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BARRIERS TO THE PROVISION OF SERVICES AND JUSTIFICATION

ILDIKÓ KOVÁCS*

In the present study two types of service activity are discussed: provision of services in the strict meaning of the term as defined in Article 56 Treaty of the Functioning of the European Union (hereinafter 'TFEU'), this type is in other words 'cross border service provision' on one hand, and provision of services within the framework of establishment on the other. In the latter case the service provider provides the service by making use of the freedom of establishment enshrined in Article 49 TFEU.

Barriers to the freedom to provide services as defined in Article 56 TFEU cannot be described separately from the freedom of establishment. The barriers to the two basic freedoms are closely related. If there are barriers to the provision of services within the framework of establishment, in the majority of cases it affects cross border service provision as well. The close logical connection is also reflected in the structural composition of the TFEU, where the provisions on the freedom of establishment are immediately followed by the provisions on the freedom to provide services. Furthermore, based on Article 62 TFEU provisions concerning the possibility of justification of restrictions on the freedom of establishments, issuing directives and companies (Articles 51-54 of the TFEU) also apply to the freedom to provide services.

Finally, reference must be made to *Directive 2006/123/EC on services in the internal market*¹ (hereinafter the 'Services Directive' or 'Directive'), the scope of which also extends to both types of services, namely services within the framework of establishment and cross border service provision. Thus, the Directive also interprets the service provision in two dimensions: as i) service provision in the framework of establishment and as ii) the freedom of cross border service provision.²

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¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006, 36-68.

² Recital (5) of the Services Directive: '[...] Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services [...].'



The present study also interprets service provision as the Directive does, in the framework of establishment and ‘in the classical meaning’ as cross border service provision. In the case of a service provided within the framework of the freedom of establishment, the service provider provides the service making use of the freedom of establishment ensured by Article 49 TFEU, while in the case of cross border service provision it carries out its activity based on Article 56 TFEU. We talk about economic activity in both cases, but while in the case of service provision in the framework of establishment the service provider carries out its activity permanently - establishing itself in another member state -, in the case of the free provision of services (cross border services) the service provider provides its services only in a temporary nature for a citizen established in another member state.

The present study tries to give a picture on barriers to services and their justification focusing mainly but not exclusively on the Services Directive.

The Direct Applicability of Primary Law and the Services Directive

The primary source of the freedom of establishment and the freedom to provide services is the TFEU.³ The direct effect of the provision on the freedom to provide services was already stated by the European Court of Justice (hereinafter the Court or the ECJ) in its early case-law, in case *Van Binsbergen*,⁴ and has been applied continuously since then. The direct applicability of the provision on the freedom of establishment had already been declared by the ECJ in case *Reyners*⁵ preceding the *Van Binsbergen* case. Thus the decisions in the two cases referred to made it obvious that both the freedom of establishment and the freedom to provide services are freedoms at the infringement of which the persons entitled can directly refer to the provisions of the TFEU before their national courts.

In order, however, to fully realise the freedom of establishment and the freedom of service providers to provide services, the harmonisation of the national laws of the individual member states had become necessary. This was the idea behind the creation of the Services Directive. Recital 6 of the Directive underlines that barriers to the freedom to provide services cannot be eliminated on a case by case basis, relying exclusively on the direct application of the provisions of the Directive, the elimination of barriers requires a systematic harmonisation of the legal systems of the member states.⁶

³ As to the early development of the freedom of services and its legislative history, see Steindorff, Ernst: Freedom of Services in the EEC. *Fordham International Law Journal*, Vol. 11 (1987) Issue 2, 347.

⁴ Case 33/74 *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, [27].

⁵ Case C-2/74 *Reyners v. Belgian State* [1974] ECR 631, [32].

⁶ Recital (6) of the Services Directive: “Those barriers cannot be removed solely by relying on

The Directive was adopted in 2006 following several years of preparatory work, and member states were to adopt the provisions of the Directive into their legal systems by 28 December 2009.⁷ Prior to the adoption of the Directive there had been fierce political debates as to which member state's law shall apply to the service provider in the case of cross border service provision (Art. 56 TFEU), *either the law of the member state where it has established itself and from which it provides the service (the country of origin principle) or the law of the country where it provides its service temporarily (the 'host state' principle)*.⁸ Finally, this latter principle prevailed and is reflected in Article 16 of the Directive; nevertheless, political compromise left its traces in the not entirely coherent, rather complicated provisions of the Directive that also contains several exceptions.⁹

In the end a comprehensive and horizontal, no service industry-specific Directive was delivered. The scope of the Directive extends to services provided within the framework of the freedom of establishment and cross border services alike, involving thus both the freedom of establishment and the freedom to provide services. The Directive, on the other hand, excludes from its scope several service industries, and the area of taxation does not belong under its scope either.¹⁰ On the basis of Article 3 the Directive is not applicable in areas regulated by other community legal act either. Not taking into account the excluded industries and areas the Directive covers more than

direct application of Articles 43 and 49 of the Treaty, since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services.”

⁷ As to implementation in member states, see Stelkens, Ulrich – Weiß, Wolfgang – Mirschberger, Michael (eds.): *The Implementation of the EU Services Directive – Transposition, Problems and Strategies*. T.M.C. Asser Press, The Hague, The Netherlands, Springer, 2012. On 14 March 2016, the European Court of Auditors (ECA) published its special report No 5/2016 entitled *'Has the Commission ensured effective implementation of the Services Directive?'* (hereinafter: ECA's report). The ECA's report gives a comprehensive picture on the implementation of the Services Directive but its special focus concerns the Commission's obligation to ensure the implementation of the Directive. In this report the ECA stated that only eight member states implemented the Directive by the end of 2009 (see point 19, p. 14). http://www.eca.europa.eu/Lists/ECADocuments/SR16_05/SR_SERVICES_EN.pdf.

⁸ See: Craig, Paul – de Búrca, Gráinne *EU Law – Text, Cases and Materials*. Oxford University Press, fifth ed., 2011. pp. 813-817.

⁹ Article 17 of the Services Directive.

¹⁰ The Directive applies the 'negative approach' and mentions only those areas which it does not cover (see Articles 2 and 3 of the Services Directive). The Directive shall not apply to e.g. financial services, electronic communications services, transport services, healthcare services, audiovisual services, gambling, social services, private security services.

half of the service industry, thus it has great significance from the point of view of the regulation of the internal market.¹¹

It follows from the above that if an opinion shall be adopted in the question whether a certain measure of a member state infringes the freedom to provide services, the provisions of the TEU and the TFEU and the provisions of the Services Directive govern, together with the EU laws governing the given activity specifically or horizontally (e.g. Directive 2005/36/EC¹²).

Barriers to Services

With attention to the fact that the provision of services can also be realised in a way that the service provider settles in another member state in order to provide service there, or in a way that it does not make use of its freedom of establishment and provides its service from „home”, its own member state to another member state, barriers can vary. It may happen that a given member state measure is a barrier to both types of service provision simultaneously. At the same time there are cases when there is a barrier only to one or only the other type of service. Thus it needs to be examined in both cases separately whether the given national measure serves as a barrier to the freedom of establishment, the cross border service provision or both at the same time.

Due to their nature some restrictions have a more disadvantageous effect on those who provide services cross border, since these barriers can essentially be interpreted only referring to these service providers – an example for this is if a member state prescribes an establishment in the given state. This particular prescription affects those who provide cross border services extremely disadvantageously, since due to its effect it is suitable to force economic players to establish, thus depriving them of their freedom granted to them within Article 56 TFEU. The opposite of this restriction, when a member state prohibits the service provider from creating several establishments on the territory of the country, makes those service providers suffer who make use of their freedom of establishment.

The absolute common element that member states need to apply in the case of both types of service provision, however, is the prohibition of discriminatory requirements based on citizenship (registered office), the positive content of which is represented by the principle of equal treatment. It means economic players wishing to provide services either in the framework of establishment or cross border service provision should be

¹¹ For the data, see: Corugedo, Emilio Fernández –Ruiz, Esther Pérez: *The EU Services Directive: Gains from Further Liberalization* [IMF Working Paper (WP/14/113), International Monetary Fund 2014], 3. It is worth noting that the authors characterise the implementation of the Services Directive as „challenging and half-hearted” (Ibid. 3).

¹² Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. OJ L 255, 30 September 2005, 22-142.

able to do so with the same conditions the given member state prescribes for its own citizens.

The main barriers to the freedom to provide services are discrimination based on citizenship (registered office) and the violation of the principle of equal treatment. The violation of the principle of equal treatment is established on one hand through applying the same rule to persons in a different situation, or through applying different rules to persons being in the same situation.¹³

Article 49 TFEU and the last paragraph of Article 57 appears to prohibit only discrimination based on citizenship. However, the case law of the ECJ highlights the fact that the aim of the Treaty is the creation of a single market which can only be realised if not only barriers based on citizenship and establishment are removed from the free movement of services but all barriers are eradicated. The free movement of services can be impeded not only by national regulations that make the provision of a certain service dependent on the fact whether the provider of the service is the citizen of the given member state or whether they have an establishment in the given state, but by other, theoretically any national regulation prescribing a barrier can impede the provision of service.

In case *Grupo Itevelesa SL and others*¹⁴ the ECJ repeatedly held that Article 49 TFEU prohibits all national measures suitable to disturb the exercise of the freedom of establishment or that make it less attractive. The notion of barrier includes measures passed by the member state which – although they are to be applied free of discrimination – influence businesses of other states in their market access, thus they impede trade within the Union.

In order to decide, therefore, whether a given measure is a restriction on the freedom of services, the only aspect to be taken into consideration is whether the measure has the – either real or possible – potential to impede trade within the EU, that is, whether it can make the activity of service provision in a certain state less attractive for service providers. The fact that the measures serving as barriers can be justified by public interest is a different question.

As a first step a position needs to be adopted invariably whether the given measure is potentially suitable to jeopardise the internal market of the EU and only then can the necessity and proportion of the barrier be examined.

The restriction on service provision can theoretically be any member state measure, whether it is a regulation, some other provision (e.g. the regulations of chambers) or inappropriate application of the law. The barrier is typically created by the member state on the territory of which the service provider wishes to provide the service. However, it may also happen that the service provider is impeded in its economic

¹³ Case C-390/96 *Lease Plan Luxembourg v. Belgische Staat* [1998] ECR I- 2553, [34]; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, [115].

¹⁴ Case C 168/14 *Grupo Itevelesa and Others* [2015] not yet published, Judgement of the Court 15 October 2015 [67].

activity in another member state by the very member state it is established in. It also counts as a barrier if the member state impedes the recipient to access services in another state (the so-called passive freedom to provide services).

In case *Watts*¹⁵ the Court found a regulation of the United Kingdom to infringe Article 56 TFEU that primarily infringed the freedom of the recipient of the service. The complainant of the case is Mrs. Watts, resident of the United Kingdom, who travelled to France to undergo a medical operation in a French health institution, an operation which she could have received only after a long time spent on the waiting list in the United Kingdom, however, her medical condition necessitated the operation to be performed as soon as possible. The regulations of the United Kingdom prescribe that a prior authorisation must be obtained for a refund to be awarded after an operation carried out abroad. Mrs. Watts nevertheless did not apply for the prior authorisation for the treatment abroad due to the lengthy authorisation procedure and her medical condition. Subsequently she asked the authorities of the UK to reimburse her for her related medical costs but due to the lack of prior authorisation she was denied it. The ECJ decided that according to Article 49 (now Article 56 TFEU) Mrs. Watts received a cross border service.

The Court repeatedly found that the freedom of providing services is infringed by all national legislation that hinders service provision or making use of the services between member states. At the same time the Court decided the practice of a member state to prescribe compulsory prior authorisation for the reimbursement of the costs of a medical treatment abroad does not in itself preclude the freedom of providing services, if its justification is recognised in the Treaty and if it also satisfies the requirement of proportionality. The ECJ held that the authorisation system of the UK presents a barrier to the freedom to provide services because it provides authorities a discretionary power not properly defined by legislative guarantees, thus it makes patients unsure of making use of services provided in another member state or even prevents them from it. The Court therefore concluded that the system of authorisation may pose a barrier to the freedom of providing services both in the case of patients and service providers abroad.

The question arises whether the infringement of the freedom to provide services can be established in the case of acts of private organisations or private persons besides member state measures, that is, whether the provisions of the TFEU regulating the freedom to provide services has a horizontal effect.¹⁶ Regarding services provided on the basis of the freedom of establishment the decision of the ECJ in case *Viking Line* held that it is adequate that the service provider refers to Article 49 TFEU in the case of the demonstrative acts of trade unions.¹⁷

¹⁵ Case C 372/04 *Watts* [2006] ECR I-4325, [94] [98] [113] [118].

¹⁶ See, Craig-de Búrca: *op. cit.* 767-768.

¹⁷ Case C 438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779 [61] [66].

Summarising the above it can be concluded that the barriers to the freedom of the provision of services can be realised in several forms and ways, through the measures of a state institution or any other institution with public authority, as well as through acts of private organisations. There can also be a barrier if the measure is not discriminative on a citizenship (registered office) basis, however, the most drastic form is discrimination based on citizenship (registered office).

There is an infinite number of services the range of which is constantly increasing with the development of society. Similarly, there is an ever increasing range of measures that represent barriers. The Services Directive on the other hand contains provisions that define particular types of barriers, the so-called prohibited requirements and requirements to be evaluated. The barriers defined by the Directive can be divided into two main groups: prohibited restrictions (Article 14) and restrictions to be evaluated (so-called 'requirements to be evaluated'), and within this the Directive regulates the requirements restricting the establishment of service providers (Article 15) and the requirements restricting the free provision of services (cross border provision of services) (Article 16) separately.

Prohibited Requirements in the Directive

As their name suggests, prohibited requirements represent barriers that, based on the case law of the ECJ, are the most serious barriers to service provision in the framework of establishment, that is why their application is permitted under no circumstances and member states need to consider eliminating these barriers also in industries that do not belong under the Services Directive.¹⁸ Among these barriers there are the direct and indirect forms of discrimination based on citizenship – in the case of companies based on registered office. A direct and explicit discrimination is realised if the member state makes the provision of the service subject to citizenship. It can refer not only to the citizenship of the service provider but their employees as well, and in the case of companies to the citizenship of their owners (members of their supervisory or management boards). An indirect form of discrimination is e.g. the prescription of the requirement of residence.

A prohibited requirement is if a member state makes it a precondition to the operation of a service provider that it shall not be established in any other member state or that it shall not have membership of a professional body in another member state.

It is considered to be a very strong therefore prohibited requirement if the member state makes it a precondition to the activity of the service provider that the service provider shall principally be established on the territory of the given member state, or if

¹⁸ Handbook on the implementation of the Services Directive, p. 28.

http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf.

the member state restricts the right of the service provider to determine the form of its secondary establishment (subsidiary, branch, office).

Another prohibited requirement is when the prerequisite for the provision of the service is member state reciprocity, the obligatory economic test of the service provider. The requirement to provide financial guarantee is not prohibited, what is more it is desirable in several instances, since it aims at creditor protection, nevertheless, the regulation that prescribes that a financial guarantee can only be accepted if it is provided by a service provider established in a certain member state is considered to be prohibited.

Although the prohibited requirements are to be found in the part of the Directive on the freedom of establishment, the cases listed in Article 14 affect not only those providing service in the framework of establishment but also cross border service providers.

The prohibited requirements of Article 14 are based on the case law of the ECJ, several provisions of the Directive are the codification of the case law of the Court. After the adoption of the Directive relatively few decisions were made as to the interpretation of the Directive.

One of these is the decision of the Court in the *Rina case*¹⁹ that refers to the possible justification of the prohibited requirements listed in Article 14. The activity of the companies belonging to Rina holding was certification in Italy. According to Italian law certification activity can only be carried out by companies the registered office of which is located in Italy. The ECJ held that the requirement concerning the location of the registered office infringes Article 14 (1) of the Directive and at the same time the provision of Article 14 (3) that prohibits the choice between a principal or a secondary establishment. The Italian government held that the prohibited requirements listed in the Directive can also be justified since Article 52 TFEU, that is, primary law serves as a basis for this, consequently the provisions of the Directive cannot be interpreted differently either. The Court did not agree with this standpoint and decided that the exclusion of the possibility of justification is not contrary to Article 52 of the TFEU. In its argumentation it referred to the fact that the Directive was created exactly because the case-by-case enforcement was not an effective means of the protection of the basic freedoms. The provisions of the Directive themselves are based on primary law, the case law of the Court, thus the interpretation excluding the justification of prohibited requirements is in line both with the TFEU and the objective of the Directive.²⁰ The argumentation of the Court in *Rina case* was confirmed in case *Commission v. Hungary* (so-called '*Cafeteria case*') as well.²¹

¹⁹ Case C 593/13 *Rina Services and Others* (not yet published), Judgment of the Court (Grand Chamber) of 16 June 2015.

²⁰ Ibid. [40].

