EUROPEAN JOURNAL *of* TRANSFORMATION STUDIES

2019

Vol. 7, No. 2

EUROPE OUR HOUSE

EUROPEAN JOURNAL
OF
TRANSFORMATION STUDIES

2019

Vol. 7, No. 2

EUROPE OUR HOUSE

e-ISSN 2298-0997

CONTENTS

REGULAR PAPERS

SPECIAL TOPIC "RULE OF LAW"

REGULAR PAPERS

ON A STATE OF DEMOCRATIC EMERGENCY

Tatiana Tökölyová

University College of International and Public Relations Prague, o.p.s.
Dept. of Global Politics,
U Santošky 17, Prague 5, 150 00, the Czech Republic
tokolyova.vsmvv@gmail.com

&

Marián Děd

University College of International and Public Relations Prague, o.p.s.
Dept. of Global Politics,
U Santošky 17, Prague 5, 150 00, the Czech Republic
marian.ded@vip-vs.sk

Abstract

Due to the spread of the third wave of global democratization from southern Europe to more distant countries and cultures, many authors have begun to address the paradoxical trend that reflects the fact that although democracy has become the norm in the world, i.e. the most common and generally legitimate form of government, it often works in a way that reduces real freedom. The main goal of this study is defining a space between functioning democracy and the failing one, identifying the most important highlights based on results of empirical researches published during 2016-2019 to identify the most current trends in liberal democracy that we originally call „a state of democratic emergency" occurring due to the untouched „near misses".

Key words: *democracy, illiberative democracy, near miss, freedom, election*

INTRODUCTION

Functioning democracies exhibit a wide range of institutional arrangements, forms of government and governmental institutions (presidential or parliamentary systems, republics, constitutional monarchies, executive and representative heads of state, unicameral and bicameral legislatures, centralized or decentralized governments, federal and unitary states, written and unwritten constitutions and so on), but decisive for the classification of democracy is the form of the political regime.

Therefore, it is often assumed that it is not possible to speak of the term “democracy” as a single concept that expresses a uniform definition of the requirements imposed on a democratic regime.

The word "democracy" means "government of the people". Although this definition says that citizens of democracy run their own nation, the main objectives on which a democratic government is generally based are the protection and promotion of citizens' rights, interests and welfare. Democracy requires that every individual be free to participate in the self-government of the political community. That is why political freedom is at the heart of the concept of democracy. The overall concept of modern democracy consists of three basic parts: democracy, constitutionalism and liberalism. In order to call a political regime a democracy, each of these parts must exist and function in the political system. There are several definitions of the concept of democracy in academic environment in particular. They range from Schumpeter's minimalist competition for votes to broader definitions, including a reference to political freedoms and a specific institutional set-up, e.g. parliament, independent judiciary, etc. The broadest definitions of democracy even include the concept of economic rights.

In 2003, the UN General Assembly adopted a resolution containing seven "essential elements" of democracy:

- respect for human rights and fundamental freedoms, freedom of association, freedom of expression and opinion;
- access to and exercise of power in accordance with the rule of law;
- holding regular free and fair elections by universal vote and secret ballot as an expression of the will of the people;
- a pluralistic system of political parties and organizations;
- independence of the judiciary;
- transparency and accountability in public administration for a clear division of powers;
- the work of free, independent and pluralistic media. (UN Human rights 2002/46)

In general, the different approaches to democracy research can be divided into two main groups, namely:

(a) **procedural definitions** aimed at organizing the regime, ensuring political legitimacy and representing the interests of voters (such as Schumpeter, Dahl, Schmitter and Karl, but also Diamond); and

(b) **substantial definitions** that address the problems of ensuring the well-being of the population, focusing on the value and specific objective of the democracy in question, such as Jacobs and Shapiro or Tilly.

Liberal democracy is experiencing a crisis of confidence, and this development, which we call the "state of democratic emergency", is confirmed by the recent polls from various sources. Based on data from transnational surveys by the Pew Research Center, data from FreedomHouse or Eurobarometer, it follows that while democracy as a way of governance is traditionally popular in general, there is still a surprisingly high degree of public openness to non-democratic governance in many countries. [Wike, Fetterolf 2018] Not only the third- wave countries are exposed to this trend, but stable democracies are also exposed to a certain degree of dissatisfaction. Surveys, also in the EU environment, show that although respondents (i.e. residents of countries with democratic regimes) identify respect for a wide range of democratic

rights and freedoms as crucial to their lives, their actual activity, within the opportunities offered by the civil society to them, does not entirely correspond to this attitude. Moreover, civic activities and mobility are generally narrowed many times to the election period or when a serious situation occurs in the country, but this may already be a manifestation of the regime's shift to its undemocratic forms. Events (not only) in Slovakia over the last year pointed out, among other things, the necessity of not ignoring such "quiet" places of civic life by political sciences, as these may result in a critical state where the reparation of the various components of power towards democratic expressions is already quite complicated and complex. Recently, a number of experts have identified a sharp deterioration in democracy in countries such as Hungary, Turkey and Venezuela. Political sciences have also responded to these facts, and several authors (even those presented here) have turned their attention to examining how this gradual death of democracies is coming, what are the indicators and circumstances of this phenomenon. This is essential for future political science and practise, in our opinion, mainly because of creation of so-called early warning system. This is not possible without defining so-called near misses, not only by examining the failing democracies, but also by examining established democracies to identify their eventual deviations. The aim of this study is to draw attention to the necessity of exploring such a situation between democracy and other non-democratic forms, as we argue that the framework established by the political sciences so far (for example by defining hybrid regimes or failing states), in particular in the field of transitional research, does not sufficiently reflect the current developments. As evidenced by the findings of the studies of the renowned experts presented in this study, this state of "emergency" or threat to democracy applies not only to the countries being under transition process, not only to the third-wave transition countries (which are expected to have already established a state of consolidated democracy), but also to the long-term permanent and traditional democracies.

1. INDICATORS OF STATE OF EMERGENCY

Scott Mainwaring and Fernando Bizzarro (2019) report that, based on the results of their research released in January 2019 published in an article entitled “The Fates of the Third-Wave Democracies”, few countries have succeeded in establishing strong liberal democracies. Their research included data concerning 91 new democracies. The authors refer to the new democracies as political systems, which originated between 1974 and 2012, i.e. that were in the process of democratic transition.

Based on the processed data, the authors report that in 34 cases the breakdowns occurred, many of them in a rapid succession. In 28 cases, they experienced stagnation of democracy after the end of the transition, which, according to the authors, achieved a relatively low level of democratic practice. The authors have identified only 23 countries in which they have seen a progress in democracy compared to the starting point. Based on these data, the authors assume that the success of democratic transition is closely linked to two essential background determinants. Based on the authors' conclusions, the issues related to the consolidation of the economies of the transit countries can be identified as the first group of determinants.

The second group is associated with an important geopolitical determinant, namely the number of neighbouring countries and the nature of their political regimes. The findings of their research confirmed that regimes that prove the following features -

started transitions at a higher level of liberal democracy, geographically surrounded by democracies, and having recorded better economic growth rates – are less likely to disintegrate.

> „Regimes that started off with a lower per capita GDP and those that experienced lower economic growth, as well as regimes that started off with a higher level of liberal democracy, were less likely to deepen democracy.“ [Mainwaring, Bizzarro 2019:1]

Based on current developments (until 2018), Levitsky and Ziblatt (2018) identify in their book two groups of causes of the fall of democracy saying that “Democracies can die with a coup d’état - or they can die slowly. This happens most deceptively when in piecemeal fashion, with the election of an authoritarian leader, the abuse of governmental power and the complete repression of opposition”. [Levitsky, Ziblatt 2018:1], that is, after insufficient treatment of so-called state of democratic emergency. They note that the circumstances of changing the regime to a non-democratic regime have changed considerably as nowadays „... military coups and other violent seizures of power are rare. Most countries hold regular elections. Democracies still die, but by different means” [Levitsky, Ziblatt 2018]. And according to Mainwaring and Bizzaro's research, such countries can also be called illiberative democracies. [Mainwaring, Bizzarro 2019] Conclusions by Levitsky and Ziblatt (2018) are confirmed also by research conducted by Tom Ginsburg and Azis Huq. (2018) Their research was focused on identifying the space between functional and dysfunctional democracy, which they originally call a “**near miss**” (this term of “near miss” is used for example in the OHS context denoting "a dangerous incident that almost resulted in a serious injury"). The studies, which comprise the base of this debate on current tendencies jointly identify that democracies can “collapse” gradually, and there may be a gradual deterioration in the quality of democratic institutions where it is extremely difficult to reverse this situation. The results of the researches carried out by these authors and the conclusions drawn from them confirm us that such near misses have received little or no attention in democracy studies, and little has been paid also to the question of why democracies die (or survive).

