not relate to doing everyday legal acts.[31] They can have for example some pocket money which they can spend on whatever they want.[32]

This is basically the same as in the Austrian Civil Code (ABGB). If a disabled person in Austria enters into a legal transaction within the scope of the guardian´s sphere of influence, but it is relating to a minor matter of daily life, such a legal transaction is effective.[33]

I personally believe that the new regulation of depriving people of their legal capacity reflects individuality of a person and supports his rights against abuse or the

[29] Judgement of the Czech Constitutional Court from 12. 7. 2010 No. IV. ÚS 3102/08. Accessible at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=66800&pos=1&cnt=1&typ=result

[30] Judgement of the Czech Supreme Administrative Court from 26. 3. 2014 No. 9 Ads 23/2014. Accessible at: http://www.nssoud.cz/files/SOUDNI_VYKON/2014/0023_9Ads_14_20140327110106_preveden o.pdf.

[31] § 64 Act No. 89/2012 Sb., Civil Code

[32] Judgement of the Czech Constitutional Court from 23. 7. 2013 No. IV. ÚS 1499/13. Accessible at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=80046&pos=1&cnt=1&typ=result.

[33] § 280 para 2 Act No. 946/1811 JGS., Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)

sweeping decision adopting by courts more. However, the Czech non-governmental organisation "League of Human Rights" criticizes the decision making of courts, when they limit the legal capacity of people in the way of using some form. In consequence of that form the disabled people are not allowed to do almost any kind of legal act, which is the same situation as before.[34] I suppose that the courts should get used to new legal regulation and take more account of individual need of legal protection.

[34] Komplexní úprava opatrovnictví a podpůrcovství pořád chybí. In: *llp.cz* [online]. [cit. 11. 9. 2015]. Accessible at: http://llp.cz/2015/03/komplexni-uprava-opatrovnictvi-a-podpurcovstvi-porad-chybi/