²¹ Case C-179/14 *Commission v. Hungary*, not yet published, Judgment of the Court (Grand Chamber) of 23 February 2016, [45-47].

Requirements to Be Evaluated in the Directive

Article 15 (2) and Article 16 (2) of the Directive lists the restrictive cases, the so-called 'requirements' of which member states must notify the Commission in a so-called notification procedure from 28 December 2009.²² The requirements mentioned in Article 15 typically infringe the freedom of establishment, while the requirements listed in Article 16 basically restrict cross border services. Article 15 (2) lists the following restrictions:

- a) quantitative or territorial restrictions,
- b) the requirement of a specific legal form of a service provider,
- c) requirements which relate to the shareholding of a company,
- d) the reservation of access to the service activity to particular providers,
- e) a ban on having more than one establishment in the territory of the same State,
- f) requirements fixing a minimum number of employees,
- g) fixed minimum and/or maximum tariffs for service provision,
- h) an obligation on the provider to supply other specific services jointly with its service.

In case *Grupo Itevelesa* the ECJ held that the Spanish regulation that prescribed that a minimum distance between technical checkpoints and the market share of service providers is a prerequisite of authorisation restricts the freedom of establishment.²³

It qualifies as a restriction of legal form if provision of service can only be carried out by certain types of legal persons or only legal persons or only natural persons. In case *Commission v. Hungary* ('Cafeteria case') the ECJ decided that the prescription of company form, and within this the prescription of a certain form of company infringes the freedom of establishment and the freedom to provide services alike.²⁴

The prohibition of several places of establishment is similar to the prohibition expressed in Article 14 (2) of the Directive, but while the latter potentially prevents the service provider from establishing in the given member state and providing service there, the prohibition in Article 15 does not prohibit the service provider from establishing but restricts them from providing their service from several establishments within the member state.

The requirement fixing a minimum number of employees imposes wage costs on the service provider thus it is suitable to restrict the service provider in choosing the

²² Article 15 (7) and Article 39 (5) of the Services Directive. As to the deficiency of the notification obligation, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Upgrading the Single Market: more opportunities for people and business* [Brussels, 28 October 2015, COM (2015) 550 final] (hereinafter: Communication). See point 4.2: 'Improving the delivery of the Services Directive by reforming the notification procedure', pp. 17-18.

<https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-550-EN-F1-1.PDF>.

²³ Case C 168/14 *Grupo Itevelesa and Others*, [84].

²⁴ Case C-179/14 *Commission v. Hungary*, [63].

member state applying this kind of prescription as the place it provides its services from.

The obligation of the service provider to provide the recipients of the service other services besides its main service (e.g. a customer service office) is also a burden on service providers. The aim of provisions containing such restrictions is usually consumer protection.

Article 16 (2) of the Directive list further barriers with an illustrative and non-exhaustive nature that typically affect cross border service providers. These restrictions include:

- a) an obligation to have an establishment in their territory;
- b) an obligation on the provider to obtain an authorisation including entry in a register,
- c) a ban on setting up infrastructure (e.g. an office);
- d) the application of specific contractual arrangements;
- e) an obligation on the provider to possess an identity document;
- f) requirements which affect the use of equipment and material,
- g) provisions that may restrict the recipient of the service from making use of the cross border service.

The most frequently applied restriction from the above is the obligation to obtain an authorisation or entry in a register, thus the Directive devotes a specific section to the requirements for systems of authorisation.

In case *Commission v. Portuguese Republic*, the Committee launched an infringement procedure because Portugal prescribed a stringent system of authorisation for construction services which was discriminative against cross border service providers. In the authorisation procedure those service providers who were established in Portugal were to fulfil the same requirements as those providing cross border services. The Court held that the Portuguese system of authorisation infringes the freedom to provide services because it does not take into account the fact that the activity of providers providing cross border services had already been authorised by their own member state, thus the Portuguese system of authorisation is a double burden on construction companies providing cross border services. The Court – similarly to the Watts case – repeatedly referred to the fact that the system of prior authorisation can only be justified if it contains non-discriminatory, objective and predictable elements to avoid the arbitrary consideration of authorities. During the procedure Portugal claimed that the reason for the stringent regulations is consumer protection, the safety requirements of construction works and environment protection. The Court acknowledged that these reasons are theoretically suitable to introduce measures restricting the freedom to provide services, but it did not examine them more closely because it held the strictness of regulations disproportionate already.²⁵

²⁵ Case C-458/08 *Commission v. Portugal* [2010] ECR I-11599, [89] [99] [107].

Justification for the Restrictions, Necessity and Proportionality

The freedom of establishment and the freedom to provide services cannot be restricted as a matter of principle, however, they are not granted absolute protection, Articles 51 and 52 TFEU contain the reasons that make it possible to justify member state restrictions. In reality, Article 51 TFEU does not contain a justification possibility but it exempts member states from their obligation to apply the provisions for basic freedoms in the case of activities related to the exercise of public power as well.²⁶ The Court has argued about the conditions necessary for an activity to be recognised as the exercise of public power in several decisions. In accordance with consistent case law a basic characteristic of the exercise of public power is the discretionary power of decision, the power of assessment and the possibility to impose sanctions.

In case *Rina Services* the ECJ held that the activity of the certifying organisations does not constitute an exception to the freedom of establishment because the certifying private entities do not have decision-making powers, they carry out their control activity under direct state supervision, thus their activity does not constitute a direct and specific connection with the exercise of official authority.²⁷

In case *Grupo Itevelesa* Spain also unsuccessfully referred to Article 51 TFEU since the Court did not regard the roadworthiness testing of motor vehicles as an activity connecting with the exercise of official authority even if the testing organisation was entitled to remove vehicles from the market. The Court held that for the purpose of removing vehicles from the market the service provider does not have powers of coercion, it is the police that is competent to enforce the sentence.²⁸

Regarding the profession of lawyers the ECJ already decided early in its case law that it cannot be considered as participation in the exercise of public power. The Court pointed out in the *Reyners* case that an activity that is not integrally connected to the activity of courts cannot be regarded as the exercise of public power, the given activity must demonstrate public power character overall.²⁹ In the infringement procedure against *Greece* the court ruled that the activity of notaries cannot be regarded as exercise of public power either, at the same time it explained that it is the nature of the activity that is considered and not the status of the person carrying it out.³⁰

While Article 51 of the TFEU excludes a full scope of activities from basic freedoms, Article 52 contains the reasons a member state can refer to in order to restrict a basic freedom. Justification for restrictions can be public order, public security and public health. The already mentioned, rather broad concepts were given meaning to by the case law of the Court, at the same time introducing the concept of ‘overriding

²⁶ See, Craig-de Búrca: *op. cit.* 769.

²⁷ Case C 593/13 *Rina Services and Others*, [19].

²⁸ Case C 168/14 *Grupo Itevelesa and Others*, [56] [60 - 61].

²⁹ Case C-2/74 *Reyners v. Belgian State*, par. [46], [51] [53-54].

³⁰ Case C-61/08 *Commission v. Greece* [2011] ECR I-4399 [105].

reasons relating to the public interest'. The scope of overriding reasons relating to the public interest is also rather broad; however, all of them originate from one of the three reasons defined in Article 52 TFEU. The overriding reasons relating to the public interest are listed by Article 4 (8) Services Directive referring to the case law of the ECJ.

The restriction of the basic freedoms can be justified by the overriding reasons relating to the public interest - but only those overriding reasons that actually exist, but not if there are other reasons behind the restrictions.

In the infringement procedure against *Spain*³¹ and in case *Belgacom*³² the ECJ held that objectives of purely economic nature cannot constitute overriding reason relating to the public interest.

An objective reason in the public interest is a necessary but insufficient ground for the justification of restrictions, the ECJ introduced the proportionality test as a further requirement. The principle of proportionality includes the requirement that the restrictive measure shall be suitable for the attainment of the general interest objective (e.g. consumer protection, environment protection etc.) and that the same objective shall not be possibly realised by a less restrictive measure.

Replicating the case law of the Court the Services Directive clearly defines the system of conditions that can justify a measure restricting the freedom of providing services in the course of the services notification.³³ In the notification procedure member states have to verify the existence of all of the following conditions: the restriction must be necessary (based on overriding reasons of public interest), proportionate and non-discriminatory.

Summary

The freedom to provide services and the freedom of establishment have evolved through the following stages: i) the elaboration of a case law covering the prohibition of discrimination based on citizenship; ii) the prohibition of potential restrictions independent of discrimination whether real or potential; iii) the publication of the Services Directive and the introduction of the services notification for the services covered by it.

In this evolution the three overriding reasons of public interest gradually broadened and became compelling reasons, parallel to which the Court also introduced the proportionality test. The Court is making the necessity and proportionality test of restrictions more and more sophisticated with time. The requirement that requires the restrictions to be in harmony also with the fundamental rights protected by the EU Charter of Fundamental Rights can more and more often be found in case law. In

³¹ C-400/08 *Commission v. Spain* [2011] ECR I-01915.

³² Case C-400/08 *Commission v. Spain*, [74]; Case C-221/12 *Belgacom* (published in the online, electronic Reports of Cases), Judgment of the Court of 14 November 2013, [41].

³³ Article 15 (1) (3) and Article 16 (1) (3) of the Services Directive.

relation to the proportionality test, on the other hand, the requirement has emerged that it should be coherent and systematic.³⁴

The member state restriction of basic freedoms is tied to a rather stringent system of conditions that is not easy to fulfil, a fact that is proven by the large number of infringement or preliminary ruling procedures for the infringement of Articles 49 and 56 TFEU. It is supposed at the same time that the cases that are brought before the Court are only the tip of the iceberg. The increasing number of cases before the ECJ justifies the necessity of the Services Directive, and at the same time it highlights the fact that the issue of the Directive did not solve the problem in itself, since although it specified the system of regulations of the Treaty, it cannot ensure the enforceability of the requirements.³⁵ In the long run the solution to ensure the requirements as fully as possible is in the hands of the member states, who should ensure the decrease in the number of restrictive provisions through their own national legislation in accordance with the EU law.

³⁴ Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-4757, [21-24].

³⁵ In the ECA's report, see Recommendation 5: '*The legislator should introduce a standstill period for the notification of draft requirements [...]*', p. 43. [In its reply the European Commission accepted this recommendation (Ibid. 59)]. The recommended 'standstill period' means that the member state shall notify their draft legislation concerning requirements listed in Articles 15 (2) and 16 (2) Services Directive and the notified draft legislation can only be promulgated after the standstill period. During the standstill period the Commission and other member states can make their observation on the notified draft legislation. The problem is that the Services Directive provides only for the notification obligation of new national requirements but it does not say anything regarding whether member states shall notify their draft or final legislation and there are no consequences of the omission of the notification. Regarding that the Services Directive was reached by heavy political debate there is not much willingness from member states to reopen the Directive in order to modify it. For the planned legislative proposal of the Commission concerning the improvement of the notification procedure, see Communication, p. 18.

CRITICAL JUNCTURES IN THE EVOLUTION OF BRITISH PARTY POLITICS

THE 1974 GENERAL ELECTIONS AND THEIR IMPACT ON THE WESTMINSTER PARTY SYSTEM

MÁRTON KASZAP *

The 'heydays of two-partyism' ended in February 1974. This was the second time after 1929 (and the first case after the World War II) that a hung parliament was formed because none of the two major parties had enough seats to have an absolute majority. This result was mainly due to the strikingly good performance of the Liberal Party (14 seats)¹ and other minor parties like the nationalists in Scotland and Wales (9 seats.) However, the most important contributor for the hung parliament came from the equally bad performance of the two major parties (301 for Labour and 297 for the Conservatives). Therefore, the February 1974 election was not about the success of third parties but rather about the failure of both two major parties.

The February 1974 election meant a dividing line in the evolution of British party politics after the World War II. Firstly, as it was mentioned in the previous paragraph, a hung parliament was formed without any clear winner party or absolute majority. In the earlier two-party competition, there was one of the two major parties which gained absolute majority. Now, in 1974, they did not get enough support. Secondly, it was also the starting point in British politics what we have been calling since the *de-alignment* of the electorate. The UK voters started to detach from those mass-parties (Labour and the Conservatives) which they had previously thought that represented their social background and interests. Instead, the February 1974 election was characterized by a record high electoral volatility and a sudden swing from traditional parties to smaller ones. Previously, both the electoral volatility and the swing were much lower, stable and predictable. After the last traditional general election in 1970, this kind of new dynamics in British politics meant a completely new phenomenon.

Thirdly, the February 1974 election introduced some quite new political concerns. First of all, because of the king-maker position of the Liberals, coalition negotiations started. This generated the appearance of the Liberals as the third national party. Also

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¹ All UK electoral data in this paper are from Commons Briefing Paper (2017) No. CBP-7529 *UK Election Statistics: 1918-2017* which has both .pdf and .xls versions. The author used the .xls version for his own calculations. The author calculated the later used indices (ENEP, ENPP, Pedersen index) from this dataset. All Figures and Tables in the text are also calculated from these data.



because of the good performance of the nationalist parties (Scottish National Party, Plaid Cymru), the question of regional autonomy and devolution appeared on the political agenda. And in the long term, election campaigns became more dominated by issues and valence politics rather than by traditional class affiliation. Altogether, it is fair to say that the first major step towards the pluralisation of British politics started in 1974.

Data

The special interest for the February 1974 election derives from its shocking difference from any other election. In 1970, during the closest previous general election, the results provided the best example for Westminster democracy. It can be easily say that all of *Lijphart's* criteria for a Westminster democracy¹ were fulfilled: the two major parties obtained together 89.4% of the votes and third parties were marginal (only 10.6%), the difference between the two parties was tight (46.4% for the Conservatives and 43% for Labour), and the first-past-the-post electoral system provided a strong majority and a single government (the Tories got 330 seats while only 316 seats were needed for the absolute majority). So the 1970 general election repeated the patterns of the previous 7 general elections after 1945.

Nevertheless, the February 1974 election provided almost a diametrically different outcome than the 1970 election. First, the two party vote share fell down to 75% from the previous 89.4%. Second, the winner party did not have enough seats for a single government (the Conservatives had only 297 seats whereas 318 were needed for an absolute majority). Only the third aspect, the tight race between the two major parties was accomplished (37.8% for the Conservatives and 37.2% for the Labour.) Therefore, in a Lijphartian sense, the two-party dominated Westminster system wrecked seriously at the February 1974 general election.

So 1974 meant a sudden and complete change in the patterns of UK party competition. Though de-alignment and the erosion of the two parties had already showed some signs (the Liberals had an upsurge since 1972 at by-elections, the SNP had better and better local election results in Scotland since 1968 and there was also an increase in the number of contestants during general elections in the whole UK,² it was unlikely that something completely strange would appear in British politics.

If we compare the February 1974 election with the previous 1970 election by using fragmentation indices³ and party system categorisation, it is obvious to see how much

¹ Lijphart, Arend: *Patterns of Democracy*. Yale University Press, 2012.

² Denver, David – Garnett, Mark: *British General Elections Since 1964: Diversity, Dealignment, and Disillusion*. Oxford University Press, Oxford. 2014.

³ ENEP and ENPP are party system fragmentation indices. They refer to how fragmented a

change has happened. In 1970, ENEP (party competition) was 2.46 and ENPP (party system)⁴ was 2.07 which resulted a two-and-a-half party competition and a two-party system. There was a very low volatility⁵ of votes following the 1966 election (just 6.02%) and the disproportional effect of the electoral system was also marginal (only 6.59 LSq which is quite healthy since every electoral system has some disproportional effect.) Nevertheless, in February 1974, all these indices showed a significant change: ENEP rose to 3.13 (to a moderate or limited multi-party system) while ENPP continued to remain 2.25 (a two-and-a half or a two-party system); disproportion jumped to 15.47 LSq (almost tripled) and volatility had a record high 14.43% level. These results together demonstrate one key fact: it was the first post-war election when the UK party competition and the Westminster party system significantly separated from each other. Both ENEP, the volatility and the disproportion indices attest that the traditional two-party system ceased to represent general UK voter preferences (at least for the time being).

Causes

The causes of the 1974 political crisis can be divided into two groups: i) there are those which were related to the political performance of major parties, and ii) there are those which happened independently from the decisions of the political actors.

Actor-related Causes

- ❖ Economic incompetence and post-war consensus: as it was mentioned earlier, the 1945-74 period was characterised by a two-party competition and a two-party system. The congruence between party competition and party system was assured by class politics; two parties represented two classes. Moreover, there was a consensus among the two major parties about the beneficial effects of welfare

party system is. ENEP is calculated by using electoral vote shares whilst ENPP is done so by parliamentary seat shares. For instance, if ENEP = 3.5, it means that there are three and a half equal sized parties in a given party system. If it is 2.0, we are talking about a two-party system. For more information: *Prof. Michael Gallagher's* website at Trinity College Dublin. Available at https://www.tcd.ie/Political_Science/staff/michael_gallagher/ElSystems/Docts/effno.php.