As Aziz Huq and Tom Ginsburg put it in their study titled “How to Lose a Constitutional Democracy” (2018), „...slow erosive processes have replaced fast collapses as the most common form of backsliding in recent decades“ [Huq, Ginsburg 2018: 18]. Zhaotian Luo and Adam Przeworski (2018) also argue from this statement (and from the previous works of other researchers) in their study of these near misses when they claim that the erosion that is gradually weakening democracy in steps, some of which are legally defensible, is an attraction for future autocrats, because it can, by its very nature, produce the same outcome as an open attack on democratic institutions, but with less risk. The opposition often finds that by the time they notice the threat, it is too late to coordinate any effective response. These conclusions are to be key ones for the presented conclusions on democratic emergency. These authors, in their next study, define this state as "near misses". The study focuses mainly on the use of the case study method. The authors focused their research on three major countries over a period of time: Finland in 1930, Colombia in 2010 and Sri Lanka in 2015, examining the dynamics of such developments. The authors justify the choice of these countries to explore how elites of political parties and the judiciary and bureaucracy can play a decisive role in preventing democratic erosion. Similarly, such

a study of political science is currently supported by the results of research by Tom Ginsburg and Aziz Huq, who conducted their research in the period of 2017-2019 in the form of case studies. [Ginsburg, Huq 2018: 29]
The methodology of the authors is quite interesting and is based on the assumption that it should include two identified groups of countries. The first is made up of the countries in which democracy has been seriously threatened but has survived without serious disturbances and malfunctions. The second group consists of those countries that may have fallen below the minimum threshold of democratic quality and could have evolved towards competitive authoritarianism, but this has been finally reversed. To name these tendencies, authors use names like "true near misses" and the "quick comebacks".[Ginsburg, Huq 2018: 17] We agree with the authors that it is quite difficult to determine the boundaries between these categories and to identify the risk indicators of an unsuccessful return, as „...erosion's effects on the possibility of democratic retrenchment are complex: While the gradual nature of this process increases the coordination costs of mustering a prodemocratic response, the longer timeframe involved also creates windows during which some institutions and political forces can mobilize to mitigate or even undo backsliding.“ [Ginsburg, Huq 2018: 18].
This process of complicated return in current political theory is also called the "U-turn", which explains the process in Hungary (for example by János Kornai in his article “Hungary's U-Turn: Retreating from Democracy”) or in Mexico (as for example by Sergio Aguayo´s “U-Turn: Guide to Understand and Reactivate the Stagnant Democracy”), but is also mentioned in the context of Brexit developments in the UK. These authors point out that, in the case of the U-turn, it is necessary to explore different spheres of the society, such as political institutions, the rule of law and the mutual influence of state and market, as well as the spiritual world, such as ideology, education, science and art and this is the only way how to assess the impact of this developments on such society.

2. ILLIBERATIVE DEMOCRACY – A MISSED „NEAR MISS“?

At the present time, we can identify quite a significant disagreement in the current discussions not only how to investigate these phenomena, but also about the seriousness of the extent of the current democratic decline. The group of authors who do not deny this phenomenon and the risks of not solving it, focus on causal questions, which are extremely important for defining the causes of these phenomena and thus setting ways of an appropriate solution. Such researches focus mainly on identifying the main actors (forces) in society that are most involved in the erosion of democracy. Here, it is necessary to focus on whether the forces are of an economic, institutional, ideological or social nature. For this reason, the current research and studies focusing in the recent years on obvious examples of the "decline and fall" of democracies need to be appreciated. The importance of these researches lies mainly in the clarification of the interactions between institutional structures, the decisions of political actors and economic and social development. In this environment, political science research also addresses the issue of illiberal democracies.
Fareed Zakaria analysed the emergence of such an illiberal democracy, and his work titled "The Rise of Illiberal Democracy" published in 1997 reinforced this debate and argued for it. From the our research point of view, it should be noted that since their very beginning, the theories of democracy have addressed a number of serious

questions regarding the correct understanding of political systems that combine elements of democracy with autocracy (e.g. situations where institutional constraints exist at central authorities in conjunction with systematic violations of political and civil liberties) and which is referred by Zakaria to as "illiberal" democracy. [Zakaria 1997] This type of system is quite difficult to grasp because it challenges expectations in the sense that concrete changes in the government's structure will be accompanied by some improvements then reflected in the way the citizens participate with government in power (see e.g. Dahl 1971, Russell 1988). As Davenport states, states may show the features of democracy on the outside, but they also have major shortcomings in their daily practice, and he even calls them "liberal autocracies". [Davenport 2000] Both of these approaches are based on understanding and exploring these regimes as hybrid regimes. These studies are crucial for this research, as they point out that there are political regimes that also show some aspects of the autocratic regime (e.g. elections do not bring any restrictions to the executive) but on the contrary they show a significant dimension of democracy, such as respect for political and civil liberties. For this reason, the basis for the study of these democratic distortions (whether illiberal or autocratic) is the data published for example on the Freedom House portal available for each of the countries under survey.

The research strategy applied in this study is a quantitative research based on a theoretical model of hybrid regimes and failing states, in accordance with which we determine the overall research problem defined above. Quantitative research is based on data obtained from the primary sources, namely analyses and evaluations of the selected organizations. One such organization whose data is used in our research is the Freedom House Index, which reports annually on the state of freedom and democracy in the world. Overall, the reports focus on a number of areas such as media freedom monitoring, web freedom monitoring, transit country monitoring, monitoring of transit countries and so-called countries at the crossroad (which contains 70 countries). In this study, this index replaces the field research focused on the collection of empirical data, which would be time- and methodologically demanding due to the time and geographical scope of our research. The information provided in this Index in the form of questions and answers in individual areas of research in a given country, with the help of processed statistical data from the environment of the countries themselves makes it possible to verify the claims and processing of this data. The long collection time of these available data thus acquires a time-lapse character and makes it possible to identify possible variations in individual countries using a comparative method. Other sources of data are the reports from the Multinational Observer Group and the Democracy Indexes by The Economist Intelligence Unit.

The most frequently explored aspects of the current policy changes include democratization in the countries of the former Eastern Bloc and changes in totalitarian countries in Latin America, Asia and parts of Africa, and more recently in Arab countries that have been affected by the so-called “Arab Spring” (e.g. in Egypt or Tunisia). This transition between successive political regimes is known in the academic world as transitology or transition theory.

The **transition process** itself begins with the initial and growing crises of the authoritarian regime, which bring some forms of political openness and greater respect for the fundamental rights of citizens, and consequently the formation of a government elected in free elections with identified guarantees of respect for democratic rights and freedoms. The second stage follows the creation of a new

democratic government and ends with the creation of a well-consolidated democratic regime that shows all the required characteristics. The theoretical discussion of these two stages is often illustrated by examples such as Spain, Egypt or countries in Central and Eastern Europe.

However, it is also necessary to address other problems encountered in the process of democratization by distinguishing the tasks of liberalization and democratization of societies. While liberalization in this process means easing oppression and expanding freedoms and moving towards democracy, it in turn brings a change in the whole political regime. In this context, it is crucial to deal with the institution of national elections during the transitional period, with a focus on shaping electoral competition rules, creating democratic elections, i.e. to address the state of the elections in the transitional period, as elections are considered a decisive factor in the democratic transition. However, the paradigm of hybrid regimes cannot be overlooked, as they deny elections as a key element in the transition to democracy (e.g. Fiji). For this reason, the theoretical approaches to the role of elections in the transitional process, which analyse selected electoral design models adapted to the new democracies, must also be explored when examining the challenges that the these political regimes resist. The rationale behind these issues is that research on democratization processes is currently a systematic effort to analyse the transformation efforts of new democracies, including elections, and their impact on the democratic transition process.

The most common name for many of them is the designation "**hybrid regime**", the **transitional regime** or their classification within the sub-category of **failing states**. The research assumption is that it is not possible to apply one classification to any of the world´s region. We also argue that, in this respect too, it is necessary to examine each country on its own, albeit adhering to a common framework for their existence, i.e. a regional characteristics and pre-conditions. The world's smallest countries, many of which are located in the Caribbean and Pacific regions, represent an anomaly for experts dealing with democracy and democratization processes.

For its followers, democracy is a universal good whose instrumental virtues illustrate the achievement of a "democratic peace," among others. [Burnell, Schlumberger 2010] For critics, any interventions undermine state sovereignty to maintain such a political order. [Hameiri 2007] Taking these normative discussions, the argumentation is based on attempts to explain why some countries and regions are more likely to be non-democratic. On the one hand, some authors judge them stubborn and disproportionately democratic. [Anckar 2011; Srebrnik 2004; Levine 2009] On the other hand, as a group that does not respect the standard prerequisites for developing and sustaining democratic institutions and institutes - economic growth, educated middle class, social homogeneity, etc. [Przeworski et al. 2003; Diamond 1996]. And they address the need for modernization, which is needed for lasting democratic manifestations. [Veenendaal 2013]

3. NOT LOOSING THE DEMOCRACY

Transition is characterized by the fact that during its course a political game is not defined by rules. Therefore, a specific type of regime cannot be defined in the countries in transition, because it is a process that depends on the organization of actors and institutions and has far-reaching implications for the future organization of the state. A typical feature of the transition is the adjustment of the regime by the

authoritarian government itself (for whatever reason) to ensure more protected rights of individuals and groups, including elections and voting on new representatives. The holding of elections and the establishment of new legislative assemblies are generally considered the end of the transformation process. [Lindberg 2009]