⁴ The author considers the UK *party system* as the party system inside Westminster and the House of Commons. However, talking about *party competition* it is a wider concept than Westminster politics and every contesting parties make part of it (not just those which manage to surpass the electoral threshold.) Therefore, ENPP and ENEP can measure both these two concepts. ENPP is calculated from parliamentary seats (so it can measure the party system) and ENEP is calculated from electoral votes (so it can measure party competition.) Due to the high electoral threshold in the House of Commons, ENEP should be always higher than ENPP.

⁵ Electoral volatility is calculated by using the Pedersen Index. This formula measures the aggregate vote share differences of individual parties from one election to the next one divided by two.

economics. This consensus was called post-war consensus. The two factors together (congruence and consensus) generated a centripetal competition in which both parties wanted to deliver pretty much the same goals with only one difference; how to do it.

- ❖ From the early 1970s, however, welfare economics became a burden on the two major parties. The economic turmoil of the 1970s could not have been resolved by traditional Keynesian economic measures. Since the post-war consensus meant a path dependency for both Labour and the Conservatives, one could have experienced that neither parties could have found solutions to the growing economic concerns like high inflation, falling productivity, high unemployment and trade union strikes. Labour was considered to be politically incompetent because they could not deliver their economic promises about full employment, wage stability and stable relations with trade unions. The Conservatives, on the other hand, were considered to be politically incompetent because they couldn't tear with the 'socialist' post-war consensus.⁶ In this context, there was a growing perception in the electorate that the two traditional parties could not handle the ongoing economic problems. There were regular disruptions in the sectors of electricity, docks, railway and coal mines because of trade union strikes. It aggravated the everyday life for many.⁷
- ❖ The incompetence of the two major parties caused a general disillusionment among the British electorate. This feeling contributed to an already existing phenomenon which was called de-alignment. De-alignment meant that class relations between voters and their respective parties became less strong over time. De-alignment and incompetence together caused the record high electoral volatility in February 1974. De-alignment made possible that voters listen to their individual preferences rather than their party affiliation. Incompetence catalysed this process. A large segment of the electorate hence was looking for a third party (an alternative for both Labour and the Conservatives.)
- ❖ Obviously, the only party which could have been appear as a third party were the Liberals. They had contestants at almost all UK constituencies and they had a history. Nevertheless, in Scotland and Wales the nationalist parties also managed to appear as a potential third party. For them, the incompetence of the British governments was also interpreted as the incompetence of the central government. They argued that much of the economic difficulties are caused by the wrong economic policies in London. (This was partly true because the welfare state was rather centralised and most of the services and economic planning was carried out nationally and not regionally.) The Liberal Party hence appeared as the third party

⁶ Ball, Stuart – Seldon, Anthony: *The Heath Government 1970-74: A Reappraisal*. Taylor & Francis. 2014.

⁷ Denver-Garnett: *op. cit.* 47.

on the national scene while SNP and PC did so on the regional level.

- ❖ Immigration policy and Enoch Powell: the political incompetence wasn't only fuelled by the economic concerns. From the 1960s, immigration to Britain rose rapidly. Enoch Powell, a Conservative politician called attention to the negative consequences of immigration in a speech in 1968.⁸ In his 'Rivers of Blood' speech he warned that the cultural homogeneity of the country was at stake with the ongoing immigration pace. His remarks were unanimously rejected by both Labour and the Conservative Party, however, a large part of the electorate agreed with him according to the opinion polls.⁹ Hence, Enoch Powell challenged the post-war consensus over immigration, too. The oil crisis questioned the welfare consensus while Enoch Powell challenged the immigration consensus. The centripetal two-party competition was challenged both economically and politically.
- ❖ Ulster crisis: in Northern Ireland, following the 1968 student movement, the Irish minority started to demand civic liberty and more freedom. In 1972, during one of such protest in Londonderry, the UK authorities killed 13 protesters on Bloody Sunday. As a reaction, the IRA conducted military operations from 1972. Prior to the 1974 elections, the Ulster Unionist Party broke its traditional alliance with the Conservative Party. There was a feeling that UK governments lost control over the Ulster crisis, too.

Non-actor Related Causes

- ❖ There are some other causes which happened independently from the incumbent governments. These are mainly international developments but there are some domestic events as well.¹⁰
- ❖ The 1973 Oil crisis: it had a major impact on Britain. Although it touched every Western countries, Britain was particularly negatively affected by high inflation, heavy industry decline and trade union unrest. For Britain, the 1973 oil crisis intensified the already existing economic decline since the 1960s. The post-war 'economic miracles of Europe' (West Germany and France) suffered much less than Britain after the 1973 oil crisis. The British economy hence ultimately became

⁸ Telegraph: Enoch Powell's 'Rivers of Blood' speech, <http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html>.

⁹ Taylor, Adam: In 1968, a British politician warned immigration would lead to violence. Now some say he was right. *The Washington Post Online*. https://www.washingtonpost.com/news/worldviews/wp/2015/11/24/in-1968-a-british-politician-warned-immigration-would-lead-to-violence-now-some-say-he-was-right/?utm_term=.563a26f5b2a3.

¹⁰ Denver-Garnett: *op. cit.* 46-52.

the 'sick man of Europe.'¹¹ The economic incompetence of successive UK governments was partly caused by this external (and structural) cause, too.

- ❖ Centralised welfare state: the other given that any post-war British government inherited was the highly centralised UK state. In fact, the welfare consensus created a need for central planning and regulations. This centralisation was indifferent to any regional differences (like in Scotland, Wales, Northern Ireland or London.) The unanimous welfare service state blocked any UK governments to initiate regional differentiation. Hence, the central governments inherited a kind of bureaucratic rigidity and unresponsiveness.
- ❖ EEC membership: the UK joined the European Economic Community in 1973 (in the same year of the oil crisis). The country became part of the customs union which limited their trade relations with third countries. It had particularly negative consequences for the trade links with other Commonwealth countries. (e.g. New Zealand and the dairy industry.) However, it was difficult to disseminate the negative consequences of the EEC membership from that of the parallel oil crisis. Therefore, the EEC membership as a constraint for the British economy was often confused with the wider economic world trends (e.g. the decline of heavy industry.)
- ❖ Scottish oil discovery: in 1970, British Petroleum found large oil fields in the North Sea at the Scottish shores.¹² After 1973, the North Sea oil became very competitive because of the soaring oil prices. This fuelled the need for Scottish regional self-governance.
- ❖ Constituency boundary change: in 1974, the review of constituency boundaries created 5 additional MP seats in Westminster (from 630 to 635.) This could have an important effect in a tight race (as it happened in February and October 1974. The Labour government had only a 3 MP seat majority after the October 1974 election.)

In sum, the February 1974 political crisis was caused both by the incompetence of the two major parties and by other external factors. The 1973 oil crisis certainly contributed to the incompetence of the two parties. However, the economic difficulties showed already their signs from the 1960s much before the oil crisis. The most important reason behind this incompetence was the post-war consensus over welfare economics. This centripetal party competition was accompanied with other unresponsiveness about regional differences (Scotland and Wales) and about immigration. As a result, voters looked for alternatives for the main two parties.

¹¹ Kavanagh, Dennis: Thatcherism and the End of the Post-War Consensus. BBC online.
http://www.bbc.co.uk/history/british/modern/thatcherism_01.shtml.

¹² BBC: Large Oil Field Found in North Sea.
http://news.bbc.co.uk/onthisday/hi/dates/stories/october/19/newsid_3769000/3769639.stm.

Aftermath

Short Term Impact – Instability (1974-79)

The February 1974 election resulted the shortest parliamentary cycle in modern British history; only 224 days.¹³ It was obviously very likely that the minority Labour government can't fulfil the whole parliamentary cycle. So the minority Labour government kept looking at opinion polls and chose October 1974 to hold another general election to get an absolute majority. Eventually, they managed to get a wafer thin majority (with only 3 MPs) at the October 1974 election: Labour increased its support from 37.2% to 39.3%, the Conservatives declined from 37.8% to 35.7% and the Liberals also declined from 19.3% to 18.3%. This meant 18 additional MPs for Labour (from 301 to 319), 20 less MPs for the Conservatives (from 297 to 277) and 1 MP loss for the Liberals (from 14 to 13). However, the overall result was pretty much the same as in February 1974.¹⁴

Political instability became part of British politics after the October 1974 election. The 3 MPs seat majority soon evaporated because of by-election losses and defections. From 1976, the Labour government became hence a minority government again.¹⁵ They could have only fulfilled their mandate with the external support of third parties in the House of Commons. The Liberals signed a pact with them in 1976 which secured external support for Labour without a coalition agreement. This was occasionally complemented by the support of other (mainly SNP) MPs. However, the 1976-79 period seemed to be a return to the February 1974 election which generated a minority Labour government with coalition talks and instability.

Long Term Impact – Pluralisation

The interpretation of the 1974 political crisis became problematic after 1979. In 1979, the Conservative Party won a stable majority and they started a 18 year-long predominant cycle. The 1979-97 period was characterised by a gradual return to two-party politics (declining ENPP in Westminster) and a polarised centrifugal competition

¹³ Butler, David – Kavanagh, Dennis: *British General Election of October, 1974*. Palgrave Macmillan UK. 1975. 330-356.

¹⁴ There was a very small constituency swing in comparison with the February 1974 election. Only 28 seats (out of 635) changed their party affiliation. The turnout in October 1974 (72.8%) was 6% under the February 1974 results (78.8%). In opposition with the Liberals, the nationalist parties could maintain and increase their support. Particularly, SNP increased from 21.9% to 30.4% in Scotland. PC, despite of their identical vote share to their February 1974 electoral result, could not send any MPs to Westminster. See Butler-Kavanagh: *op. cit.*

¹⁵ Bell, Patrick: *The Labour Party in Opposition, 1970-1974*. Routledge. 2004.

between the two major parties.¹⁶ From this perspective, the 1974 crisis and its immediate aftermath until 1979 proved to be rather *temporary*. In 1992, for instance, one could have evaluated that Britain usually had two-party politics (between 1945-74 and 1979-92) and the short instability after 1974 was only minor irregularity. Nevertheless, this paper argues that the pluralisation process never stopped after 1974. It might have become less apparent and more covered; however, it did not completely disappear. The author hereby lists the following arguments to prove that a long term pluralisation has been indeed going on since 1974.

i) Birth of the 'two-and-a-half' party system. The Liberal Party can certainly date its second come-back to British politics (the first one was in the early 20th century) from the 1974 general elections.¹⁷ Moreover, the successful electoral performance was not just a temporary upsurge. They kept their electoral support always over 15% vote share since February 1974. As Table 1 confirms, there is a significant difference between the Liberal vote share from 1945 to 1970 (with a mean 7.06%) and the 1974-2010 interval (with a mean 19.73%). So the Liberals suddenly became the half party in a two-and-a-half party system after 1974 and they managed to keep this position. (They only lose this influence in 2015 when they experienced a catastrophic electoral defeat.) The importance of the Liberal Party hence determined British politics for the next 31 years.¹⁸ They had an impact on both the Westminster party system (MP seats) and the UK party competition (electoral votes). In the first case, they sometimes became king-makers in the House of Commons (like in 1976 and in 2010) and in the second case, they stole votes from the major parties at the constituency level hence indirectly manipulating the rivalry of the two major parties. The sudden rise of the Liberals in 1974 and their later electoral stability shows some similarity with the electoral success of the Labour Party in 1945. Nevertheless, while in 1945, Labour's success was due to a process of electoral alignment (the working class found the Labour Party), in 1974 and later, the Liberal success was fuelled by the opposing trend: de-alignment and protest voting against the two major parties. Therefore, the Liberal's rise and stability has become the symptom of a long term trend in British politics. I argue that one of the most important evidence for the pluralisation of UK party competition is the continuous electoral success of the Liberal Party.

¹⁶ Heath, Anthony: *Understanding Political Change: the British Voter, 1964-1987*. Pergamon Press, 1991., Jackson, Ben – Saunders, Roberts: *Making Thatcher's Britain*. Cambridge University Press, 2012.

¹⁷ Lemieux, Peter: Political Issues and Liberal Support in the February 1974, British General Election. *Political Studies*, Vol. 25 (1977) No. 3, 323-342., McCallum, Ronald Buchanan: *The British General Elections 1945-92: The British General Election of October 1974*, Macmillan. 1999.

¹⁸ Russell, Andrew et al.: The Anatomy of Liberal Support in Britain, 1974-1997. *The British Journal of Politics & International Relations*, Vol. 4 (2002) No. 1, 49-74.

		VOTE SHARE %	SEATS	SEAT SHARE %
1945		9.0%	12	1.88%
1950		9.1%	9	1.44%
1951		2.6%	6	0.96%
1955		2.7%	6	0.95%
1959		5.9%	6	0.95%
1964		11.2%	9	1.43%
1966		8.5%	12	1.90%
1970		7.5%	6	0.95%
1974	Feb	19.3%	14	2.20%
1974	Oct	18.3%	13	2.05%
1979		13.8%	11	1.73%
1983		25.4%	23	3.54%
1987		22.6%	22	3.38%
1992		17.8%	20	3.07%
1997		16.8%	46	6.98%
2001		18.3%	52	7.89%
2005		22.0%	62	9.60%
2010		23.0%	57	8.77%
2015		7.9%	8	1.23%

Table 1 The Liberal party's results at general elections (1945-2015)

ii) *Disproportional general elections.* The rise of the Liberal Party as the third party had an additional effect on British politics. The February 1974 election demonstrated how disproportional the first-past-the-post electoral system was for the third party. Although the Liberals got 19.3% vote share in February 1974 and 18.3% vote share in October 1974, this was only enough for 14 and 13 MP seats respectively (out of 635). So the 19.3% vote share worth 2.2% seat share in February 1974 and the 18.3% vote share worth 2.1% seat share in October 1974. This underrepresentation has also become a long term pattern of British politics. The Liberals, as the third party at general elections, had always disproportional representations in the House of Commons. This generated a further political debate about the undemocratic nature of the FPTP electoral system. It is hence not surprising that the Liberals have been keeping electoral system change on the agenda.

iii) *Nationalist parties and devolution.* Beside the Liberal Party, the other important contributors to the pluralisation of British politics were nationalist parties. The Scottish National Party had a breakthrough both at the February and October 1974 general elections. They got 21.9% and 30.4% vote share in Scotland. Plaid Cymru also did well in Wales with their 10.8% vote share at both two elections. However, in opposition to the Liberal Party, the nationalist parties could not keep their electoral support and influence in the 1980s. The SNP only got 17.3% in 1979, 11.8% in 1983 and 14.0% in 1987. The next time when they achieved a similar result to their 1974 performance occurred in 1992 with 21.5% vote share in Scotland. After 1992, they stabilised their

electoral vote share around 20% (ie. 1997 (22.1%), 2001 (20.1%), 2005 (17.7%), 2010 (19.9%).) In 2015, however, they experienced a landslide victory in Scotland with 50% vote share.

The reasons for SNP's *rise* and decline are ambiguous. *Newman* says that the reasons for SNP's rise prior to the 1974 elections are threesome: (1) it was a combination of wider general de-alignment from the two major parties, (2) a lack of appropriate answers to growing economic problems in Scotland and (3) the SNP's cross-class political appeal as an ethnoregional party.¹⁹ The economic problems of the 1960s and 1970s had particularly hit Scotland for the centralised welfare state. Therefore, the British economic failure was interpreted as an English failure which undermined the Scottish prosperity. In addition, major oil fields were found in the North Sea in 1970.

The causes for SNP's *decline* are threesome, too: (1) the failure of the 1979 Scottish referendum on devolution, (2) internal party disunity and (3) the SNP's ideological move to the Left. The failure of the referendum caused the evanescence of the independence issue which was the central message for SNP.²⁰ The party in the House of Commons and after the failed referendum experienced major splits which undermined party unity. And finally, the internal divisions ended up by the strengthening of the left wing inside the party. This move to the left automatically lose the ideologically right voters.

The Welsh Plaid Cymru (PC) experienced similar rise and decline in the 1970s and 1980s like the SNP. However, PC's rise started one election before already in 1970. They got 11.5% vote share in 1970, 10.7% in February 1974, 10.8% in October 1974. They turned to PC which provided 'decentralist socialism.' In opposition to the SNP's cross-cleavage appeal, PC had a leftist ideology which limited their electoral appeal to only de-aligned Labour voters. Hence they never managed to gain so much vote share like SNP did. In the 1980s and 90s, PC fell back to 7-8%. For both SNP and PC, the sudden rise in popularity was caused by de-alignment from major parties and a perceived incompetence locally. In response to this sudden rise and Labour's decline in these regions, *Wilson's* Labour government put devolution on the agenda. However, the failed two referenda in Scotland and Wales lead to a contra-productive effect: the issue of devolution disappeared and nationalist parties lose ground. Devolution remained a marginal issue until the 1990s.

The author still considers that the 1974 election had long term effects on nationalist parties and devolution. Although, devolution was taken off the agenda for a while, the nationalist parties never declined under their 1966 electoral result. (Figure 1.) In the 1980s, perhaps the nationalist parties did not do so well like in 1974, nevertheless, they never collapsed. The SNP's worst electoral performance was in 1983 (11.8%) and the

¹⁹ Newman, Saul: The Rise and Decline of the Scottish National Party: Ethnic Politics in a Post-industrial Environment. *Ethnic and Racial Studies*, Vol. 15 (1992) No. 1, 1-35.

²⁰ See, Newman: *op. cit.*

PC's occurred in 1987 (7.3%). Nevertheless these results were still much higher than their previous post-war electoral support. Between 1945 and 1970, SNP had a mean 2.76% vote share and between 1945 and 1966, PC had a mean 2.91%. This mean value was 19.66% for SNP between February 1974 and 2010 and 10.16% for PC during the same time. So the pluralisation process kept going on regionally even if the 1980s meant a temporary setback.

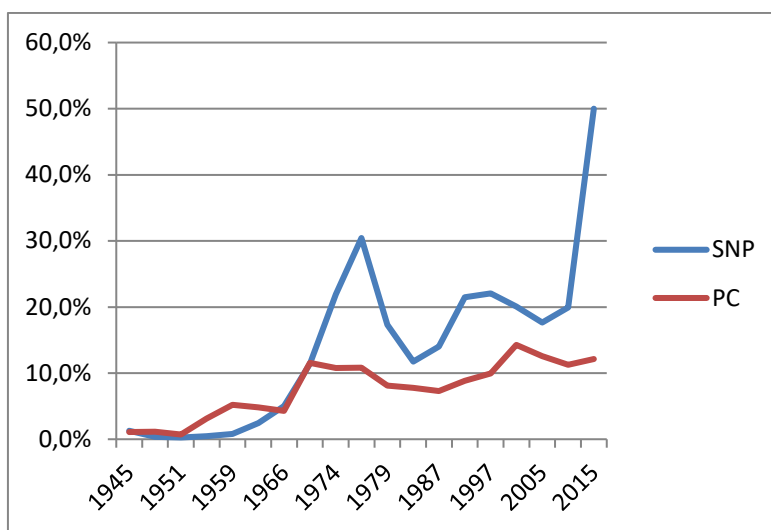


Figure 1 SNP vote share in Scotland and PC vote share in Wales (1945-2015)

iv) *EP elections*. Since 1979, the UK has been holding EP elections every five years. Between 1979 and 1994, these elections were held under FPTP electoral system while after 1999 the PR party list system was introduced. Obviously, the 1999 PR electoral system change had important consequences for the pluralisation of party politics in the UK. However, the 1979 FPTP electoral system also had some pluralising effects. Apart from the two major parties, the Lib Dems and the Greens did well at EP election between 1979 and 1994. The Lib Dems usually performed worse at EP elections than at general elections with the same FPTP system. The Green Party, however, could successfully use the EP election in 1989 to make a breakthrough: they got 15% at the 1989 EP election. Since then, the Greens never have been so successful at any elections. The EP elections confirmed the already ongoing national trend (the two-and-a-half party politics).

	1979	1984	1989	1994	1999
<i>Conservative</i>	51%	41%	35%	28%	36%
<i>Labour</i>	33%	37%	40%	44%	28%
<i>Liberal Democrat</i>	13%	19%	6%	17%	13%
<i>UKIP</i>				1%	7%
<i>Scottish National</i>	2%	2%	3%	3%	2%

<i>Plaid Cymru</i>	1%	1%	1%	1%	3%
<i>Green</i>	0%	1%	15%	3%	6%
<i>BNP</i>					1%
<i>Other</i>	1%	0%	1%	3%	5%

Table 2 Vote share in Great Britain (without Northern Ireland) at EP elections (1979-1999)

v) *Referenda*. The UK held the first nationwide referendum in 1975 about the EEC membership.²¹ This referendum was followed later by other regional ones in Scotland and Wales in 1979. Since then, there have been two other national ones (in 2011 about AV vote and in 2016 about EU membership) and several others regional ones (in 1997 about Scottish and Welsh devolution, in 1998 about devolution in London and in Northern Ireland, in 2014 about Scottish independence). Moreover, there have been 58 additional mayoral referenda at local councils in England between 2001 and May 2016. So, it is fair to say that the first referendum in 1975 was followed by the *proliferation* of referenda in the following decades.²² Given the fact that referendum brings political decision outside Westminster, it further enhanced the gap between party system and party competition. In this sense, referenda indirectly affected the pluralisation of British politics by turning attention to extra-parliamentary politics (party competition.) Therefore, the author argues, referenda since 1974 have had effect on the pluralisation process, too.

vi) *Issue politics, polarisation and electoral instability*. The 1974 elections had major consequences for the long term patterns of British party competition. As argued before, the 1945-74 period was characterised by class politics and strong party identification. This period suddenly changed in 1974 with a record high electoral volatility. Although in 1979, there was a superficial return to traditional two party politics, the old class politics and post-war consensus never came back again.²³

Instead of cleavage politics, there has been a trend towards *issue politics* since 1974. It means that social interests are less important than individual voter preferences. Moreover, this issue politics coincided with growing differences between Labour and Conservative manifestos.²⁴

²¹ Baimbridge, Mark: *The 1975 Referendum on Europe – Volume 1: Reflections of the Participants*. Imprint Academic. 2016., Baimbridge, Mark et al.: *The 1975 Referendum on Europe – Volume 2: Current Analysis and Lessons for the Future*. Imprint Academic. 2016., Butler, David – Kitzinger, Uwe: *The 1975 Referendum*. Palgrave Macmillan UK, 2016.

²² Putschli, Bernadett: *The Referendum in British Politics: Experiences and Controversies Since the 1970s*. Omniscryptum GmbH & Company Kg., 2007.

²³ Evans, Geoffrey – Tilley, James: How Parties Shape Class Politics: Explaining the Decline of the Class Basis of Party Support. *British Journal of Political Science*, Vol. 42 (2012) No. 1, 137-161.

²⁴ Kavanagh, Dennis: *Thatcherism and British Politics: the End of Consensus?* Oxford University Press, USA. 1990.

Labour wanted to reform the welfare state in its current form while *Margaret Thatcher* wanted to break down the post-war consensus. Hence, the policy distance between Labour and the Conservatives became serious after 1979. This phenomenon meant the polarisation of British politics. (Figure 2.) This centrifugal competition lasted until the end of the 1980s when Labour gradually gave up its strong links with trade unions. After 1992, the rivalry between the Conservatives and Labour became, however, centripetal because *Tony Blair* accepted much of Margaret Thatcher's neoliberal economic measures. Hence, the polarisation of the 1980s was followed by a consensus of free market and neo-liberalism after 1997. In the long term, hence, the 1974 general elections caused a centrifugal competition and it only became centripetal in the late 1990s. However, this centripetal competition was very different from the post-war consensus of welfare politics: it was the opposite consensus with neo-liberal economic politics.

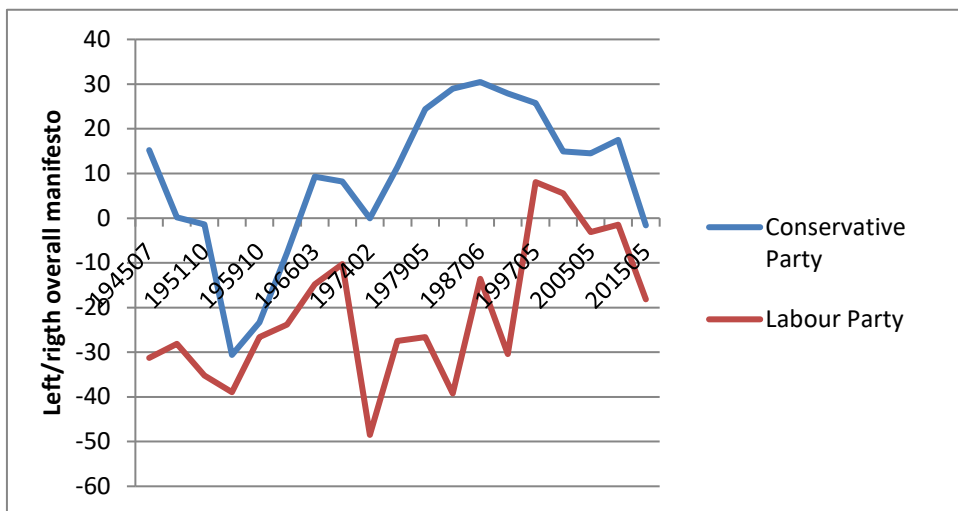


Figure 2 Left/Right manifesto positions at UK general elections (CMP data)²⁵

Dealignment which meant a change from cleavage politics to issue politics was accompanied by electoral instability.²⁶ After 1974, the overall level of UK electoral volatility raised from the post-war 4.71% to 8.02% between 1974 and 2015. The biggest difference, however, was not in the degree of mean volatility but its sudden unpredictable changes. After 1974, it was common that high electoral volatility was followed by very low levels and later by very high levels again. (Figure 3.). So, electoral instability has become also part of British politics since 1974.

²⁵ CMP (Comparative Manifesto Project) is an online project aiming to code and compare individual party electoral manifestos over time and countries.

<https://manifestoproject.wzb.eu/>.

²⁶ Lemieux: *op. cit.* 323-342.

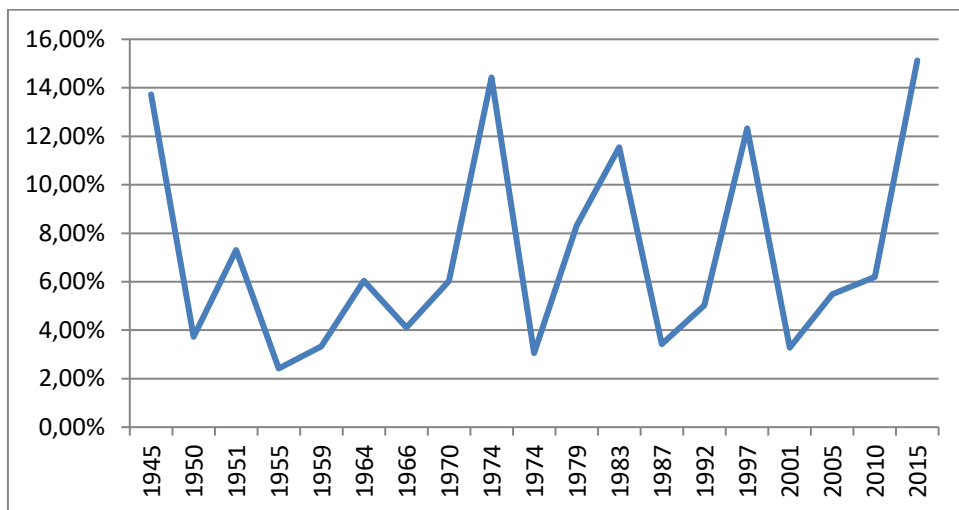


Figure 3 Electoral volatility in the UK at general elections

The incongruence between party system and party competition has kept growing since 1974. When Margaret Thatcher was elected in 1979 with a stable majority, it seemed there was a return to classic two-party politics. Between 1979 and 1992, ENEP certainly showed temporary decline. In 1979, it dropped significantly from 3.15 (October 1974) to 2.87. In 1983, there was a rise because of the splits inside the Labour Party (the Social Democrats left the party), nevertheless, during 1987 and 1992, ENEP continued declining. (Figure 4.) It could have been truly interpreted that the pluralisation process was reversed. However, in 1997, ENEP grew again and has kept doing so [3.22 (1997), (3.33 (2001), 3.59 (2005), 3.71 (2010), 3.93 (2015)]. So from today's perspective, the 1979-92 period can be indeed seen as a temporary return to two-party politics. In the long term, pluralisation was confirmed.

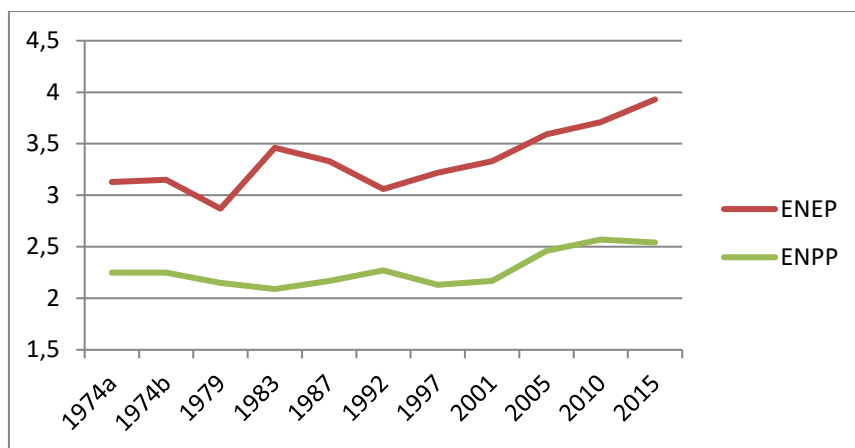


Figure 4 ENEP and ENPP in the UK (1974 February – 2015)

Comparing 1974 with 2010

In 2010, similarly to 1974, a hung parliament was elected because none of the two major parties had an absolute majority. The Conservatives had 306 seats and Labour had 258 out of the total 650. The 326 seats for an absolute majority could have been secured only if the winner Conservative Party either formed a coalition government with the Lib Dems (by obtaining their 57 extra seats) or they could rely on the Lib Dem support from outside without any formal coalition agreement (similarly to the 1976-78 Lib Lab pact.) This time, however, the *David Cameron*-led Conservative Party chose the formal coalition agreement which provided the first coalition government since 1929.

The Lib Dems therefore had a king-maker position in 2010 like in 1974. The coalition negotiations in 2010 were also similar to the 1974 negotiations: one of the key liberal demands *was electoral reform*. This demand was later fulfilled by holding a referendum in 2011 on AV vote.

The question of devolution also appeared on the political agenda. In 2014, the SNP hold a referendum on independence. And the question of EU membership also became part of the political debate because David Cameron announced an in-out referendum in 2013 if he were re-elected in 2015.²⁷ In 1974, the Labour Party similarly committed itself to hold a referendum about the EEC membership in 1975.

Enoch Powell's maverick personality was repeated by *Nigel Farage* who also campaigned against mass-immigration (from the EU and not from the Commonwealth countries as it was the case for Powell). Farage could play an important role in 'stealing votes' from the Conservatives since his UKIP party got 3.1% vote share. Similarly, Powell also stole votes in his marginal constituency.

	1974–	2010–
<i>Liberals' king-making position</i>	Coalition talks with the Conservatives and later Lib Lab pact	Coalition agreement with the Lib Dems
<i>Penetration of the EU topic into domestic affairs</i>	1975 EEC referendum From 1979 EP elections	2016 EU referendum 2014 EP victory by UKIP
<i>Introducing the immigration issue into British politics</i>	Enoch Powell	Nigel Farage
<i>The proliferation of referenda</i>	1975 (EEC), 1979 (Scotland), 1979 (Wales)	2011 (AV), 2014 (Scotland), 2016 (EU)
<i>Demands for an electoral reform</i>	PR EP elections and SV general elections	AV general election, elected House of Lords
<i>Liberal retreat</i>	In 1979 (13.8% after	In 2015 (7.9% after previous

²⁷ Copsey, Nathaniel – Houghton, Tim: Farewell Britannia? 'Issue Capture' and the Politics of David Cameron's 2013 EU Referendum Pledge. *Journal of Common Market Studies*, Vol. 52 (2014) No. 1, 74-89.

previous 18.3%)

23.0%)

Table 3 Comparing the 1974 and 2010 general elections

Conclusion

As the 1945 general election, the February 1974 election proved to be a critical juncture in the evolution of British politics. Whereas the 1945 election was a critical juncture which established a long term path dependency of two-party politics, the 1974 election created a path dependency of pluralisation. It is not controversial that the legacy of the 1945 election could co-exist with the opposing trend of the 1974 elections. The author argues that the two parallel and opposing path dependencies generated a growing incongruence between party system and party competition.

The first-past-the-post majority electoral system favoured large parties for keeping their parliamentary dominance while electoral vote shares showed an increasing popularity for third parties. The incongruence between parliamentary seat share and electoral vote share did not become a major concern for a while. However, the growing incongruence eventually led to electoral complaints about fair representation, democratic deficit and electoral system reform. This phenomenon became particularly relevant after 2010 when a chain of anomalies happened in British politics (the 2010 coalition government, the 2014 Scottish independence referendum, the 2014 UKIP EP victory, the 2016 so-called Brexit Referendum or the 2017 snap election.) These anomalies can be seen as the fulfilment of the high incongruence between party system and party competition. Therefore the 1974 elections introduced a long term phenomenon (called pluralisation) which undermined traditional two-party politics started in 1945.