The concept of Western democracy suggests some forms of political participation by citizens. In this context, people must be provided with decision-making procedures that are binding on all members of society. [Lindberg 2009] The choices, which are seen as a means of legitimacy, are presented in this context as a **stability factor**. One of the stability factors of any political regime is the people's loyalty to the regime, so unless members of society show support for ideas embodied in a democratic government, it is difficult to enforce any of the democratic principles. Based on these arguments, Lindberg has created three instrumental dimensions that are needed to implement any sovereign government that ensures the long-term stability of a democratic society. This is the idea of legitimacy (elites) associated with equal political participation under conditions of competition. [Lindberg 2009] As Lindberg explains, the role played by the elections here is critical, because if these dimensions are ensured in society, the recurring elections concern the legitimacy of voters and political elites, thus promoting the stability of the whole system. [Lindberg 2009]

There are many cases in which the survival of democracy could be "explained" by the absence of any probable threat to a given democratic system. These cases could shed light on the general social and economic conditions in which democracy flourishes, but are unlikely to talk about factors that may repel the threat to a participatory government when it occurs. We are rather of opinion that we should pay particular attention to a smaller group of near missed democracies, i.e. countries in which democracy is exposed to social, political or economic forces that can catalyse backsliding, yet somehow overcomes those forces and regains its position. Focusing on “near misses” helps to identify institutional mechanisms or situational conditions that will contribute to the benefit of democracy in times of crisis. It allows us to identify those balancing social, institutional or political factors that increase the chances of a democracy under stress to survive. [Ginsburg, Huq 2018; Klučiarovský 2018: 110-114]

The authors rather agree that investigated cases of endangered democracies could clarify the general social and economic conditions in which these democracy thrives. Even in our opinion, it is much harder to anticipate factors that may pose a threat, and therefore it is necessary to pay attention to those countries in which democracy has been exposed to social, political or economic forces that can catalyse a departure from democracy and examine how the country has acquired back her democratic character. Therefore, focusing on these “near misses” helps to reveal some conditions effective for any democracy in times of crisis. Political science so „allows us to ascertain the countervailing social, institutional, or political factors that increase a democracy’s chances of survival under stress.” [Ginsburg, Huq 2018: 17]

The process of transition and the form of government constantly evokes the question of defining the criteria of democracy. At this point, the research problem is starting to focus on systems that do not show precise criteria for democracy on their way to democracy. Due to the ambiguity in the definition of such a regime, this dichotomy can be referred to as a **hybrid regime** and is usually illustrated by examples in the mentioned Arab countries, in some Latin American or other transit countries with regard to the exact practical implications of power distribution or impact on system development.

Such regimes are not new in political theory, for example Robert A. Dahl called them "polyarchy-like regimes" in an attempt to name the existence of forms of government that may not be described as undemocratic, even though they are not yet true polyarchies, stating that in this regard, free and fair elections are the culmination of this process, not the beginning thereof. [Dahl 1992] In fact, unless and until other rights and freedoms are firmly protected, free and fair elections cannot be held. Except for countries that are already approaching democracy. It is therefore a grave mistake to assume that it is sufficient to convince the leaders of a non-democratic country to hold elections, and then complete democracy would follow. (1992)

Another term is a delegative democracy, used by O'Donnell and Schmitter in the so-called concept of 'precarious regimes' to indicate the existence of different types of regime that occur as a result of a partial, unfinished transition. [O'Donnell, Schmitter 1986]

The current discussions on the nature of hybrid regimes have been maintained in recent years, especially when examining democracy and democratization (due to turbulent developments in many cases outside Europe). So the development has also brought about studies and approaches that sought to see elections as a prerequisite, but not as the only condition for claiming that the regime was democratic, as Diamond confirms that

> "Contemporary minimalist conceptions of democracy - what I term here electoral democracy, as opposed to liberal democracy - commonly acknowledge the need for minimal levels of civil freedoms in order for competition and participation to be meaningful. Typically, however, they do not devote much attention to the basic freedoms involved, nor do they attempt to incorporate them into actual measures of democracy". [Diamond 1996: 21].

It follows from Sartori's theory of electoral democracy that democracy requires an autonomous public opinion supporting elections approved by the government that responds to public opinion. Options of choice and elections are an institutionalized process of recording public opinion. [Sartori 1993] Electoral democracy does not have some attributes of liberal democracy (such as a system of checks and balances, bureaucratic integrity, impartial judiciary), but the regime organizes free and fair elections, which are thus a crucial point for defining the boundary with electoral authoritarianism. [Schedler 1998] One such theoretician is Carothers who questions the fundamental premise of democratization efforts at the end of the 20th century by questioning the position of the elections in the democratization process and underlining the need for other factors that are necessary to be run as they have a particular impact on the success of the transition. [Carothers 2002]

According to Freedom House, a country must meet "certain minimum standards" to qualify as "electoral democracy". Freedom House sets out the following four criteria: a) Competitive multilateral political system; b) Universal suffrage for all citizens; c) Regular elections conducted by secret ballot and in the absence of major fraud with voters; d) widespread public access of major political parties to voters through the media and through a generally open political campaigning. Based on the Freedom House, a conceptual and methodological framework thus defines that every liberal democracy is also an electoral democracy, but not every electoral democracy qualifies as a liberal democracy [Freedom House 2008].

As pointed out by Lührmann, Mechkova, Dahlum, et al. in their study entitled "State of the World 2017: Autocratization and Exclusion? Democratization", the results of their research provided an evidence of a global trend of autocratization. Elections are

the most visible feature of democracy and, according to the authors, their position remains strong and even improves in some places. As noted in this study, autocratization mainly affects electoral aspects of democracy such as media freedom, freedom of expression and the rule of law „yet these in turn threaten to undermine the meaningfulness of elections. While the majority of the world's population lives under democratic rule, 2.5 billion people were subjected to autocratization in 2017." [Lührmann, Mechkova, Dahlum 2018: 1]

The reason is that the essence of the hybrid regime lies in the presence of established democratic institutions, but the social and political elite is in the hands of a higher oligarchy, so that elites come to power in a democratic way, but their exercise is essentially authoritarian. Due to the culmination of power, these are mostly semi-presidential or presidential regimes with significant powers. Their policy usually deliberately excludes some parts of society from political life. The basic declared objective of the regime is political stability and resistance, and practical policy is dominated by concerns about economic efficiency. As Ratuva states, attempts to apply classical literature on political party taxonomy to the democracy-developing world are complex [Ratuva 2006]. The relevance of such research is also underlined by security experts, as such reverse democratic developments can be suppressed while more lasting changes take place, for example, if international actors anticipating the risk of reverse take action in time. At that time, it is possible that there will be no visible deterioration in the quality of democratic institutions. Such a case may be Solomon Islands, because the situation in that country required international military-police intervention, the RAMSI mission. The international community thus ranked the country among the failing states (the intervention took place also in Fiji, but it was a less extensive and complex mission). This mission has been classified as so-called state-building mission, i.e. mission to build democratic institutions in the country. Therefore, in the context of this study, the main concepts for understanding the security challenges of democratization, namely the hybrid regime and the failing states, can be cited in cases such as Fiji, Papua New Guinea, Solomon Islands and others. The analysis of the current situation also requires to have a look at the past conflicts and the current security challenges of the democratization of these countries, as the reasons for the conflict are always multiple, ranging from socio-economic status to the individual ambitions of politicians or leaders of armed groups.

Referring to the characteristics of the hybrid regime in the framework of transition approaches, it should be noted that the hybrid regime is a regime that is located at the interface between democracy and authoritarianism, incorporating elements of both. Characteristics of hybrid regimes include low civic engagement, limited political pluralism, and poor accountability of politicians and political parties. The existence of hybrid regimes shows that democratization is rather a long-term process of gradual development. [Zinecker 2009] Hybrid regimes, sometimes called semi-authoritarian regimes, can become fully closed authoritarian regimes, evolve into full democracy, or remain hybrid. [Brownlee 2009]

CONCLUSION

The aim of this study was to draw the attention of contemporary political science to the fact that the study of democratic decline should not start and end with the cases where democracy has failed to return and totalitarianism has been established in the

country in various forms. Directing research solely in this direction (or only to successful transitions and consolidations) would be a serious methodological mistake, since such research would significantly limit or exclude the study of a wide range of variables of different strengths operating in different societies at different intensities. It is extremely important to examine the third group of countries, countries that have stabilized the democratic transition despite the crises. Thus, it is possible to derive constants and variables or causes of the whole process in a certain geopolitical space.

The importance of this research, to which political science should pay an increased attention nowadays, is that the crisis of confidence in liberal democracy and its effectiveness is currently being struggled (in varying intensities) by model and traditional democratic systems such as the United States or the United Kingdom. And the instruments that helped the failing countries to be directed back to democracy can help traditional democracies find the causal context of their democratic failure, and thus find their way of dealing with the crisis.

REFERENCES

Anckar, D., (2011), Democracy as a Westminster Heritage, Taiwan Journal of Democracy. Vol. 7, no. 1.

Brownlee, J., (2009), Portents of Pluralism: How Hybrid Regimes Affect Democratic Transitions. American Journal of Political Science [online], Midwest Political Science Association. 53(3), 515-532.

Burnell, P., Schlumberger, O., (2010), Promoting democracy – promoting autocracy? International politics and national political regimes, Contemporary Politics, 16:1, 2010. DOI: 10.1080/13569771003593805

Carothers, T., (2002): The End of the Transition Paradigm, in Journal of Democracy. Vol. 13, No 1

Dahl, R., (1971), Polyarchy: Participation and Opposition, New Haven: Yale University Press.