A BRIEF CRITICAL ANALYSIS OF THE APPLICATION OF THE DOCTRINE OF SELF-DETERMINATION IN THE CASE OF IRAQI KURDS

DILDAR FRZENDA ZUBER ZEBARI*

Introduction

Speaking on 2 February 2016, the president of Kurdistan region of Iraq and leader of the Kurdistan Democratic Party stated that “the issue of self-determination” should be considered “a right” for the Kurdish people, and presented to call referendum and deciding their own future.¹

In the light of this new and open demand for increased self-determination, it is extremely timely to examine the legal basis that the Kurds may wish to make their claim for increased devolution or independence on. The Kurds occupy a unique position in Iraq. The Kurdish state within Iraq has been an oppressed non-entity, a quietly accepted dominion, a Western protectorate and now a part of a federal and fragmented Iraqi state. This paper will aim to examine the modern state of the Kurds, focusing in particular on the question of if the Iraqi constitution’s recognition of the rights of the *Hikûmetî Herêmî Kurdistan* (Kurdistan Regional Government/"KRG") can be said to have granted them a true measure of self-determination within the Iraqi state. The historical recognition provided for the Kurds in the Treaty of Lausanne offers the possibility of legal effect and offers some parallels to the recognition of the Quebecers within Canada. This parallel will be examined, assessing the relationship between international and municipal law in assessing self-determination claims and how this has been changed by Kosovo. This will be combined with an initial assessment and application of the current state of self-determination law, examining the logic of both the Canadian case on Quebec and the more limited findings of the ICJ case on the independence of Kosovo.

The Principle of Self-determination

The principle of self-determination as an issue of international law is relatively recent; it was not included in the League of Nations Covenant, and seems not to have been

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¹ <http://rudaw.net/english/kurdistan/02022016> (5 February 2016).



treated as a legal rather than political concept.² For a long time, it was regarded mostly and exclusively political concept, and the 1921 *Aaland Islands* case also establishes that the principle was not a feature of customary law at the time that the case was heard, with both the International Commission of Jurists and the Committee of Rapporteurs treating the issues as primarily political and more importantly novel.³ The Commission did make the famous finding that “the separation of a minority from the State of which it forms a part and its incorporation in another state can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.”⁴ This appeared to accept that the forcible separation of territory might be an acceptable solution to a sufficiently serious issue (such as the *Aaland Islands* repression of culture), and indeed it is argued by Crawford that the hypothetical cases that would allow for this separation is the start of a chain of law that connects to the Bangladeshi claim of independence based on *carence de souveraineté*⁵ and directly influenced the decision to mention the principle in UN Charter, Article 1 para. 2. Aside from Crawford's citation of Bangladesh, Finkelstein *et al.* identified the independence through self-declaration Croatia, Slovenia, Bosnia and the Baltics as further evidence that the principles of this chain of law are increasingly accepted.⁶

If this line of law is accepted, it would thus be clear that the situation may exist (even setting aside the Kosovo law) where a proto-state may have the right to claim that their non-representation⁷, or, on a different reading of *Aaland Islands*, the right to minority cultural identity as expressed as a matter of “the struggle for the preservation of their ethnical heritage”⁸ can result in the right to be disconnected from the main state. This was prevented in the *Aaland Islands* case by the provision of guarantees from the Finnish government of political and cultural autonomy, and the hearing thus rejected the right on the facts of the islands to seek a greater, true independence.

It was thus established that independence based on *carence de souveraineté* may be prevented by provisions for political and cultural protection, and indeed this is the situation of most of the world's minorities. The Quebecers and Basques are given substantial cultural freedoms, and exist within democracies with protections that apply

² Miller, David Hunter: *The Drafting of the Covenant*. New York, G.P. Putnam's Sons, 1928. pp. 12-13.

³ Shaw, Malcolm: *International Law*, Cambridge University Press, Cambridge, 2010. p. 251.

⁴ Beyens, Calonder, Elkus: *Report of the Commission of Rapporteurs*. Council of the League of Nations, Doc. B7/21/68/106. 16 April 1921. p. 28.

⁵ Crawford, James: *The Creation of States in International Law*, Clarendon Press, Oxford, 1979. pp. 85-87.

⁶ Finkelstein, Neil – Vegh, George – Joly, Camille: Does Quebec Have the Right to Secede at International Law? *Canadian Bar Review*, Vol. 74 (1995) 225.

⁷ Crawford: *op. cit.*

⁸ Beyens: *op. cit.*

to both majority and minority populations. It must be a question of fact as to if this is provided to the Kurds in Iraq, however.

The Principle within the UN System

Aside from this basis of law based purely on a pre-UN case and state practice, treaty law has moved the right of self-determination from the airy “hand-waving” of Article 2 para. 1 of the UN Charter to something far more tangible.

The first truly clear statement of a right to self-determination arises in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which states in Article 2 that “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁹ This was then strengthened by the 1966 International Covenants on Human Rights, which contain further references to the “right” of self-determination. The 1970 Declaration on Principles of International Law Concerning Friendly Relations then further cements this, was passed unopposed, and states that all peoples are entitled to self-determination. It must be noted that this was consistently held to be a matter of self-determination within inviolable state boundaries, and is almost invariably dealt with in this context precisely to prevent a right of secession arising.¹⁰

Indeed, this was discussed in the context of Quebec, and the Canadian Supreme Court commented that “international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”¹¹ This presents a considerable obstacle to independence, and yet the Court also noted that unilateral succession, whilst it “arises only in the most extreme of cases and, even then, under carefully defined circumstances”,¹² can be valid.

The Principle within the International Jurisdiction

ICJ law has moved on since this point, and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*¹³ and

⁹ *United Nations General Assembly Resolution 1514*, XV. 1960.

¹⁰ Franck, Thomas: *Fairness in the International Legal and Institutional System*. Oxford University Press, Oxford, 1998.

¹¹ *Reference re Secession of Quebec* of 1998, 161 DLR (4th) 385. p. 436.

¹² *Ibid.* 438.

¹³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010.

*Case Concerning East Timor (Portugal v. Australia)*¹⁴ represent the most developed (and authoritative) synthesis of both treaty and customary law.

East Timor established that “Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.”¹⁵ The only question at issue is thus the inviolability of borders. The facts around *Kosovo* relate to a declaration of independence that was made by a province within a state, and it was found that “general international law contains no applicable prohibition of declarations of independence. Accordingly, [the Court] concludes that the declaration of independence of 17 February 2008 did not violate general international law.”¹⁶ This means that the right to self-determination may exist within a state, and may result in legal independence.

The pure question of if a declaration may be made is not greatly related to municipal law; indeed the *Kosovo* findings include the fact that an explicit local monopoly on foreign relations by UNMIK against the local government was circumvented by merely having a member of the public who was not in government declare independence. This was a matter of international law over municipal law, as the court accepted that the declaration was legal based purely on international law. The court does not deal with the question of recognition, and thus this remains a political issue. It is therefore apparent that a right to independence exists, but no duty to recognize exists. Accordingly, state practice must be looked to in this matter, and it is apparent that the one widely recognized state to have gained self-determination was denied political and cultural control by the previous controlling state. This seems analogous to the threats against culture and political freedom in *Aaland Islands*, and the “extreme circumstances” mentioned in the *Quebec* case.

Since *Kosovo* specifically spoke of the right of independence in general, state practice must be the only guide to recognition, and thus the application of the *Aaland Islands* and *Kosovo* standards seem the best yardsticks. Relating to the *carence de souveraineté* test, it is notable that a similar test of a clear political break from the host state exists. It therefore seems likely that the Kurds will only be *recognized* as potentially independent if they are i) a non-state people within a majority state (hereinafter: Test A), and; ii) clearly being denied self-determination within that state (hereinafter: Test B). Both of these are matters that may be examined on the facts and law.

¹⁴*Case Concerning East Timor (Portugal v. Australia)*, International Court of Justice (ICJ), I.C.J. Reports 1995.

¹⁵*Ibid.* 102.

¹⁶*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), [84] 22 July 2010.

The Self-determination in the Iraqi Legal System

It must first be noted that the first words of the Iraqi constitution refer to “the people of Mesopotamia”¹⁷ and the fact that the constitution uses the singular might appear to the cynical observer to be an attempt to undermine the potential Kurdish claim to be an independent people. Indeed, this unitary theme is a constant repetition of the constitution, which also describes ethnic diversity as “Shiite and Sunni, Arabs and Kurds and Turkmen and from all other components of the people”¹⁸ and appears very much to wish to reject the claims of nationalities to be separate peoples. This is particularly clear when it is considered that the drafts did have more explicit references to peoples and a federal structure.

As a matter of formal recognition, the definition of a 'people' was historically somewhat problematic. *Katangese Peoples' Congress v. Zaire*¹⁹ established that a people must be considered within the boundaries of a state rather than being capable of existing within a non-colony state, but even though this was the established view²⁰ this is apparently no longer good law. Kosovo's self-determination establishes that this colony status is no longer essential, and the independent area may be geographically separate within a state; Kosovo is enclosed by Serbia in large part, but touches a foreign country in a similar way to the KRG. The KRG is thus not banned from being considered geographically separate for the purposes of being considered a separate people. The Arab/Kurd split is considerable, and is both an ethnic and cultural divide.

Interestingly, the deliberations regarding the Kurds during the drawing up *Treaties of Sevres and Lausanne* now have no real bearing on the status of the Kurds as a people; both the Kosovo and UNESCO tests are not based on the opinions of other states, but are objective criteria.

The *UNESCO meeting of Experts on Further Study of the Rights of Peoples*²¹ list the criteria for determining if a group is a people as possessing

1. A common historical tradition;
2. Racial or ethnic identity;
3. Cultural homogeneity;
4. Linguistic unity;
5. Religious or ideological affinity;
6. Territorial connection;
7. Common economic life,²²

¹⁷ *Iraqi Constitution of 2005*, www.uniraq.org/documents/iraqi_constitution.pdf, (17 December 2016).

¹⁸ *Ibid.*

¹⁹ *Case Peoples Congress v. Zaire* in 1995, No. 75/92: see 13 NQHR, 1995, p. 478.

²⁰ Gudeleviciute, Vita: Does the Principle of Self-determination Preval over the Principle of Territorial Integrity?, *International Journal of Baltic Law*, Vytautas Magnus University School of Law, Volume 2, (2005) No. 2.

²¹ *UNESCO meeting of Experts on Further Study of the Rights of Peoples*, Paris. February 1990.

with the “belief of being a distinct people”²³ and “institutions or other means of expressing its common characteristics and will for identity.”²⁴

The Kurdish state existed in a de facto independent state from the end of the first Gulf War to the end of the second Iraq invasion. It therefore seems clear that the institutions existed (and, indeed, exist under the Iraq constitution (“IC”) Article 117 provision that “[t]his Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region”). The Kurds also possess a common history and ethnic identity, have cultural homogeneity and linguistic unity, and have a history of 20 years of independent economic life and thousands of years of territorial connection. The Kurds must thus be viewed as a people, with rights under international law. Thus, “Test A” is passed.

The remaining test is thus if self-determination is, as a matter of fact, being denied within the existing Iraqi structure. The Kurdish people are provided with linguistic protection under IC Article 4, which states that “the Arabic language and the Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their mother tongue, [...] shall be guaranteed in government educational institutions in accordance with educational guidelines.”

As Kurdish is an official language, a full set of freedoms is necessarily entailed. Linguistic restrictions might otherwise constitute an infringement of community rights under the 1966 International Covenant on Civil and Political Rights (“ICCPR”), where Article 19 (2) allows that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”²⁵, working in combination with the ICCPR Article 27 requirement that “linguistic minorities [...] shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”²⁶ These are judicable matters before the Human Rights Committee (*Korneenko and Milinkevich v. Belarus*²⁷ and *Mavlonov and Sa’di v. Uzbekistan*²⁸), and as such could form evidence of human rights restrictions of the type required to demonstrate cultural repression for the purposes of *Aaland Islands* or clarifying the status of the repression of human rights as an “extreme case” for *Quebec*. IC Article 4(3) also guarantees this right, stipulating that “the federal and official institutions and agencies in the Kurdistan region shall use both

²² Raič, David: *Statehood and the Law of Self-determination*. Martinus Nijhoff Publishers, The Hague, 2002. p.262.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Article 19 para. 2 of 1966 *International Covenant on Civil and Political Rights*.

²⁶ *Ibid.* Article 27.

²⁷ *Case Korneenko and Milinkevich v. Belarus Human Rights Committee*, 1553/2007, 2009.

²⁸ *Case Mavlonov and Sa’di, v. Uzbekistan Human Rights Committee*, 1334/2004, 2009.

[Arabic and Kurdish] languages.” As mentioned above, IC Article 117 guarantees the right to Kurdistan's territory and existing authorities to be considered a federal region, granting considerable powers under the IC's structure.

Article 120 allows that “each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution.” This grants an effective power of self-governance over almost all areas, and the ability to remake the governmental structure of the federal region as desired.

Indeed, IC Article 115 states that “all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.” It is thus clear that in all matters that are not explicitly a matter purely for the federal authorities, political self-determination exists. Kurdistan is a region with a people in it, and is treated as a federal area. It is thus hard not to conclude that the laws are largely determined by local lawmakers, and that these are elected by the Kurdish people almost exclusively. Article 121 also gives the right for the regions to “have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government” [IC Article 121(1)] to “amend the application of the national legislation within that region” [Article 121(2)] when it does not relate to an exclusive authority, and stipulates that that “the regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.”²⁹ This is quite an astonishing amount of power for the regions compared to most states; the center cannot make law relating to most areas, and does not hold the monopoly on force.

The amount of freedom this actually grants is of course dependent on the competencies deemed to be exclusive to the central government, but these are delineated by IC Article 110, and appear restrained. Specifically, the exclusive competencies are foreign policy;³⁰ formulating national security and military policy;³¹ formulating customs and fiscal policy and running the central bank;³² regulating standards and measures;³³ regulating citizenship and immigration;³⁴ regulating broadcast

²⁹ See, IC Article 121 (5).

³⁰ *Ibid.* 110 (1).

³¹ *Ibid.* 110 (2).

³² *Ibid.* 110 (3).

³³ *Ibid.* 110 (4).

³⁴ *Ibid.* 110 (5).

frequencies and mail;³⁵ drawing up the central budget;³⁶ planning international water management,³⁷ and population statistics and census³⁸.

Conclusion

The afore-mentioned issues leave huge areas unrestricted. To note a few, it is perfectly possible to raise local taxes, invest in security forces, determine the local curriculum for education, and pass local laws and measures as may be necessary to regulate day to day trade and maintain the peace. It is notable that the government does not have the right to regulate political assembly, for example (although, as with most states, there remains a potential future issue of stretching what is covered under national security) and the amount of freedom to act that the Kurds have is remarkable. The situation the Kurds find themselves in is thus being part of a looser federal state than almost all in Europe, possessing the right to speak their own languages, make their own laws in most areas, tax as they wish, control the local police and other security forces, and determine their own administrative requirements such as provision of education and other services. This is strongly analogous to the deal eventually given to the islanders in *Aaland Islands*. The provisions against further infringements of rights are constitutional, and are thus extremely difficult to remove without Kurdish agreement.

The rights of self-determination that are possessed by the Kurds are thus somewhat more generous than those possessed by the Quebecers. The logic of the *Quebec* and *Aaland Islands* cases thus applies to show that the Kurds do possess self-determination under international law, although it should be noted that this also applied to the Kosovars without preventing them from declaring independence. It is thus clear that a unilateral declaration of independence by the Kurds would not be unlawful.

³⁵ *Ibid.* 110 (6).

³⁶ *Ibid.* 110 (7).

³⁷ *Ibid.* 110 (8).

³⁸ *Ibid.* 110 (9).

RULE OF LAW: CONSTITUTIONAL INTERPRETATION IN CHINA

DA LU*

The Constitutionalism in China

Constitution is considered as the fundamental law in most countries. The modern constitutionalism came to China in the very early of 1900s, exactly in 1908, when the first version of Constitution in China had been introduced by the Qing Dynasty.¹ However, with the development of revolution, this Constitution has not entered into force and been buried with the last empire. Since then, China is facing and witnessing the Chinese Nationalist Party's (Kuomintang) governing and many challenges. Nevertheless, the development of Constitution in China had not stopped. After the victory of anti-Japanese war, Kuomintang introduced the new Constitution in China in 1946 and put it into force in 1947. However, with the defeat of the Kuomintang, the legal system of Republic of China was abolished by Chinese communist party, the development of Constitution in China entry into a new chapter.² Current Constitution of the People's Republic of China came into force in 1982.³ In some scholars view, Chinese constitution is an "inaction law" or "dead letter"⁴, since there is not Constitutional Court or constitutional cases in China.⁵ According to Chinese constitution, the "Standing Committee of the National People's Congress has the

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¹ Jianhong, Ma: 《钦定宪法大纲》: 清末宪政观的制度载体 [Outline of Imperial Constitution: the System Carrier of Constitutionalism in the Late Qing Dynasty]. *Social Science in Hunan*, Vol. 6 (2008) 82.

² Hungdah, Chiu: Constitutional Development and Reform in the Republic of China on Taiwan, (1993) *Reprints Series in Contemporary Asian Studies*, 1.

³ There are four amendments of Constitution of the PRC.

http://www.gov.cn/gongbao/content/2004/content_62714.htm.

⁴ Qianfan, Zhang: Constitution without Constitutionalism? The Paths of Constitutional Developments in China. *International Journal of Constitutional Law*, Vol. 8 (2010) 950-976.

⁵ Yan, Lin – Ginsburg, Tom: Constitutional Interpretation in Law Making: China's Invisible Constitutional Enforcement mechanism. *American Journal of Comparative Law*, (2015) 1. See also Cao Yin: Judicial system should enforce the Constitution. *China Daily*, 2014. http://www.chinadaily.com.cn/china/2014-10/24/content_18794278.htm.



power to interpret the Constitution and supervise its enforcement.”⁶ Standing Committee is the only organ which has the power to exercise and interpret constitution.

However, the rule of law came into this socialist nation even lately. Since *Deng Xiaoping* regain his power in 1978, China started to rebuild its legal system. Numerous laws or codes entered into force within this period.⁷ In 1997, the concept of “Rule of Law” proposed by 15th National Congress of the Communist Party of China. Rule of law, as a political policy or the governing strategy, begun to be popular in China. With the development of rule of law in China, the 4th plenary session of the Central Committee of the Communist Party of China (CPC) put rule of law as the main topic in October 2014. It is the first time that the plenary session of the CPC Central Committee paid its main attention to the rule of law.⁸ A decision of rule of law with Chinese characteristics had been introduced by CPC after this plenary session.⁹ It was a big progress of rule of law in China.

Relevant Decisions

How do we improve the level of enforcement of constitutional interpretation according to the rule of law? At the beginning, this paper examines the development of practice of constitutional interpretation in China.

The story of Constitution of People’s Republic of China started from 1949, the publishing of Common Program of The Chinese People’s Political Consultative Conference (hereinafter referred to as Common Program),¹⁰ had been recognized as the interim Constitution from 1949 to 1954. In 1954, the first real Constitution of People’s Republic of China was introduced by the National People’s Congress of the PRC. Nevertheless, neither of the Constitutional documents have not regulated any provision of constitutional interpretation.¹¹ The following two versions of

⁶ Paragraph 1, Article 67, Constitution of The People’s Republic of China.

⁷ Chongpu, Luo: Evolution of the Basic Strategy of Governing the Country According to Law since the Reform and Opening Up. *Reform*, Vol. 8 (2014) 5-7.

⁸ Ibid.

⁹ After the 4th plenary session of the 18th CPC Central Committee, “Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law” was issued by CPC. The plenary session in English version is available at <<http://en.people.cn/102775/310499/index.html>>.

¹⁰ Common Program, in Chinese 共同纲领, an interim Constitutional document in PRC. From 1949 to 1954, Common Program had served as Constitution in China, until the publishing of Constitution of PRC (1954).

¹¹ There are a few of Chinese scholars who prepared the article of the Common Program and Constitution of PRC (1954). Taking *Xiaobo Zhai’s* article as an example, *Zhai* believe that the development of constitution of PRC is a process, from the movement to the legal system (Fa Zhi). Xiaobo, Zhai: 代议机关至上的人民宪政-我国宪法实施模式的解释性建构

Constitutions in China did not mention the provision of practice of Constitution as a consequence of Cultural Revolution.

The change came from late 1970s, the collapse of Gang of Four¹² and when Deng Xiaoping regained his power. Socialist China started its reform in legal (or political) and economic fields. However, before starting China's new charter, the author would like to explain the meaning and differences between legal system and rule of law.

In English or other foreign languages, there is no confusion between legal system and rule of law, however since the same pronunciation between legal system (*Fa Zhi*) and rule of law (*Fa Zhi, as well*) in Chinese, there is a long disputation of these words in China.¹³ In Chinese scholars' opinion, these two words stand two different attitude of governing the state. Legal system (*Fa Zhi*) means governing the country with law, law or act will be used in the governing process as a tool, while the legal system should be existed in any type of the form of government. A nation with legal system is not a democracy in itself, e.g. the Nazi Germany was a country with legal system; however, we could not say that it was a democracy. Nonetheless, rule of law, as a modern political concept which stands governing by law, law is the supreme, not any specific person.

As mentioned previously, rule of law became a basic principle of ruling the country by central government since 1997. The Socialist System of Laws with Chinese Characteristics had been taking place since 2010.¹⁴ Its establishment is an important milestone in China's development of socialist democracy as well as the legal system.¹⁵

The "Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law" (hereinafter: Decision) and the Explanation of the Decision which made by *Xi Jinping*, current President of PRC, both

[Popular Constitutionalism with the Supremacy of Representative Organ], *Tsing Hua Law Review*, Vol. 1 (2007) No. 2, 40.

¹² Gang of Four, Si Ren Bang in Chinese, which is considered as the leading and pioneer group of Cultural Revolution by most Chinese.

¹³ In Deng Xiaoping's era, democracy (*Min Zhu*) and legal system (*Fa Zhi*) were usually mentioned in the government's documents; however, as we all know that rule of law (*Fa Zhi*) became a basic principle of ruling the country by CPC. The difference between Legal system (*Fa Zhi*) and Rule of Law (*Fa Zhi*) can be found, for instance, Buyun, Li – Qing, Li: 从“法制”到“法治”二十年改一字——建国以来法学界重大事件研究 [From 'Legal Reform' to 'Rule of Law', The One Word Change in 20 Years: The Research on Important Events of Jurisprudential Circle Since The Establishment of the People's Republic Of China (26)]. *Law Science Magazine*, Vol. 7 (1999) 2.

¹⁴ On 10 March 2011, *Wu Bangguo*, the former chairman of the Standing Committee of the National People's Congress announced that “we had put in place a socialist system of laws with Chinese characteristics”, the English version of The Socialist System of Laws with Chinese Characteristics is available at

<<http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1036756/1036756.htm>>.

¹⁵ Ibid.

of these documents mentioned the enforcement of constitution and perfection of constitutional supervision system in China.¹⁶ These speeches imply that the importance of constitution, the enforcement of constitution is playing a key role in the period of building a rule of law in China.

With the development of rule of law, Constitution of PRC had shown a progress after Cultural Revolution. Considering Constitutional interpretation for example, it is a very important part of the enforcement of constitution. The Standing Committee of the National People's Congress (hereinafter: Standing Committee) became the only organ which has the power to interpret the Constitution of the People's Republic of China since 1978, the third version of Constitution of the People's Republic of China.¹⁷ Nevertheless, there is no specific legal procedural of constitutional interpretation in China. In practice, the constitutional interpretations were introduced through resolution or decision by Standing Committee or National People's Congress.¹⁸

On *Fan Jinxue's* opinion, there are three models of constitutional interpretation: i) interpretation by common court (i.e. USA), interpretation by a special court (e.g. Constitutional Court or constitutional council) and iii) interpretation by the parliament in some form (e.g. UK).¹⁹ Chinese constitutional interpretation system belongs to the third one, however, Fan hold a view that Chinese constitutional interpretation system is not the same as UK's, although there are some scholars argued that China has the same constitutional interpretation system as UK's.²⁰ In *Zhou Wei's* article, the Chinese constitutional interpretation system is modelled upon that of the Soviet Union, since it was a popular system in the socialist states.²¹

There is no constitutional interpretation procedure law in China. Scholars also argued that whether there is any constitutional interpretation practice in China. In *Han Dayuan's* view, until now, there is no constitutional interpretation practice. In order to

¹⁶ In the second part of the Decision, the title of this part implied the importance of constitution and the necessity of enforcement of constitution, and within this part, perfection of constitutional supervision system is also mentioned.

<http://news.xinhuanet.com/politics/2014-10/28/c_1113015330_2.htm>. Also in the Explanation of the Decision, Xi mentioned the importance of constitution and the perfection of constitutional supervision system in China.

<http://news.xinhuanet.com/politics/2014-10/28/c_1113015372.htm>.

¹⁷ Paragraph 3, Article 25, Constitution of the PRC.

¹⁸ Jinxue, Fan: :宪法解释的理论构建 [*The Theoretical Construction of Constitutional Interpretation*], Shangdong People's Publishing House, 2004. 90. In Fan's book, the dispute of subject of constitutional interpretation is also mentioned.

¹⁹ Jinxue: *op. cit.* 5

²⁰ Ibid. 6

²¹ Wei, Zhou: 中国大陆宪法解释案例研究 [*Case Study of Constitutional Interpretation of Mainland China*]. *Legal Research of Tunghai University*, Vol. 15 (2000) 151.

regulate the constitutional interpretation, the constitutional interpretation procedure law should be drafted.²²

However, there are some scholars in China, who believe that constitutional interpretation practice does exist in China. The reason of the existence of practice of constitutional interpretation in China could divide into two parts: i) on one hand, the practice of constitutional interpretation is not only in the existence of the Constitutional Court or Constitutional Council, but also it is important to implement the constitution into the political sphere. Interpreting the Constitution in China is usually considered as a political issue rather than a legal problem;²³ ii) on the other hand, some scholars admitted that constitutional interpretation should focus on the “judicialization” of constitution. According *Hu Jinguang* and *Wang Conghu*, there are several constitutional interpretations. In their article, from 1978 to 2000, there were roughly 8 constitutional interpretation practices.²⁴ In *Wang Xun*’s opinion, there is at least one constitutional interpretation practice in China, though it is not clearly seen, there is still some work to be done.²⁵ In *Fan Jinxue*’s book, “Taking Constitutional Interpretation Seriously”, Fan hold a view that there are two kind of constitutional interpretations, one is a legislative constitutional interpretation, the other is a judicial constitutional interpretation.²⁶

According to Fan Jinxue’s opinion, since the Chinese constitutional interpretations are legislative constitutional interpretations, the procedure of constitutional interpretation should be similar to the legislative procedure.²⁷

Since the more or less missing practice of constitutional interpretation and legal procedure, there are no defined and specific patterns for Chinese constitutional interpretation. Nevertheless, in the Decision of Rule of law, it is stated “we must improve the constitutional supervision system of the National People’s Congress and

²² Dayuan, Han: 宪法程序解释法》的意义、思路与框架 [Significance, Thought and Frame of ‘Constitutional Interpretation Procedure Law’]. *Zhejiang Social Sciences*, Vol. 9 (2009) 15.

²³ Guoqiang, Zhai: 中国宪法实施的双轨制 [Double Track System of the Implement of Constitution in China], *Chinese Journal of Law*, Vol. 3 (2014) 82.

²⁴ Hu, Jinguang – Wang, Conghu: 论我国宪法解释的实践 [On the Practice of Constitutional Interpretation of People’s Republic of China]. *Studies in Law and Business*, Vol. 2 (2000) 3.

²⁵ Xu, Wang: 论我国宪法解释程序机制：规范、实践与完善 [On Constitutional Interpretation Procedure Mechanism in PRC: Regulation, Practice and Perfection]. *Social Sciences of Chinese University*, Vol. 4 (2015) 140.

²⁶ Jinxue: *op. cit.* 21.

²⁷ This is the normal legislative procedure of PRC, Legislation Law of the People's Republic of China was adopted on 15th March 2000 by the 3rd Plenary Session of the 9th National People’s Congress, and the amendment entered into forced on 15th March 2015 by the 3rd Plenary Session of the 12th National People’s Congress. The Chinese version is available at http://news.xinhuanet.com/politics/2015lh/2015-03/18/c_1114682142.htm. See also <http://www.npc.gov.cn/npc/sjb/2013-02/19/content_1755104.htm.

its Standing Committee, and the completion of the Constitutional Interpretation Procedure Mechanism.”²⁸

Historical Reminiscences

In 1988, there is a reply made by the Supreme People’s Court of PRC. In this Reply, it stated that the protection of labour is stipulated by Constitution of the People’s Republic of China.²⁹

In 2001, the Supreme People’s Court hold the following: based on the facts of the case, the defendant *Chen Xiaoqi et al.* who infringement of the plaintiff *Qi Yuling’s* basic right to receive education protected by Constitution through infringement of right of Mr. Qi, Mr. Chen et al. should bear civil liability.³⁰ This legal interpretation raised a great debate among the Chinese legal scholars. *Huang Songyou* (the chief judge of the first civil jurisdiction of the Supreme People’s Court of PRC) pointed out that “it set a precedent of judicialization of constitution.”³¹ *Song Chunyu*, Huang’s colleague, published an article in *People’s Court Daily*, and stated that “the interpretation completes and enriches the citizens’ constitutional right approaches to judicial protection, it has a great significance.”³² In *Robert J. Morris’* paper, he thinks that Qi case

²⁸ Ling, Ma: 我国宪法解释的程序设计 [The Programming of Constitutional Interpretation in PRC]. *Law Review*, Vol. 4 (2015) 1. The original version of this citation is “完善全国人大及其常委会宪法监督制度·健全宪法解释程序机制”, see also in <http://news.xinhuanet.com/politics/2014-10/28/c_1113015330.htm>, accessed 26 Nov. 2015. *Huixing Liang*, the deputy of National People’s Congress and famous jurist in China, submitted a proposal of constitutional interpretation procedure law of PRC in the 5th Plenary Session of the 11th National People’s Congress, <<https://www.iolaw.org.cn/showNews.aspx?id=30094>>.

²⁹ Ibid 133.

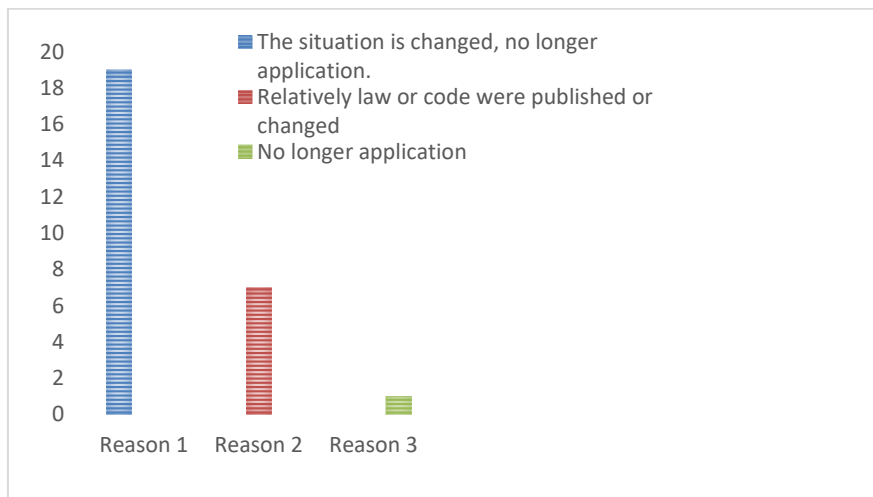
³⁰ Ibid 134. See also Huang, Songyou: 宪法司法化及其意义--从最高人民法院今天的一个《批复》谈起 [Judicialization of Constitution and its Meaning: Discussion on Today’s “Reply” of Supreme People’s Court]. 13 Aug. 2001 Page B1, *People’s Court Daily*. A brief introduction of Qi case: Plaintiff, Qi Yuling, female, 28 years old (in 2001), lives in Shangdong Province. Defendant, Chen Xiaoqi, female, the same age in 2001 and lives in Shangdong province. In 1990, Qi passed the entrance examination, Chen did not. However, with the help of Chen’s father, Chen got Qi’s admission letter and had the chance to attend the school and got her further education. 11 years later, Qi was unemployed, Chen got a job in Bank of China. Finally, Qi found that her right of education was infringed by Chen and sued Chen Xiaoqi et al. in 1999, the Final Decision made by Shangdong Higher People’s Court in 2001.

³¹ Huang: *op. cit.*

³² Chunyu, Song: 齐玉苓案宪法适用的法理思考--受教育权的性质与公民基本权利保护的法律研究 [Jurisprudential Thinking on Constitutional Application of Qi Yuling Case: The Nature of Right of Education and Legal Research on the Protection of Citizens’ Basic Rights] 13 Aug. 2001 Page B1, *People’s Court Daily*.

is somewhat China's so-called Marbury case.³³ As we all know, *Marbury v. Madison* case was a milestone in American legal history, since then, the Supreme Court of the United States has the power to exercise judicial review over legislation.

Although, in some scholars' view, Qi case is a significant breakthrough in the enforcement of constitution in China. Huang Songyou's judicialization of constitution aroused a widely debate among the jurists.³⁴ Nevertheless, that decision was annulled on 8th December 2008 by 1457th meeting of the Judicial Committee of the Supreme People's Court.³⁵



Source: China Court, see <http://old.chinacourt.org/html/article/200812/24/337161.shtml>

There were 27 items where judicial interpretations annulled. 19 of these interpretations were annulled because “the situation is changed”. (情况已变化 · 不再适用); 7 of them were annulled, since the law or code changed (不再适用).³⁶ In Ma Ling's paper, Ma gives five reasons for the annulment of the decision: i) denying the judicialization of

³³ Morris, Robert: China's Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education & Constitutionalization. *Tsinghua China Law Review*, Vol. 2 (2012) 273- 274.