Davenport, Ch., (20002), Understanding Illiberal Democracies, Liberal Autocracies, and Everything in Between: A Cross-National Examination from 1972-1996. University of Houston. DOI: 10.1.1.608.9971.

Diamond, L., (1996), Is the Third Wave Over? Journal of Democracy, Vol. 7, No. 3, pp. 20-37.

FREEDOMHOUSE. Methodology, (2008), Washington D.C. and New York: Freedom House.

Ginsburg, T., Huq, A., (2018), Democracy's Near Misses. Journal of Democracy, 29.

Hameiri, S., (2007), The trouble with RAMSI: Reexamining the roots of conflict in Solomon Islands. The Contemporary Pacific. Vol. 19(2), pp. 409-441. DOI: 10.1.1.608.9971.

Chedler, A., (1998), What is Democratic Consolidation? Journal of Democracy. 9(2), 91-107 DOI: 10.1353/jod.1998.0030.

Klučiarovský, M., (2018), Globalizácia ako predmet komparatívnej analýzy. Central European Education Institute, s.r.o.

Kušnírová, J. - Rabatinová, M. - Válek, J., (2017), Daňová politika a jej vplyv na efektívny výber daní a elimináciu daňových únikov : vybrané aspekty. Praha : Wolters Kluwer.

Levine, S, ed. (2009), Pacific Ways: Government and Politics in the Pacific Islands. Wellington: Victoria University Press.

Lindberg, S. I. (ed.). (2009), Democratization by Elections. The Johns Hopkins University Press. Baltimore.

Lührmann, A., Mechkova, V., Dahlum, S., et al. (2018), State of the world 2017: autocratization and exclusion? Democratization [online]. 25(8), 1321-1340. DOI: 10.1080/13510347.2018.1479693.

Mainwaring, S., Bizzarro, F., (2019), The Fates Of Third-Wave Democracies. Journal of Democracy. 30(1), 99-113 DOI: 10.1353/jod.2019.0008.

O'Donnell, G., Schmitter, P.C., (1986), Transition from authoritarian rule: tentative conclusions about uncertain democracies. Johns Hopkins University Press. Baltimore.

Przeworski, A., Alvarez, M.E., Cheibub, J. A. and Limongi, F., (2003), Democracy and Development. Political Institutions and Well-Being in the World, 1950-1990. Cambridge: Cambridge University Press

Ratuva, S., (2005), Primordial Politics? Political Parties and Tradition in Melanesia. s.27-42. IN: Rich, R. et al. Political parties in the Pacific Islands. ANU E Press The Australian National University.

Russell, B., (1992), Power: a new social analysis. London: Routledge.

Sartori, G., (1993), Teória demokracie. Bratislava: Archa.

Srebrnik, H., (2004), Small Island Nations and Democratic Values. World Development 32, no. 2. pp. 329-41.

Levitsky, S., Ziblatt, D., (2018), This is how democracies die | Opinion. In. The Guardian 9/2/2018.

Veenendaal, W. P., (2013), Democracy in microstates: why smallness does not produce a democratic political system. In Democratization [online]. 2013, 22(1), 92-112 DOI: 10.1080/13510347.2013.820710

Wike, R., Fetterolf, J., (2018), Liberal Democracy's Crisis of Confidence. Journal of Democracy [online]. 2018, 29(4), 136-150 [cit. 2019-11-10]. DOI: 10.1353/jod.2018.0069.

Zakaria, F., (1997), The Rise of Illiberal Democracy. In: Foreign Affairs. Vol. 76, No. 6 (Nov. - Dec., 1997), pp. 22-43. DOI: 10.2307/20048274

Zhaotian, L., Przeworski, A., (2018), Subversion by Stealth: Elementary Dynamics of Democratic Backsliding. (unpublished manuscript, New York University Department of Politics, 27 March 2018); Adam Przeworski, *Crises of Democracy* (forthcoming from Cambridge University Press).IN: Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (February 2018): 78–165.

Zinecker, H., (2009), Regime-Hybridity in Developing Countries: Achievements and Limitations of New Research on Transitions. International Studies Review. Wiley on behalf of The International Studies Association, 2009, 11(2), pp.302-331

PUBLIC DIPLOMACY AS A THEORETICAL PROBLEM: SEARCHING FOR A DEFINITION

Erik Pajtinka

Matej Bel University in Banska Bystrica,
Faculty of Political Science and International Relations,
Department of International Relations and Diplomacy,
Kuzmanyho 1, 974 01 Banska Bystrica, Slovakia
erik.pajtinka@umb.sk

Abstract

The article analyzes the meanings of the term "public diplomacy" in contemporary diplomatic theory and practice and tries to find its suitable definition. It is concluded, that public diplomacy should be defined as a complex of activities carried out or supported by a state which focuses on influencing public opinion abroad with the aim of reaching or promoting a certain foreignpolicy goal. In this context, public diplomacy should not be confused with government public relations and foreign propaganda. It is argued that while the former is, unlike public diplomacy, targeted on domestic public primarily and its aim is to inform rather than to influence the citizens, the latter uses the means of communication based on one-way messaging rather than dialogue.

Key words: *public diplomacy, government public relations, foreign propaganda*

INTRODUCTION

The term "public diplomacy" is used very frequently in today's diplomatic practice. Ministries of foreign affairs of many states have strategies and programmes of "public diplomacy", the organisational structures of diplomatic bodies frequently comprise "public diplomacy" units or departments and mentions of the importance of "public diplomacy" are often found in official foreign policy documents or in public speeches and statements of politicians and representatives of diplomatic services. However, the opinions regarding what, in fact, the term "public diplomacy" constitutes or what activities it encompasses, often differ from one another and/or are only very vague, not only between the diplomatic services of individual states, but in many cases even among diplomats themselves. In addition, diplomats, and especially politicians, like to use the term "public diplomacy" without properly getting to know its etymology or

the context of its previous usage[1]. In this manner, various purposeful "definitions" of public diplomacy, which only take into account the institutional needs of a specific ministry of foreign affairs and/or the subjective political needs of a particular statesman during a specific time and situation, and which usually lack theoretical precision, are brought into the diplomatic terminology. The result of all this is that today, "public diplomacy" is used in a very inconsistent way in diplomatic practice, with more or less different meanings. However, a similar semantic variety of use of the term "public diplomacy" is typical also for contemporary academic literature in which we can encounter several diverse – and in some cases even partly contradictory – interpretations of this notion. Such variety in meaning, or non-unified interpretation of the concept of public diplomacy, ultimately complicates expert discussion on the topic, that being on an academic as well as practical level – within foreign affairs ministries. It is therefore certainly reasonable to devote oneself to the issue of the definition of "public diplomacy".

In academic literature, it is possible to find quite a large number of works which deal with public diplomacy, whether it be in the mostly generally-theoretical plane [e.g. Leonard 2002; Melissen 2007; Snow 2009], the mostly practical plane – in relation to individual states [e.g. Simons 2014; Kruckeberg and Vujnovic 2005; d'Hooghe 2015], or possibly in both of the abovementioned aspects of this issue more or less equally [e.g. Ostrowski 2010]. Hence there are a sufficient number of possible sources to draw on for the needs of this paper.

The aim of this study is to attempt to find a definition of "public diplomacy" that is not merely theoretically precise, but also has the widest range of application both for diplomatic practice as well as for the needs of international relations theory. At the same time, this paper aspires to differentiate the term "public diplomacy" from other similar or related processes and activities, which we may encounter in the states' current international political practice and which are often incorrectly identified with or mistaken for public diplomacy.

The first section of this study outlines individual definitions in which the term "public diplomacy" is employed most often in current academic literature. Subsequently, on the basis of critical analysis, selected interpretations of the notion of public diplomacy have been chosen from among them which appear to be the most universally practical for the theory and practice of diplomacy. Drawing on interpretations of the term "public diplomacy", its defining features are outlined in the next part of this study. Based on this, it is possible to identify public diplomacy in practice and separate it from other similar or related phenomena. In the final two parts of the study, a comparison is made between public diplomacy with regard to government public relations and foreign propaganda.

1. MEANINGS OF THE TERM PUBLIC DIPLOMACY

In contemporary academic sources, the term "public diplomacy" carries at least four different meanings.

In its original and currently less pervasive meaning, public diplomacy is used as the opposite to secret diplomacy. That is, as a term synonymous with open diplomacy

[1] The current popularity of the term "public diplomacy" among politicians and diplomats probably derives from the fact that it carries a rather strong positive connotation, (perhaps also as a result of the frequent use of this idea as a contrasting term to "propaganda", which, on the contrary, comes with a markedly negative connotation).

[e.g. Berridge and Lloyd 2012; Peterková 2008]. In this understanding, public diplomacy is viewed as negotiation carried out "before the eyes", under the surveillance or control of the public. We can encounter this understanding of public diplomacy most often in a historical context, namely in connection with the ban on secret agreements between states and greater public control of diplomacy, which was postulated by the American president Woodrow Wilson after World War I in his famous, "Fourteen Points" speech.

In another meaning, the expression "public diplomacy" is sometimes understood to denote the combination of all activities and expressions of various actors which contribute to the creation of a state's image abroad –regardless of whether they influence in a positive or negative way. In this meaning, public diplomacy is defined by the American author Cynthia Schneider [2004: 1], who understands it as "all a nation does to explain itself to the world".