³⁴ The arguments was existed in Liang Huixing and Qiang Shigong's paper. Huixing, Liang: 最高人民法院关于侵犯受教育权案的法释 [2001] 25.号批复评析 [Review of the Supreme People's Court Reply of Judicial Interpretation No. 25 (2001) of Infringement of Education Right]. See also Shigong, Jiang: 谁来解释宪法? – 从宪法文本看我国的二元违宪审查体制 [Who Shall Interpret the Constitution? – the Examine of Dual Constitutional Review System in China from the Constitutional Text].

³⁵ Ling, Ma: 齐玉苓案“批复”废止“理由”析 [Analysis of ‘the Reason’ of the Abolition of ‘the Reply’ of Qi Yuling Case]. *Law Science Magazine*, Vol. 4 (2009) 18.

³⁶ See <<http://www.chinalaw.gov.cn/article/fgkd/xfg/cfjs/200905/20090500133973.shtml>>.

constitution in China; ii). asking the courts not to apply the Constitution; iii) denying the necessity of the judicialization of constitution in China; iv), denying the necessity of the judicialization of constitution in China at the present stage; v), denying the approach to “be benign unconstitutionality (良性违宪)” reform.³⁷ In *Chen Xuanyu*’s view, there are two reasons for the annulment: i) the “right of education” should not be applied to the Qi case; and ii) the court should not apply constitutional provision.³⁸

In my point of view, the following should be done in the future. *My suggestion* is to set up specific organs to the constitutional interpretation in the future. The Decision stated that “we must improve the constitutional supervision system of the National People’s Congress and its Standing Committee, and completion of the constitutional interpretation procedure mechanism.”³⁹ In order to improve the constitutional interpretation procedure mechanism, scholars suggested that Constitutional Council (宪法委员会) or Constitutional Interpretation Advisory (宪法解释咨询委员会) should be set up, and the Constitutional Interpretation Procedure Law should be enacted by the National People’s Congress.⁴⁰

However, the constitutional interpretation made by Standing Committee is a legislative constitutional interpretation, but we still need a special organ to carry out judicial constitutional interpretation.

Conclusion

We should admit that constitutional interpretation is not well implemented in China. As a socialist country, constitutional interpretation in China will not follow the western constitutional interpretation system completely, and by preserving the Chinese characteristics,⁴¹ there is a chance to reform the constitutional interpretation. However,

³⁷ Kui, Shen: 宪法规范层次论：一种解释方法 [Hierarchy of Constitutional Provision: An Interpretive Approach]. *Tsinghua Law Journal*, Vol. 6 (2012) 5. See also Quanxi, Gao – Wei, Zhang – Feilong, Tian: *The Road to the Rule of Law in Modern China*. Springer, 2015. 108.

³⁸ Hongyi, Chen: 齐案“批复”的废止与“宪法司法化”和法院援引宪法问题 [The Abolition of the Reply of Qi Case and the Question of Judicialization of Constitution and Courts Applying Constitution]. *Legal Science Magazine*, Vol. 3 (2009) 11.

³⁹ Ibid. 22.

⁴⁰ These suggestions are provided by Wang Xu, Ma Ling and Han Dayuan. See Xu: op. cit., Han: op. cit. and Ma: op. cit.

⁴¹ Chinese characteristics or socialism with Chinese characteristics is a political concept in China, which introduced by *Deng Xiaoping* in 1982, it emphasized China will insist socialism system, however with special Chinese characteristics and special circumstances. It shows China will employ socialism with a more flexible way, 中国特色社会主义：概念演变与内涵升华 [Socialism with Chinese characteristics: The development and sublimation], available at <<http://theory.people.com.cn/n/2013/0116/c49157-20216946.html>>.

there are still some experiences China can learn from the foreign countries. With the government put more and more emphasis on the implementation of constitution and rule of law, the practice of constitutional interpretation should become more and more common in China.

OVERVIEW ON THE MAIN AIMS AND GOALS OF THE SECURITY STRATEGY OF THE SLOVAK REPUBLIC

CHALLENGES OF THE MIGRATION CRISIS

KRISTIÁN UJVÁRY*

The Security Situation

Europe is facing to the threat of illegal and uncontrollable migration fueled mainly from the poor socio-economic conditions and population growth in its neighboring regions. The populism of some EU representatives and insufficient EU's integration capacity create conditions for the growth of intolerance, that is an obstacle to the successful integration of the migrants.

When we imagine the number of migrant passing the German borders reaching recently the limit of 1,1 millions that German society tries to integrate, we can see the security, social, economic and healthcare problems, that the destination member states for migration are facing. The German chancellor *Angela Merkel* received in 2015 the prestigious title of Person of the Year, awarded by the Time magazine which highlighted its strength and leadership in the fight with the migration crisis.¹ She left behind the next nominate, *Abu Baker Al-Baghdadi* – the mastermind of the Islamic State of Iraq and Syria. Some sources said that the uncontrolled migration influx resulted the arrival of approximately 5000 jihadists at large that have slugged back into European capitals after being trained in Iraq and Syria. The head of Europol, *Rob Wainwright*, has warned, that the agency expects ISIS-trained jihadists to „stage an attack somewhere in Europe with the aim of achieving mass casualties among the civilian population.“²

Number of terrorist attacks had been recently committed in European capitals, having led several anti-terrorist action against ISIL occupying Syrian and Iraqi areas. The most serious ones were so far executed in Paris (in November 2015), Ankara (in March 2016), and Brussels (in March 2016). In the table below, there is a list of terrorist attacks in France and Belgium since 7th January 2015.

The present paper collects and takes a general overview on the most important news, article parts and EU actions within the given field.

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¹ Time: *Angela Merkel, Person of the year*. <http://time.com/time-person-of-the-year-2015-angela-merkel-choice>.

² See <http://www.dailymail.co.uk/news/article-3455254/There-5-000-ISIS-trained-jihadists-roaming-large-European-Union-warns-head-Interpol.html>.



EVENTS

<i>January 7, 2015</i>	Brothers Chérif and Saïd Kouachi (French citizens aged 32 and 34) shoot dead 11 people at the Paris offices of French satirical magazine <i>Charlie Hebdo</i> . As they make their escape they kill a 12th person, a 42-year-old policeman.
<i>January 8, 2015</i>	A municipal policeman is killed in a shooting in Montrouge, south of Paris
<i>January 9, 2015</i>	The shooter at Montrouge, Amedy Coulibaly, is identified as an acquaintance of Chérif Kouachi. The Kouachi brothers are shot dead as they try to escape a printing works in Dammarin-en-Goële (a town 40 km north-west of Paris) in which they had been hiding. At the same time security forces raid a Jewish supermarket in Vincennes. Amédi Coulibaly, a 32-year-old French citizen, had been holding several people hostage in the supermarket and is shot dead in the raid. He had killed four of the hostages.
<i>January 11, 2015</i>	More than four million people take part in marches in support of Charlie Hebdo across France, while other solidarity rallies are held in cities around the world.
<i>January 14, 2015</i>	The Yemeni branch of al-Qaeda claims responsibility for the Charlie Hebdo attacks.
<i>June 26, 2015</i>	Yassin Salhi, later identified as a suspected follower of the ultra-conservative Salafist movement, a radical branch of Sunni Islam, assassinates and beheads his boss Hervé Cornara in an industrial zone in Saint-Quentin-Fallavier, near Lyon.
<i>November 13, 2015</i>	Almost simultaneous shootings and suicide bombings in Paris. Three suicide bombings outside the national sports stadium Stade de France during an international football match kill the three bombers and one passer-by. Subsequent shootings take place at bars and the Bataclan music venue inside central Paris. A total of 129 people are killed and 352 people injured.
<i>November 14, 2015</i>	ISIL claims responsibility for the Paris attacks the night before.
<i>November 18, 2015</i>	Belgian jihadist Abdelhamid Abaaoud, suspected of organising the November 13 attacks, is killed during a police raid on an apartment where he had been hiding in the Saint-Denis area north of Paris.
<i>December 22, 2015</i>	Yassin Salhi commits suicide in his prison cell in Fleury-Mérogis.

March 15, 2016	A police operation in the southern Brussels district of Forest ends with the fatal shooting of Mohamed Belkaid, until that point unknown to anti-terrorism agencies, and the escape of two men, including Salah Abdeslam.
March 18, 2016	Salah Abdeslam is arrested in the Molenbeek area of Brussels. The most wanted man in Europe was hiding in a building a few hundred metres away from his parents' house
March 22, 2016	Two coordinated deadly attacks at Brussels airport in Zaventem and one in underground train network at Maalbeek station.

Table 1: A timeline of terror attacks in France and Belgium since *Charlie Hebdo*³

The intelligence services in Belgium – the General Intelligence and Security Service – SGR (Général du Renseignement et de la Sécurité) and the Belgian State Security Service have been criticised by many security experts and organizations worldwide for the insufficient assessment of intelligence information. The lack of sharing of information amongst many intelligence services of the 28 states of the European Union and the dysfunctional separation of powers in Belgium resulted in the attack on Europe's political capital on the 22 March 2015. Turkish President *Recep Tayyip Erdogan* claimed that the Turkish authorities warned their Belgian counterparts that one of the suspected bombers, *Ibrahim el Bakraoui* was a dangerous terrorist. The intelligence services in France - DGS (Direction générale de la Sécurité intérieure), DGSE (Direction Générale de la Sécurité Extérieure) had a history of non-cooperation. A senior official provided the information, that it was better now — though he admitted to “continuing problems on the political level.”⁴ There was given an example of the problematic cooperation between the Belgian law enforcement agencies about *Salah Abdeslam*, the only terrorist, who has stayed alive after the synchronized terrorist attacks in November 2015 in Paris. The current security situation represents the challenge not only for the intelligence exchange, that has a direct implication on the permanent dilemma between the effective electronic surveillance of the communication of the terrorists and the personal data protection, but also for the closing or control of the external borders of the European Union.

³ Source: <http://www.euronews.com/2016/03/22/a-timeline-of-terror-attacks-in-france-and-belgium-since-charlie-hebdo/>

⁴ Reuters: *The world's spies agree Belgian intelligence is broken*. See <http://blogs.reuters.com/great-debate/2016/03/24/how-the-worlds-intelligence-services-rate-each-other/>.

The Security Strategy of the EU

The security strategy of the EU has been compiled in the intention of facing global challenges, such as:

- ❖ *conflicts*, that destroy not only the infrastructure, including the social one, it also encourages criminality, deters investment and makes normal economic activity impossible;
- ❖ *competition for natural resources*, notably water - which will be aggravated by global warming over the next decades, is likely to create further turbulence and migratory movements in various regions and
- ❖ *energy dependence* is a special concern for Europe. Europe is the world's largest importer of oil and gas. Imports account for about 50% of energy consumption today. This will rise to 70% in 2030. Most energy imports come from the Gulf, Russia and North Africa.

As the recent terrorist attacks showed, Europe is facing to several key threats that are included in the European Security strategy.

Terrorism: Europe is both a target and a base for such terrorism: European countries are targets and have been attacked many times.

Weapons of mass destruction are potentially the greatest threats to our security. The international treaty regimes and export control arrangements have slowed the spread of WMD and delivery systems. We are now, however, entering a new and dangerous period that raises the possibility of a WMD arms race, especially in the Middle East.

State failure corrodes states from within. It may be caused by various factors, such as the conflicts of cultures, religion, economic disparity, corruption, extremism, antisemitism, etc. The collapse of the State can be associated with obvious threats, such as organized crime or terrorism. Organized crime is an internal security threat with the external dimension. It may have form of terrorism, human trafficking (mainly children and women), trafficking of migrants, smuggling of drugs and smuggling of weapons. Dealing with terrorism may require a mixture of intelligence, police, judicial as well as military and other means.

Terrorism uses various methods of attack. One of the most dangerous is the use of the Weapons of Mass Destruction. Belgium is now alert not only for the recent terrorist attacks, but also because of the murder of the nuclear guard at Belgium's national radioactive elements institute at Fleurus, to the south of Brussels. The media reports tap into fears about the possibility militants are seeking to get hold of nuclear material or planning to attack a nuclear site.⁵ The British Office for Nuclear Regulation (ONR)

⁵ Reuters, Belgian nuclear guard shot, prosecutor rules out militant link, <http://www.reuters.com/article/us-belgium-blast-nuclear-idUSKCN0WS09E>.

has explicitly acknowledged the growing terrorist threat to the nuclear industry.⁶ It has issued a Strategic Plan – the document that lists as the highest risk the “Failure to protect the confidentiality, integrity and availability of sensitive information and assets from both known and emerging security threats to the UK nuclear infrastructure (e. g. cyber-attacks, terrorist activity, state-sponsored espionage).” In another reference, it says: “we recognize the world is increasingly globalized and digitized, where both the terrorist threat and the risks from cyberspace are changing. The Government and duty-holders have well-developed security capabilities to deter and defend against organizations and individuals that might conspire to attack or exploit the nuclear estate. ONR will continue to work with the Government to ensure that security-focused regulations evolve to remain fit for purpose and align with safety regulation.”⁷

The security strategy presents policies that represent the reaction of the European Union to the existing security threats. It has responded after 11 September with measures that included the adoption of a European Arrest Warrant, steps to attack terrorist financing and an agreement on mutual legal assistance with the U.S.A. The European Union and Member States have intervened to help deal with regional conflicts and to put failed states back on their feet, including in the Balkans, Afghanistan, and in the Democratic Republic of Congo (DRC). Restoring good government to the Balkans, fostering democracy and enabling the authorities there to tackle organized crime is one of the most effective ways of dealing with organized crime within the EU. The third chapter of the Security Strategy (Policy Implications for Europe) contains the commitment of the EU of supporting the United Nations as it responds to threats to international peace and security. The EU is committed to reinforcing its cooperation with the UN to assist countries emerging from conflicts, and to enhancing its support for the UN in short-term crisis management situations.⁸

Although the EU and the Security Council responded with UN Security Council Resolution 1244/99, in the case of Kosovo for example, which authorized the presence of NATO troops (KFOR). In the case of Syria EU did not discuss the possibility of UN Security Council resolution. UN, as well as the EU, is focusing on receiving migrants in particular through the UN High Representative for Migration.⁹

⁶ Independent, Exclusive: Nuclear watchdog warns of terrorist threat to UK reactors, <http://www.independent.co.uk/news/uk/home-news/exclusive-nuclear-watchdog-warns-of-terrorist-threat-to-uk-reactors-a6953396.html>.

⁷ Independent, Exclusive: Nuclear watchdog warns of terrorist threat to UK reactors, <http://www.independent.co.uk/news/uk/home-news/exclusive-nuclear-watchdog-warns-of-terrorist-threat-to-uk-reactors-a6953396.html>.

⁸ Council of the European Union, *European Security Strategy*, <http://www.consilium.europa.eu/uedocs/cmsUpload/031208ESSIISK.pdf>.

⁹ Refugees are responsibility of the world. Proximity doesn't define responsibility, interview with Peter Sutherland, <http://www.un.org/apps/news/story.asp?NewsID=52126#.VhLVTBZweBZhttp://www.un>

The security strategy of the EU has the following strategic objectives:

i) *Addressing the threats* - EU has intervened to deal with regional conflicts, such as restoring good government, fostering democracy, enabling authorities to tackle organized crime. The EU has to improve a lot to fulfill this objective, since the source countries of the immigration (mainly Syria and Iraq) are still in the far and their security situation are not stabilized yet.

ii) *A broader engagement with the Arab world* – This objective has been fulfilled by creation and operation of organizations like EUROMED, which aim is to support the multicultural society. The activities of such organizations operated by the European Union could lead to rise of the influx of migrants.¹⁰

iii) *Working with partners* - *The aim of EU is the effective and balanced partnership with the USA.* Unfortunately during the last two years the European citizens have witnessed the political, social and economic pressure of USA, various NGO's and the mainstream media on the decision making of the European leaders.

iv) *To maintain the relationship with Russia* is an important objective, since the European Union is currently dependent on Russian natural resources. In spite of that the EU high representatives insist on the economic sanctions on Russia, which causes huge economic loss to many companies in the European Union and in Russia as well.

The Security Strategy of the Slovak Republic

Brief Overview

There are several security threats that the Security Strategy of Slovakia is focusing on. The most severe consequences for the Slovak Republic and its allies could have the use of *weapons of mass destruction* by the terrorist organizations or by failing or failed states. Terrorism represents to Slovakia a strategic global threat. It uses the ideologies supporting the race, ethnical or religious hate, violence and genocide and tries to undermine fundamental democratic values of society, such as openness, freedom of the individual, value of human life and tolerance. Slovak Republic was so far only a transit area for migrants. Increasing its economic growth in the upcoming years the threat of illegal and uncontrollable migration can grow and Slovakia is gradually becoming the destination country.¹¹

The Security Strategy of Slovakia has been adopted on 27. September 2005. Its interests are:

[.org/apps/news/story.asp?NewsID=52126#.VhLVTBZweBZ](http://apps/news/story.asp?NewsID=52126#.VhLVTBZweBZ).

¹⁰ European External Action Service, Euro – Mediterranean Partnership EUROMED, http://eeas.europa.eu/euromed/index_en.htm.

¹¹ Ministry of Defence of the Slovak Republic, *Security Strategy of the Slovak Republic*. See <http://www.mod.gov.sk/data/files/833.pdf>.

K. UJVÁRY: *GOALS OF THE SECURITY STRATEGY OF SLOVAK REPUBLIC*

- i. to guarantee the safety of citizens and to protect their human rights and fundamental freedoms,
- ii. to guarantee the territorial integrity, sovereignty, inviolability of borders, political independence,
- iii. to develop a democratic state, the rule of law and the market economy,
- iv. to create conditions for sustainable economic, social, environmental and cultural development of society,
- v. to strengthen the strategic transatlantic partnership,
- vi. to strengthen the effectiveness of international organizations and promote the expansion of NATO, and the EU,
- vii. to develop good partnerships and all forms of mutually beneficial cooperation,
- viii. to guarantee its own security, based on the rights to individual and collective self-defense,
- ix. to contribute to strengthening and proliferation of freedom and democracy, respect for human rights, the rule of law, international law, peace and stability in the world.

Slovakia has created its security policy with the aim to develop the security system. For this purpose the government uses several tools, such as intelligence services, armed security forces (police, corps guards), security forces (customs), emergency corps and ambulance services. The security of the environment is ensured via membership in UN, EU, NATO, OSCE, OECD and the Visegrad group, as well.¹²

Actions of the Slovak Government Taken in Order to Eliminate the Security Threats

The Slovak Republic at the meeting of interior ministers of 22 September 2015 in Brussels confirmed that in the context of managing the refugee crisis in Europe accepts only 100 Christians from Syria. The Slovakian PM *Robert Fico* announced that the Slovak Republic refuses to accept immigrants on the basis of obligatory quotas and will sue the European Commission before the European Court of Justice in Luxembourg.¹³ The Minister of Interior *Robert Kaliňák* is going to reflect the seriousness of the immigration crisis by the increase the number of police officers by 2500 staff members. Slovakia cooperates with its allies and contributes to European partners by sending police officers to Hungary (50), Slovenia (20) and FYROM (25).¹⁴ The Slovak Republic has amended the law nr. 460/1992 – The Constitution of the Slovak Republic on 8 December 2015.

¹² Ibid.

¹³ See <https://www.independent.co.uk/news/world/europe/slovakia-wants-to-stop-muslim-migrants-from-entering-a6803811.html>.

¹⁴ Greekreporter, Slovakian Police to Help FYROM Guard Its Border, <http://eu.greekreporter.com/2016/01/06/slovakian-police-to-help-fyrom-guard-its-border/>.

The amendment of the Constitution is the basis of the anti-terrorist legislative package implemented by the Parliament of the Slovak Republic. After the amendments the police will be able to detain persons for offenses of terrorism to 96 hours, yet the law set maximum limit for restrictions on personal freedom to 48 hours. The amendment of the penal code defines the concept of “terrorist criminal act” and increases the lower-bound of the criminal act of establishing, plotting and supporting a terrorist group from 8 to 10 years. The obligate arrest has been introduced, based on which the court will be able to detain a person accused from the criminal act connected with the terrorism without giving reasons. The deadline of the court for decision about detention remains 72 hours, instead of the proposed 144 hours. There have been several measures adopted regarding the witness protection.¹⁵ The proposal regulates the use of special technical stuff in interventions and use of weapons, including special and specific coercive measures.

Regarding police the reasons for arrest and the deadlines will be extended, as well as the authorization for inspection of the vehicles. The police are also authorized to use videoconferences more frequently during interrogations of the protected witnesses.

The Military Intelligence gets in same authorization in relation to counter-terrorism measures such as the Slovak Intelligence Service (SIS).

The court is based on the initiative of the Slovak Information Service prohibits the operation of a web portal, where the proliferation of ideas that promote or support terrorism, political or religious extremism and extremism manifested in a violent manner is present. Anyone who has monitored public areas will be obliged to provide SIS a photo or video, if the Secret Service asks for it for purposes defined by law, to protect national security. The SIS is authorized to the possibility for pretending of selling or buying things applicable in terrorist offenses. The SIS and the police are authorized for the use of telecommunications record from the prison. (All calls can be recorded except of those between the sentenced persons and their solicitors.)¹⁶ In the table below are listed the amendment of laws connected to the law enforcement agencies and the secret services.

¹⁵ National Council of the Slovak Republic, *Law on Witness Protection nr. 256/1998*.

¹⁶ National Council of the Slovak Republic, *Law on Slovak Information Service nr. 46/1993*.

NR./YEAR	DESCRIPTION
300/2005	Criminal (penal) code
301/2005	Criminal (penal) procedure
171/1993	Law on the Police Force
46/1993	Law on Slovak Information Service
198/1994	Law on Military Inteligence
297/2008	Law on Protection from Legalization of Proceeds of Crime and terrorism financing
256/1998	Law on Wittness Protection
4/2001	Law on Corps Guards
475/2005	Law on the Execution of Sentences
221/2006	Law on Remand in Custody
647/2007	Law on Travel Documents
154/2010	Law on European Arrest Warrant
351/2011	Law on Electronic Communication
404/2011	Law on Stay of Aliens

Table 2. Anti-terrorist law package amendments

Conclusion

The current influx of migrants from the Middle East and Africa is forcing the European Union Member States to perform actions in which they must take into account both the human rights aspect and the security of the European Union. We must realize the need of protection of the state borders, as well as the security and cultural inharitance of the society. There is no doubt that the leaders of Germany and the European Parliament are facing the pressure to promote multiculturalism in Europe. The solution is clear based upon the aforementioned relating to the Slovak Strategy: closing of borders of the European Union for illegal migrants and the closer cooperation between intelligence services and law enforcement agencies of all EU member states.

INTRODUCTION TO COMMERCIAL DISPUTES IN JORDANIAN COURTS

UNDER JORDANIAN COMMERCE ACT 12 OF 1966 AND ITS AMENDMENTS

WADDAH AL RAWASHDEH*

In Jordan, the Commerce Act 12 of 1966 and its amendments, applies to commercial activities or transactions, such as exporting, transport, agency, insurance, buying and selling for profit, general or activities carried out by merchants whether a person whose profession is commerce, or a company whose main objective is commercial.¹ However, any dispute arising from the above transactions which main objective is commercial could be considered a commercial dispute.²

In general, the Jordanian judge should apply the Jordanian Commerce law if any commercial dispute will arise regarding to the abovementioned commercial activities. Nevertheless, Jordanian Commerce law did not address all commercial disputes. It has a shortage in a provision for addressing a particular commercial dispute; as a result the judge will turn to the other sources of a commercial rule such as, Civil Law Act 43 of 1976 and the judicial practice.

The aim of this paper is to point out to the existing legislative situation of the role of jurisprudence in addressing commercial dispute in Jordanian courts under Jordanian Commerce Law by clarifying the nature of commercial dispute in Jordanian courts and the role of jurisprudence in addressing commercial dispute.

The Nature of Commercial Dispute in Jordanian Courts

The Jordanian Commerce Law regulates the legal commercial transactions³ falling under articles (6), (7) and (8).

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¹ Article 6 of Jordanian Commerce law No. 12 for the year 1966 and its amendments.

² Al-Khashroom, Abdullah: The Sources of a Commercial Rule under the Jordanian Commercial Law No. 12 for the Year 1966, *Muta Magazine for Researchs and Studies*, Volume XV (2000) No. 4, 3.

³ The Jordanian Commerce Law does not regulate all commercial activities, therefore, there are other commercial laws regulating different areas of business life in Jordan, see the following list:

Commercial and Industrial Chambers Law No. 41 of 1949.

Trademark Law No. 33 of 1952 and its amendments.

Patents Act No. 32 of 1999.



Article (6) of Jordanian Commerce Law states the activities (by virtue of their inherent nature) which should be considered as land business activities. Moreover, it should be mentioned here that the same article is considered as source of commercial activities⁴ by virtue of being similar to the characteristics and objectives of the abovementioned activities.⁵

Article (8) of Jordanian Commerce Law states the following: “all work carried out by the trader for commercial purposes is also considered as commercial activity by the virtue of the law. When the suspicion arises with regard to the activity of the merchant then it should be considered that activity as a commercial activity for this purpose, unless the contrary is proved.”

In other words, the commercial activities from commercial disputes may fall under these two categories.⁶ (1) Certain actions are considered to be commercial by definition, which means that the identity of the person(s) performing these actions do not matter

Trade Names Law No. 3 for the year 1953 and its amendments.

Banks Law No. 4 for the year 1971.

Maritime Trade Law No. 12 for the year 1972.

Auditing Profession Law No. (22) for the year 1985.

Agents and Brokers Trading law No. (44) for the year 1985 .

Companies Law No. (22) for the year 1997 .

Temporary Securities Law No. (23) for the year 1997 .

In addition to these laws, there is a set of regulations, instructions and decisions governing the various commercial issues, such as:

Ottoman Murabaha (profits) system for the year 1303 *Hijra*, which determines the amount of interest on civil and commercial debt.

Trademark Regulation No. 1 of its amendments.

Record brand names Resolution No. 1 for the year 1953.

Record Trade Regulation No. 13 of 1966.

⁴ It should be mentioned here that Jordan is a member of the World Trade Organization (WTO), Free Trade Agreement with the United States and is member of the Euro-Mediterranean Association Agreement. It is party to the Agadir Agreement of February 2004 with the EU. By signing of the mentioned agreement Egypt, Jordan, Morocco, and Tunisia may pool their value added inputs for preferential access to EU markets. For more information see: Hammouri, Tariq – Khleifat, Dima – Mahafzah, Qais: Arbitration and Mediation in the Southern Mediterranean Countries: Jordan. *Kluwer Law International*, Vol. 2 (2007) No. 1, 1.

⁵ Furthermore, Article (7) of Jordanian Law of Commerce states that the following acts should be considered as maritime commercial acts:

- all the constructions or purchase of vessels intended for internal or external navigation for the intention to invest commercially or sold and every sale of the purchased vessels in this manner.
- all marine missionaries and all the process related thereto such as buying or selling of ropes and sails and supplies.
- leasing vessels or transported commitment and maritime lending and other relevant maritime trade contracts such as entrepreneur, contracts which determines the wages of sailors and rent the sailors to work on the trading ships.

⁶ Hammouri-Khleifat-Mahafzah: *op. cit.* 74.

for the purposes of classifying the dispute as commercial or civil. A person or company, whose status does not qualify them to be traders (by the legal definition) may carry out a commercial transaction if the transaction was one of the commercial activities defined by the law, and such activity does not label the person performing it to be a trader. In this case the transaction itself falls under the provisions of the Commercial Law, and thus any dispute arising from or related to such transaction may be considered commercial. (2) All actions committed by a trader for commercial purposes are considered as commercial. According to the law, the definition of a trader includes people whose profession is trade and companies whose main objective is commercial.

However, the commercial disputes might be a payment default on delivery of goods or could be a dispute relating to the payment and/or finalization of commitments according to the contract. In general, a dispute settlement clause drafted in a commercial contract in order to state in which way the future dispute should be settled. This can be a national court through litigation according to the agreed applicable law or an arbitration panel upon the agreed arbitration rules.⁷

Regarding the courts, it will be discussed below in details but it should be mentioned here that the Jordanian Constitution divides the courts into four main types:⁸ i) civil, ii) religious, constitutional⁹ and special courts. None of Jordan's courts are specialized in settling commercial disputes but the civil judges will examine the commercial disputes. In other words, the 'Specialization of Courts principle' does not exist under the Jordanian judicial system. For example, according to the Commerce Law, the bankruptcy case is considered as a commercial dispute while the labor case is not

⁷ It should be mentioned here that in the absence of such dispute settlement clause the international private law will decide in which jurisdiction and at which forum a claim should be brought.

⁸ Jordanian Courts are divided into four kinds of courts:

- Civil courts: the civil, criminal and administration jurisdiction is exercised under the title of civil courts as a following:
 - the civil and criminal and Magistrates' court/the courts of First Instance,
 - the civil and criminal Court of Appeal, and
 - the civil and criminal Court of Cassation (Supreme Court).
- administrative courts.
- Religious courts, divided into Shari'a courts for Muslims and tribunals of other religious communities.
- Constitutional Court.
- Special courts: such as, military and state security courts. (For more information, see article 99 of the Jordanian Constitution for the year 1952 and its amendments.)

⁹ In 2011, some vital amendments made to the Constitution of the Hashemite Kingdom of Jordan. The main amendments aimed to establish a Constitutional Court to be located in Amman. The main role for the Constitutional Court shall be to monitor the constitutionality of laws and regulations. For more information, see Articles 58-61 of the Jordanian Constitution for the year 1952 and its amendments.

considered as a commercial dispute. Nevertheless, the same civil judge may examine the two cases.¹⁰

The Role of Jordanian Civil Law

In Jordan, any dispute arising from transactions (made by people whose profession is trade or companies whose main objective is commercial) could be considered a commercial dispute, provided that these transactions have been made for a commercial purpose.

Generally, the Jordanian civil judge should apply and interpret the Jordanian Commerce law if any commercial dispute arises. Nevertheless, Jordanian Commerce law did not address the whole commercial disputes. It has a shortage in a provision for addressing a particular commercial dispute; as a result the judge will turn to the other sources of a commercial rule.

Article (2) and (3) of the Jordanian Commerce Law clarified the following:

- If the commerce law has a shortage in a provision for addressing particular commercial disputes, then the judge will turn to the provisions of the Jordanian Civil Law No. 43 for the year 1976 and its amendments.
- If no legal applicable provision is to be found in the Civil law, the judge can then seek guidance in judicial precedents, jurisprudence, justice rules, and commercial custom, respectively.¹¹

However, this section will state the sources of a commercial rule to settle the commercial dispute under the Jordanian Commercial Act but it should be focused the role of jurisprudence in addressing commercial dispute.

Jordanian Civil Law Act 43 of 1976

Jordan enacted its' first civil law in 1976 under the name Provisional Jordanian Civil Code 43 of 1976 (in effect since 1 January 1977). The Jordanian Civil law are divided into an introductory chapter and four books with 1449 Articles, as follows:

1. The introductory chapter (Articles 1-86) contains general provisions regulating the application of the law, its' sources, and certain provision related to legal personality and most importantly provisions related to Private International Law.
2. The first book of the Jordanian Civil law (Articles 87-464) deals with contract,

¹⁰ Hammouri-Khleifat-Mahafzah: *op. cit.* 76.

¹¹ In other words, the sources of the commercial rule are divided into the following:

- Basic principal sources: which are considered as commercial legislations: Jordanian Commerce Law.
- Basic alternative sources: which are represented with the Jordanian Civil Act of 1976 and its amendments.
- The guiding sources: include judicial precedents, jurisprudence, rules of equity and commercial customs, respectively.

unilateral disposition, tort, beneficial acts, law as well as rules organizing obligations' effects.

3. The second book of the Jordanian Civil law (Articles 465-1017) contains rules regulating numerous contracts, such as sale, lease, labour, insurance, surety.
4. The third book of the Jordanian Civil law (Articles 1018-1321) includes property rules and other rules related to many rights.
5. The fourth book (Articles 1322-1447) deals with securities, such as mortgage and privileges.

Commercial Custom

In general, the traders refer to the national legal systems in the dispute. They believe that custom cannot regulate questions to which a commercial transaction may appear and they welcome the backing of the national law when the law fails to give clear and satisfying answering.¹²

However, commercial custom defines as business rules which shall be followed by the traders for a long time in doing business for their commercial transactions. Commercial custom is very important in the business life, due to the lack of legislative texts and their inability to prosecute the rapid business life. For instance, marine sales and letters of credit are still governed by customary rules. Commercial custom is more flexible than legislation, due to the fact that it is considered to be a method to settle the commercial disputes.¹³ The requirements of commercial custom will be guidance for the judge to issue a decision regarding for the commercial dispute.

Conclusion

The Jordanian Commerce Act 12 of 1966 and its amendments shall be applied to all commercial activities or transactions carried out by merchants whether a person whose profession is commerce, or a company whose main objective is commercial.¹⁴ However, any dispute arising from the above transactions could be considered a commercial dispute.¹⁵

Nevertheless, as it put before, Jordanian commerce law did not address the whole scope of commercial disputes. It has a shortage in a provision for addressing a particular commercial dispute; as a result the judge will turn to the other sources of a commercial rule such as, Civil Law Act 43 of 1976.

¹² Sarcevic, Petar – Volken, Paul: *The International Sale of Goods Revisited*. Kluwer Law International, Boston. 2001. 248.

¹³ Kamal Taha, Mustafa: *The Principles of Commercial Law*. University of Cultural Foundation, 1979. 26.

¹⁴ Article 6 of Jordanian Commerce Act.

¹⁵ Al-Khashroom: *op. cit.* 3.