In a similar but narrower meaning, "public diplomacy" is used as an umbrella term for all of the various activities of governmental and non-governmental actors which contribute to the creation of a positive image of a certain state. In this understanding, public diplomacy is defined by the Slovak academic Jozef Bátora [2005: 4], who describes it as "all activities by state and non-state actors that contribute to the maintenance and promotion of a country's soft power".

Lastly, in its fourth meaning, public diplomacy is associated with the complex of state and possibly state-supported activities which focus on influencing public opinion abroad and whose purpose is the realisation of foreign-policy interests of a particular state. Public diplomacy in this sense is understood as a kind of supplement or counterpart to "traditional" government-to-government diplomacy, whose essence is on the contrary, the advancement of foreign-policy interests of the state through negotiations with foreign governments and/or their diplomatic representatives. In other words, public diplomacy represents in this sense a specific dimension or form of diplomacy that aims to fulfil the goals of foreign policy by influencing public opinion abroad and not through direct diplomatic negotiations with official representatives of foreign countries, as it is in the case of the "traditional" government-to-government diplomacy. The first to define public diplomacy in this understanding was the American Edmund Gullion in the 1960s, as "influencing the way groups and peoples in other countries think about foreign affairs, react to our policies, and affect the policies of their respective governments" [quoted in Delaney and Gibson 1967: 31]. From contemporary scholars, we can perceive a similar understanding by another respected American expert on the issue of public diplomacy, Hans Tuch [1990: 3]. For Tuch, public diplomacy is "a government's process of communicating with foreign publics in an attempt to bring about understanding for its nation's ideas and ideals...as well as its national goals and current policies". In an analogous meaning, public diplomacy is viewed by American author Anthony Pratkanis [2009: 112], who defines it as "promotion of the national interest by informing and influencing the citizens of other nations". Some state institutions also understand it similarly. For example, The Planning Group for Integration of United States Information Agency (USIA) in the Department of State has characterised public diplomacy as "the promotion of national interests...through understanding, informing and the influencing of foreign audiences" [quoted in Heller and Persson 2009: 226]. From other similar definitions of public diplomacy formulated by scholars, is worth mentioning one offered by the Canadian expert Evan H. Potter. For Potter, public diplomacy is "the effort by the government of one nation to influence public...opinion

of another nation for the purpose of turning the policy of the target nation to advantage" [Potter 2002: 3]. From among European scholars we can find a similar understanding of the notion public diplomacy, for instance from German expert Daniel Ostrowski [2010: 48], who defines it as a "complex of measures adopted by state actors involved in foreign policy which target the public abroad, and whose goal is the strengthening of the soft power of the state which these actors [of public diplomacy – author's note] represent".

When selecting the most appropriate definition for "public diplomacy", one that is the most universally applicable in theory and practice, it is rational to work with such interpretations which are a) established and widely used in diplomatic theory and practice, b) sufficiently precise to enable us to identify the range of activities of public diplomacy in practice, and at the same time also c) specific, therefore understanding public diplomacy as an independent process or concept and not only as a synonymous or alternative value for another phenomenon. If we take into account the three abovementioned criteria, then it is most suitable to understand public diplomacy – for the purposes of the theory and practice of diplomacy, and therefore also for the purposes of this work – in the latter "Gullion" meaning; the complex of activities carried out or supported by state which focuses on influencing public opinion abroad with the goal of reaching or promoting a certain foreign-policy interest.

2. DEFINITION OF PUBLIC DIPLOMACY

In practice it is possible to identify public diplomacy – in its "Gullion" interpretation – and differentiate it from processes similar or related to it through several characteristic features.

One of them we can consider to be the primary purpose or motive of the implementation of public diplomacy, which is the furtherance of a certain foreign-policy interest of the state. In their definitions, several authors point to this characteristic feature when emphasising that public diplomacy is carried out by the state "in an attempt to bring about understanding for its nation's ideas" [Tuch 1990], "with ambition to transform the policy of the target state for its benefit" [Potter 2002], or "with the aim to facilitate the fulfilment of the government's goals" [Butler 2002, quoted in Leonard 2002: 1]. This functional, inter-connection between public diplomacy and the foreign-policy goals of the state is understandable and logical. If we take as the point of departure the fact that public diplomacy is a certain form or specific part of diplomacy, and diplomacy is a tool of foreign policy realisation, then public diplomacy likewise has to serve the foreign-policy interests of the state and thus is carried out primarily with the purpose of attaining a certain goal. This is not affected at all by the fact that the observed foreign-policy objective may not always be clearly visible amongst the background of public diplomacy activities – especially if these activities are carried out through non-state actors (such as NGOs). To this we have to add that this indiscernibility may also often be a part of the "strategy". The point is that these days, activities openly associated with the promotion of a foreign-policy interest of foreign governments tend to by perceived by the public with a certain dose of mistrust, or even objection. To this fact points Jan Melissen [2007: 15], whose opinion is that an overly visible "linkage of public diplomacy with foreign policy" may "damage the credibility of the particular state in its communication with the foreign public", and thus decrease the overall effectiveness of its public-diplomatic activities.

Similarly, Mark Leonard [2002: 72] notes that a "conspicuous government involvement in public diplomacy" may be "counter-productive", because governments these days tend not to be perceived as trustworthy, public diplomacy actors. Due to this, today ministries of foreign affairs in the interest of a higher trust and therefore also a higher efficiency of their public diplomacy activities often prefer to choose forms of practical realisation in which the observed foreign-policy interest is not openly declared, but is promoted rather indirectly and/or inconspicuously. Such forms of public diplomacy may then outwardly seem as apolitical and/or even altruistic activities, although in fact, a certain foreign-policy goal remains in the background.

Another characteristic feature by which we can define public diplomacy is its primary **target group**, which is the foreign public. In this sense, several authors emphasise that public diplomacy is a "process of communicating with foreign publics" [Tuch 1990: 3], or that it is the influencing of opinions of "citizens of other nations" [Pratkanis 2009: 112]. The focus of public diplomacy on a foreign environment is logically "justifiable": if public diplomacy is a certain form or part of diplomacy, and diplomacy in general is understood as a process carried out "internationally", therefore in the relationship between various states – on which today most academics and diplomats agree – then public diplomacy, as one of the forms or parts of diplomacy, should likewise be understood as a process carried out between states relative to foreign countries. At the same time, it in no way calls into question the theory today often emphasised by a number of experts that for effective influence of public opinion abroad it may be, from the viewpoint of the state, extraordinarily useful to communicate and cooperate also with its own citizens, or with domestic social actors, who may significantly contribute to the opinions of the foreign public through their activities.[2]

We may consider the **method of operation**, typically influencing public opinion through communication of information, another characteristic feature of public diplomacy. In this regard, several authors describe public diplomacy, inter alia, as "the effort…to influence public opinion of another nation" [Potter 2002: 3] or "promotion of national interests through influence" [Pratkanis 2009: 112]. The fact that swaying public opinion as a method of operation is an important feature of public diplomacy testifies to this. An interesting fact is that in France, public diplomacy is often referred to by the term diplomatie d'influence, which literally means "diplomacy of influence". By its method of operation, public diplomacy differs from "traditional" government-to-government diplomacy, which is based on direct communication and the exchange of information among diplomats and/or statesmen.

From the method of operation follows the **means and techniques** which are typical for a practical realisation of this form of diplomacy. As public diplomacy primarily attempts to influence a wider public, in its practical realisation the means and techniques of mass communication are used to a great extent. These are employed much less within "traditional" government-to-government diplomacy. The reason is the fact that government-to-government diplomacy mostly entails direct communication between diplomats and/or statesmen, which is more suitable to realise in practice through other means and techniques (e.g. through negotiation techniques).

[2] However, the actual communication of a state with its own citizens falls under government public relations and not public diplomacy. We deal with the relationship between public diplomacy and government public relations in more detail in a separate part of the work.

From a theoretical viewpoint, we could thus define and identify public diplomacy in practice through its

- motive of realisation: the achievement of a certain foreign-policy goal
- target group: the foreign public
- method of operation: influencing the opinion of the public through targeted communication
- means of realisation: to a great extent based on using the tools of mass communication

3. PUBLIC DIPLOMACY VS. GOVERNMENT PUBLIC RELATIONS

Government public relations usually refers to a mixture of activities carried out by governmental institutions within the process of communication with the domestic people, the goal of which is, above all, to inform citizens about current policies and activities of the government, to ensure citizens' active participation and reflect public opinion in the government's decision-making process, to increase the involvement of citizens and other social actors in matters of public interest and to maintain a positive image among the domestic public. Generally, the motive of government public relations is primarily an effort to support the activity and to advance the mission of government agencies or/and to advance the goals of democratic society [Lee 2008; Neeley and Stewart 2012], in particular, to enhance the democratic accountability of government institutions. Since the foreign affairs ministries are by their nature not only diplomatic but governmental bodies, too, government public relations are a part of their activities. In practice, the typical activities of government public relations conducted by the ministries of foreign affairs include: the publication of information about activities of the foreign affairs minister and other high representatives of the ministry through press releases, discussion forums, seminars and conferences about the priorities of state´s foreign policy and/or current issues of the foreign service, attended by representatives of the ministry of foreign affairs and public experts; lectures for students at universities about foreign policy priorities and/or the organisation and functioning of foreign service; the presentation of new services offered by the ministry of foreign affairs for citizens or companies; support and coordination of activities of local non-governmental entities promoting the state and its foreign policies abroad; organising "open door days" at the ministry of foreign affairs and other similar events focusing primarily on the presentation of the activities of the foreign service before the public.

Government public relations activities have two distinct features in common with public diplomacy. The first is a primary focus on the wider public, and the second, a frequent use of the means and techniques of mass communication. Unlike the activities of public diplomacy, however, government public relations pursuits have a different motive; fulfilling the government's information duty to its own citizens and not the promotion of foreign-policy goals. This represents a different primary target group, which is the domestic and not foreign public, and partly also a different method of operation, which – similarly as in the case of activities of public diplomacy – despite being based on communication with citizens, nevertheless has the ambition to inform the populace, "educate" them, or reflect their opinions and requirements rather than influencing them in line with its own interests.

Table 1. Public diplomacy and government public relations: common and different features.

	Public diplomacy	**Government Public Relations**
Purpose	to influence public opinion in order to achieve foreign policy goals	to inform the public in order to maintain government accountability to citizens
Target group	foreign public	domestic public
Method	communication of information by means of dialogue	communication of information by means of dialogue
Instruments	mainly means of mass communication	mainly means of mass communication

Source: Author´s own processing.

It is true that in practice it may be problematic at first sight to distinguish between the activities of the ministries of foreign affairs in the area of public diplomacy and government public relations. Not only with respect to some of their external common features as described above, but also with respect to their partial overlap and close interrelatedness. Even some experts understand the government public relations of foreign affairs ministries – or at least a certain part of their activities – as a part of public diplomacy, including under this term not only activities of the state performed in relation to the public abroad, but also activities of the state relative to domestic social actors, the goal of which is to gain the support of these people for its foreign-policy goals and/or coordinate joint steps in the promotion of these goals [e.g. Bátora 2005, d'Hooghe 2015, Peterková 2017][3]. The proponets of such a wide understanding of the concept of public diplomacy usually argue that in the process of influencing public opinion abroad states nowadays have to increasingly rely also on the domestic public that is on domestic social actors, who can influence the foreign public much more efficiently through their own activities. From this they derive the conclusion that as part of public diplomacy it is necessary to consider not only those activities of the state that focus on the actual influence of opinions of the foreign public, but also the state's communication with domestic social actors who contribute to influencing the opinions of public abroad. We may certainly agree that if a state wishes to effectively influence public opinion abroad in line with its own foreign-policy interests, it should focus not only on gaining the support and sympathy of the public in foreign countries themselves, but also on procuring support of the domestic public or domestic social actors – this being especially due to the reason that citizens and non-governmental entities may be exceptionally effective actors of public diplomacy because their actions affect the community of a specific country in a more trustworthy way. Moreover, the support of the domestic public endows the state's foreign policy with a higher legitimacy. In practice, this creates preconditions for better "justification" in relation to foreign partners also on the level of traditional

[3] In this relation, some academic sources mention two "dimensions" of public diplomacy; "international", which is oriented towards the foreign ambience, and "domestic", which is focused internally, towards one's own state [see e.g. Bátora 2005, Huijgh 2013, Peterková 2017].

government-to-government diplomacy. But that in itself by no means calls into question the "Gullion" understanding of public diplomacy as a process of communication of the state, focusing exclusively on the public abroad. Nor does it justify expansion of the definition of the term "public diplomacy" to include state activities focused on the domestic people to gain support for its foreign policy. On the contrary, there is at least one good reason why it is more suitable to use the term "public diplomacy" exclusively for denoting the activities of the state that focus on communication with peoples abroad; the risk that a joint designation of public diplomacy will also to refer to parts of government public relations activities which could lead to the tendency to overlook a fundamental difference between the primary purpose of the government's domestic communication - seeking to inform, educate or reflect the opinions of the public - and the primary purpose of the government's foreign communication activities, whose goal is to influence public opinion in line with its own interests. It is namely due to this reason that, for example, the government in the USA has the duty, even rooted in legislation, to draw a strict line between public diplomacy as a process of communication with foreign public whose goal is "to shape the opinions, actions and perceptions of people of other nations to be more in line with U.S. national interests", and government public relations, (in the USA referred to as public affairs), as a process of communication with its own citizens, the goal of which is "to provide information to the public...allowing the evaluation of the policies, decisions and functions of their government" [Heller and Persson 2009].

4. PUBLIC DIPLOMACY VS. PROPAGANDA

In the contemporary political theory, the notion of propaganda is usually understood to denote a process of influencing public opinion with the desire to reach a certain political goal. In this sense, propaganda in academic literature tends to be defined by individual authors as a "deliberate attempt to influence the opinions of an audience through the transmission of ideas and values for a specific persuasive purpose, consciously designed to serve the interest of the propagandists and their political masters" [Welch 1999], as "efforts to influence the opinions of a public in order to propagate a doctrine" [Newsom, Turk and Kruckeberg 2004: 400] or as "the use of mass communications to reinforce or change public opinion" [Berridge and Lloyd 2012: 301]. In this context, state can realize propaganda inwards, that is towards its own citizens, which is so called domestic propaganda, or outwardly, that is in relation to the people in foreign countries which is known as foreign propaganda. The latter tends to be compared to and confused with public diplomacy.

It is unquestionable that foreign propaganda shares several features with public diplomacy. Both have the same motive, which is the achievement of a certain foreign-policy goal, and the same target group, which is the foreign public. They also, to a great extent, rely on means and techniques that utilize the same instruments – the tools of mass communication. Another common feature between foreign propaganda and public diplomacy is the fundamental method of their operation which is based on influencing the public opinion through targeted communication of information. But it is namely in the method of operation that we may also identify certain differences between public diplomacy and foreign propaganda, those being in the manner of communication. Whereas propaganda is especially about influencing the public opinion through "one-way messaging" and "narrowing people's minds", public diplomacy is rather about influencing public opinion "by means of dialogue that is

based on the liberal notion of communication with foreign public" [Melissen 2007: 18]. But we have to add that the difference between public diplomacy and foreign propaganda defined in this manner may be very hard to identify objectively in practice, because even a dialogue intended to influence public opinion, may be more or less purposefully influenced – such as by the selection of the topics discussed, through which it is possible to establish certain "opinion limits" within the discussion.

Table 2. Public diplomacy and foreign propaganda: common and different features.

	Public diplomacy	**Foreign propaganda**
Purpose	to influence public opinion in order to achieve foreign policy goals	to influence public opinion in order to achieve foreign policy goals
Target group	foreign public	foreign public
Method	communication of information mainly by means of dialogue	communication of information mainly by means of one-way messaging
Instruments	techniques of mass communication mainly	techniques of mass communication mainly

Source: Author´s own processing.

Some authors see the difference between foreign propaganda and public diplomacy in the truthfulness or objectivity of the information which is communicated. In this context, the notion of propaganda tends to be associated with spreading disinformation, half-truths, or a purposeful selective presentation of arguments, whereas the notion of public diplomacy is used to denote a manner of communication based on the dissemination of truthful and objective information [e.g. Misyuk 2013]. We encounter rather often a similar view of the difference between public diplomacy and propaganda in international political practice, where politicians tend to use the term propaganda to refer to all the "cunning", "lying" or "manipulative" information-spreading activities of the state, whereas, as a rule, they call "truthful" communication of the state with a foreign public "public diplomacy". But it has to be said that the use of propaganda and public diplomacy very often tends to be purposeful. Since the term "propaganda" currently has a markedly negative connotation in the minds of the public, statesmen attempt to avoid the use of this term by all means to name the activities of their own or possibly some allied state, having at the same time the tendency to purposefully use this term to denote all the "uncomfortable" or "politically undesirable" communication of foreign countries, regardless of the "truth value". The intentional use of the terms "propaganda" and "public diplomacy" in political language testifies to the fact that the same activity of a particular state in practice is sometimes called public diplomacy by one state and propaganda by another. As an example, the Russian Federal Agency for the Commonwealth of Independent States Affairs, Compatriots Living Abroad, and International Humanitarian Cooperation (Rossotrudichestvo) describes its information and communication activities focusing on the wider public abroad as public diplomacy [Rossotrudnichestvo 2018], whereas the European Parliament has

termed the activities of this Russian governmental agency a part of the Russian government's propaganda [European Parliament 2016].

Even if we ignore the frequently purposeful use of these terms by politicians, the lack of truth of information disseminated does not seem to be a suitable criterion according to which it would be possible, in theory and practice, to unequivocally differentiate between public diplomacy and foreign propaganda. The reason is the fact that in communication with a foreign public focused on reaching various goals of foreign policy, states nowadays nearly always, in some way, purposefully select or edit the information communicated, as a minimum emphasising or, on the contrary, omitting some aspects of the truthful, objective image of reality. For example, a diplomat whose role is to support the influx of foreign investments into his state at a presentation given before businessmen in a foreign country, will quite understandably speak about the positives of investing in his country and will underline the availability of qualified labour force or developed traffic infrastructure, and on the contrary, will be silent on the negatives, such as complicated bureaucracy or a difficult law enforcement. Similarly, diplomats charged with the task to draw foreign tourists into their state will, within communication with the public in the foreign state, rather naturally present the most attractive tourist destinations in their home country and speak about various benefits, discreetly leaving out disadvantages like poor public transportation or a lower quality of services. In both of these cases, there undoubtedly occurs the spreading of purposefully distorted – and hence not wholly truthful – information, with the aim to reach some foreign-policy goal. If we thus differentiated propaganda and public diplomacy only on the basis of whether it works with true or with purposefully distorted, and therefore untruthful, information then we would have to rank both abovementioned practices under propaganda rather than under public diplomacy. However, this would run contrary to our contemporary reality and the universally accepted diplomatic practice, within which the activities described above, either within the support of foreign investments or tourism, are considered a completely legitimate, natural, or even necessary part of states' diplomatic activity, and hardly anyone would call them propaganda. In addition, if the term "public diplomacy" should only be strictly associated with the spread of truthful information, or with the presentation of a state's honest image, then this notion would be basically nearly empty because as previously stated, with the aim of reaching their foreign-policy goals states in some way nearly always purposefully distort the information communicated to the foreign public.

CONCLUSION

For the purposes of diplomatic theory and practice, it seems most suitable to understand public diplomacy as a combination of activities whose goal is to reach or support a certain foreign-policy interest of the state, executed with the desire to influence opinions of the foreign public through goal-oriented communication of selected information, but based on the principle of liberal dialogue. It is necessary to thoroughly differentiate public diplomacy from government public relations, which focuses primarily on the domestic and not foreign public, and whose mission is specially to inform the public and not influence its opinions in line with its own goals. At the same time, it is necessary to differentiate public diplomacy from foreign propaganda, which is based rather on one-way communication of information and gives the public abroad a relatively narrow space for interpretation of the message.

But this difference between public diplomacy and foreign propaganda may be very hard to identify in practice, and may also be subjective to a certain extent. In this respect, it is very important to avoid a purposeful use, confounding the notions of public diplomacy and propaganda, to which especially politicians, but also journalists, incline heavily in contemporary practice.

ACKNOWLEDGEMENT

The study is published within the framework of the VEGA project no. 1/0949/17 "Concept of the soft power in the context of the transforming international environment and its potential for the small states strategies".

REFERENCES

Bátora, J., (2005), Public diplomacy in Small and Medium-Sized States: Norway and Canada. In: Discussion Papers in Diplomacy. No. 97, pp. 1-26.

Berridge, G. R., Lloyd, L., (2012), The Palgrave Macmillan Dictionary of Diplomacy. Third Edition, Palgrave Macmillan, Houndmills and New York.

Delaney, R. F., Gibson, J. S., (1967), American Public Diplomacy: The Perspective of Fifty Years, The Edward R. Murrow Center of Public Diplomacy, Fletcher School of Law and Diplomacy, Medford.

d´Hooghe, I., (2015), China´s Public Diplomacy, Brill Nijhoff, Leiden and Boston.

European Parliament, (2016), European Parliament resolution of 23 November 2016 on EU strategic communication to counteract propaganda against it by third parties (2016/2030(INI)). (online) available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0441+0+DOC+XML+V0//EN

Heller, K. S., Persson, L. M., (2009), The Distinction Between Public Affairs and Public Diplomacy. In: Routledge Handbook of Public Diplomacy. Routledge, New York and London, pp. 225-232.

Huijgh, E., (2011), Changing Tunes for Public Diplomacy: Exploring the Domestic Dimension. In: Exchange. The Journal of Public Diplomacy. Vol. 2, Issue 1, pp. 62-73.

Kruckeberg, D., Vujnovic, M., (2005), Public relations, not propaganda, for US public diplomacy in a post 9/11 world: Challenges and opportunities, in: Journal of Communication Management. Vol. 9, No. 4, pp. 296-304.

Lee, M., (2008), Public Relations in Public Administration. In: Government Public Relations. A reader. CRC Press, Boca Raton, pp. 3-20.

Leonard, M., (2002), Public Diplomacy, The Foreign Policy Centre, London.

Melissen, J., (2007), The New Public Diplomacy: Between Theory and Practice. In: The New Public Diplomacy. Soft Power in International Relations. Palgrave Macmillan, Basingstoke a New York, pp. 3-27.

Misyuk, I., (2013), Propaganda and Public Diplomacy: the Problem of Differentiation. In: Humanities & Social Sciences 2013, 21-23 November 2013, Lviv, pp. 76-77.

Neeley, G., Stewart, K., (2012), Introduction. In: The Practice of Government Public Relations. CRC Press, Boca Raton, pp. 1-8.

Newsom, D., Turk, J., Kruckeberg, D., (2004), This is PR: The realities of public relations, Belmont, Wadsworth.

Ostrowski, D., (2010), Die Public Diplomacy der Deutschen Auslandsvertretungen weltweit. Theorie und Praxis der deutschen Auslandsöffentlichkeitsarbeit, VS Verlag für Sozialwissenschaften, Wiesbaden.

Peterková, J., (2017), The Impact of the EU Accession on the Domestic Dimension of Public Diplomacy – the Czech Case, in: Politické vedy. Vol. 20, No. 2, pp. 8-26.

Peterková, J., (2008), Veřejná diplomacie, Aleš Čeněk Publishing, Plzeň.

Potter, E. H., (2002), Canada and the New Public Diplomacy. In: Discussion Papers in Diplomacy. No. 81, pp. 1-19.

Pratkanis, A., (2009), Public Diplomacy in International Conflicts. A Social Influence Analysis, in: Routledge Handbook of Public Diplomacy. Routledge, New York and Abingdon, pp. 111-153.

Rossotrudnichestvo, (2018), About Rossotrudnichestvo. (online) available at: http://rs-gov.ru/en/about

Schneider, C. P., (2004), Culture Communicates: U. S. Diplomacy that works. In: Discussion Papers in Diplomacy. No. 94, pp. 1-22.

Simons, G., (2014), Russian public diplomacy in the 21st century: Structure, means and message, in: Public Relations Review. Vol. 40, pp. 440-449.

Snow, N., (2009), Rethinking Public Diplomacy, in: Routledge Handbook of Public Diplomacy. Routledge, New York and Abingdon, pp. 3-11.

Tuch, H., (1990), Communicating with the World: U. S. Public Diplomacy Overseas, Institute for the Study of Diplomacy, Georgetown University, Washington.

Welch, D., (1999), Powers of Persuasion. In: History Today. Vol. 49, No. 8, pp. 24-26.

ON HUMAN IDENTITY IN CYBERSPACE OF DIGITAL MEDIA

Slavomír Gálik

University of Saints Cyril and Methodius in Trnava,
Faculty of Mass Media Communication,
Department of Mass Media Communication,
J. Herdu 2, 917 01 Trnava, the Slovak Republic
slavomir.galik@ucm.sk

Abstract

Human identity is not static but dynamic. It depends on somatic and cognitive development, culture and society. Human identity is now extending to cyberspace of digital media. According to Turkle, cyberspace acts as a mirror in which one can get to know one another. However, virtual identity is not entirely virtual because it is continually linked to real identity through cognitive functions and abilities. The author focuses on two risks of expanding identity in cyberspace of digital media, which are cybersex and narcissism. Narcissism and cybersex are two risks that currently endanger especially children and adolescents. Therefore society should pay particular attention to education. Media education, with special emphasis on critical thinking, is a necessity.

Key words: *real identity, virtual identity, cyberspace, digital media, cybersex, narcissism, media education*

INTRODUCTION

The topic of human identity has been an extensively discussed subject since the second half of 20th century, especially in humanisties. This is brought by a fundamental cultural change in Western civilisation – change from Modernism to Postmodernism[1] and its present development to Post-postmodernism, Hypermodernism or Late modernism. All of these eras share one feature –

[1] In sociology, this change is known as a shift from industrial to post-industrial or information society.

technological changes, especially in digital media such as the Internet and various platforms and applications that use it. The Internet, as a dominating type of media, has a great impact on our sensory perception, ideas, thinking and learning and consequently on collective mentality and social organisation. T. H. Eriksen [2009: 17] sees the Internet as an extraordinary medium that started the 21st century in the early 90s. Basing on this, we can assume that the Internet and new forms of media will significantly change human identity. This will include virtualisation of human and even further diversion from metaphysics, or more precisely form metaphysical identification of human, in which it was the spiritual substance that was understood to be the human's core, the spiritual "I." This concept is questioned in postmodern and modern philosophy, identity (or human nature), is seen as a temporary and variable construct that is established by convergence of individual mental and somatic dispositions such as language, customs, religion, social establishment and so on. In the context of new media, especially the Internet, human identity gets even more complicated as we can reflect our identity here by generating various statuses on social networks, sharing photos, texts or videos. In cyberspace of digital media, especially in videogames, we can create our own avatars and control their lives. Cyberspace of digital media, including videogames, is becoming our new existential space in which we live our alternative way of life. This is the reason why it is highly probable that life in cyberspace will somehow influence also our real life, or more precisely – our real identity.

The aim of this text is to find what real human identity is, learn about how it is constructed in cyberspace of digital media and consequently, determine how digital identity influences our real identity. In this work we will be using phenomenological and hermeneutic methodology. The first method will be used to find the nature of media which, in principle, influence shaping of identity. For example the Internet brings us an opportunity to quickly find, link, change and use information. Hermeneutic methodology will be used to compare real and virtual reality, find differences and learn about changes in real identity caused by virtual identity.

1. ON HUMAN IDENTITY

When we speak about human identity, we generally start with an assumption that identity is something lasting, despite permanent changes in our life. A human is still the same human being, regardless all those changes happening in life[2]. Even though we can see some permanent changes, we can also see something that is immune to these changes and therefore remains the same. However, we should not see identity as a mathematical identity, but more as a specific, paradoxical identity that combines a permanent identity and dynamic change. Moreover, the term human identity is also connected with various structural levels, such as somatic, mental, social and cultural. We need to look for human identity somewhere at the point where all these levels intersect. However, also here various levels are dynamic and static at the same time, thus they define internal and external identity. By the term internal dimension we mean the very "I" of a person, something that is understood to be permanent and

[2] A. J. Lyon [1988 : 441] starts his analysis of personal identity by comparing himself to his photo from the past. He thinks about how much this photographs reflects him, as he has changed both physically and mentally. He speaks about the principal paradox in human identity, which on one hand relates to physical and mental change, but on the other hand it is also something that remains and links our past with our present.

time resistant. The external aspect then means the unstable human body. The internal aspect of identity relates to spiritual and cultural characteristics, while the external aspect is connected with somatic and social characteristics of human.
Human identity is therefore a multi-aspect and multi-dimensional phenomenon. Ken Wilber's concept [2006: 30], quite integral and holistic, will serve us very well as the principal concept for our study. In his work Introduction to the integral approach Wilber came with a number of integral models of human. We chose one of them for our study – his concept of a four-quadrant grid. This grid represents human development, with individual interconnected and organised development lines. These lines go left to right and up and down. The upper left quadrant represents the interior, individual or intentional aspect in human, studied by psychology. The bottom left corner is meant for interior collective aspects of human mind. This field is studied by cultural science, cultural psychology and anthropology. The upper right quadrant describes exterior individual aspects that are subjects for medical science, for example neurology, and cognitive science. Finally, the bottom right quadrant describes exterior collective aspects that are studied by sociology.

Upper left quadrant Interior individual (intentional – awareness) "I"	Upper right quadrant Exterior individual (somatic – brain and body) "it"
Bottom left quadrant Interior collective (cultural – language, religion…) "we"	Bottom right quadrant Exterior collective (social and environmental) "their"

Wilber's identity concept is not only multidimensional, it is also dynamic, developing and integrative, in which it agrees with a number of different psychological approaches, for example Freud's, Jung's and other. These concepts all agree that identity is something we grow into, when awareness and unawareness, or when aspects of personality, integrate. In his concept of human individuation, Jung [Stevens 1996: 39] even speaks about integration of "me" (ego) with Self – the very core of human being. According to him, this integration is realised by a gradual rise of awareness – from unconsciousness to perception of Self. Nevertheless, Jung [Stevens 1996: 86] notices that "me-Self" integration is more an ideal state than real

possibility: "This goal is an important idea; however it is opus that leads to the desired state."

Understanding this, we should distinguish between human identity and personality. Identity means the principal integration of mental, cultural and social components, while personality means complex integration of all components in human. Regardless of age, adult or child, with an exception for certain pathological cases, every human being are defined by his or her identity,[3] but not everybody is a personality. In this respect, personality then means a more advanced and more complex level of identity.[4] To sum up, we cannot see human identity as something permanent, but something that is dynamic and changeable, something that changes together with changes in body and mind, something that depends on awareness and unawareness, society and culture. Human identity is quite different from the Cartesian Cogito[5], it is more similar to the so-called "Wittgenstein's Eye" which becomes the object it sees.

2. ON VIRTUAL IDENTITY OF HUMAN

With introduction of computers and the Internet there came also new possibilities for development of human identity. It does not cover only human body, but spreads into a new technological dimension that we call virtual reality. This term also gives meaning to another one – virtual reality. Virtual reality and consequently also virtual identity have a variety of meanings. Most frequently they refer to something that differs from reality and covers a whole spectrum from partial reality (for example augmented reality) to mere fantasy. Even though all of these are rooted in technology and not human body, they are linked to human body through sensory perception (vision, audition or perhaps tactile sense) and therefore may bring some effects. This is the reason why also virtual identity means certain degree of reality. Ontologically, if we take human body as a reference point, we could see virtual identity as a lower level of reality. Some religions, for example Buddhism, see also our physical existence as relative, or conditional. The only unconditional reality is seen in nirvana, something that is beyond all sensory and abstract content. In our approach, we will simply rely on physical existence of a human as a fundamental and principal requirement to constitute virtual identity. Therefore, if virtual identity is a partial reality, then we must accept it as a part of our real identity. Or, as E. T. Olson [2009: 8] argues: "anything that contributes to identity, means identity."

For this reason we need to expand Wilber's model of human identity and add virtual existence. Identity of a person then becomes even more multidimensional, less transparent and more complicated, but in return we see a greater chance for its integration.

There is one more problem – the generally accepted concepts that a person's identity, for example on social networks, is his or her real representation. The key feature of such representation is in the status image. Everybody originally thought that such a photograph described reality, so photographs were taken as a tool for scientific proof.

[3] We should also distinguish identity and person. Every human is a person, but not everybody's identity can be integrated, as there are also cases of pathological disintegration.

[4] In philosophical discourse we distinguish a person and personality; while psychological discourse defines that every human being is a personality.

[5] In L. Wittgenstein's theory of knowledge [1993: 131] we learn that mind does not recognise itself (the eye cannot see itself) because it is not transparent. It is not a substance; it is a mere product of linguistic games. In this context, also human identity is a construct; we can use this argument also in the case of media communication and videogames.

Later this approach was abandoned. Presently photographs are generally mistrusted to represent reality faithfully, even by the wider public. People for example do not believe that photographs testify to the existence of UFO; even though we have some photographs that apparently record UFOs. In semiotic discussions we think about what a photograph is, is it an icon, or index? In his work Semiotics of photography, G. Sonesson [1989: 36] introduces several ideas that semiotics comes with. It is noteworthy that there is no consensus about what a photograph actually is. R. Barthes, for example, sees it as an icon, while Ch. S. Peirce a G. Sonesson believes it is an index and finally, U. Eco and N. Goodman take it as a symbol. There are some strengths and weaknesses in each of these interpretations. On one hand, a photograph is similar to reality, therefore we can take it as an icon, but on the other hand, recording a brief moment, it can also greatly distort the reflection of reality. A photograph is created by a flow of photons trapped in a photosensitive surface. However, a photograph is quite different from reality, because it only records two dimensions, placed in a photo-frame, taken from certain angle and influenced by lighting. Our eyes constantly move, while a photograph depicts a frozen moment [Goodman, 2007: 27] – this all declares it is more a symbol than index. Also, we need to learn how to "read" photographs and see them in context if we want to understand them. A photograph is therefore a strange phenomenon, because it may seem to be an icon or it may seem to be an index at the first sight, but when inspected more closely, it seems to be more a symbol. A photograph published on the web or social networks therefore constitutes a symbolic and therefore virtual representation of our identity.

3. ON PICTORIAL TURN IN MODERN CULTURE

Photographs are a very important, if not a decisive, component that represents our identity. This trend is strengthened also by Instagram, a social networking service, and a popular and global phenomenon - selfies. We can describe the phenomenon as frequent taking pictures of oneself in different places and on numerous occasions and publishing them on social networks. Besides selfies, we can also speak of experimenting with identity, for example in videogames such as The Sims, Second Life, or World of War craft. The first two videogames represent a life simulation type of games, where one can construct his or her own avatar and play its life according to his or her personal wishes and fantasy. In the third game players can play and identify themselves as fantasy of mythological creatures. These possibilities multiply and virtualise human identity even more than social networks. However, also these new identities emphasize picture, or visual representation of identity. Virtual expression and multiplication of identity is possible only through advanced digital technology that we have seen expanding in the last decades. Nevertheless, the decisive turning point came in the second half of the 20th century, when first computers and television started to appear. N. Postman spoke about television dominance over other kinds of media as early as in the 1980s – when television started to take over other forms of media, and everything was finally decided when the Internet came in the beginning of the 21st century. A picture does not require any abstraction or thinking, it is easily approachable and therefore it naturally steers towards entertainment. This is why the main function, or even ideology, of television as a visually based medium is, according to Postman [2010: 105], to entertain: "entertainment is the principal ideology of television communication." In the late 90s

G. Sartori, understanding dominance of television in media, even argued that a new sort of man was being created – homo videns - whose perception and knowledge was greatly affected by media images. In his idea, the turn from conceptual language of texts to media images brings deprivation of abstract thinking. We do not need to think, seeing a picture is enough. Sartori [1997: 40] explains: "Television brings metamorphosis that affects the very nature of Homo sapiens. It is not a mere tool for communication, but also an anthropological instrument that constructs a new kind of human existence."

Thus, in the second half of 20th century, we identify another shift (after Copernican shift, Kantian shift, linguistic shift) that W. J. T. Mitchell [Martinengo 2013: 309] called pictorial turn. According to him, it is not a simple comeback to the naïve mimésis, copy or correspondence theories of representation or rebirth of metaphysical pictorial presentation, but post-linguistic, post-semiotic re-appearance of picture as a complex that plays an important role among visual perception, tools, institutions, discourses and bodies. Similarly, Martin Solík [2014: 207], in reference to Gilbert Cohen-Séat, argues that we live in a universe of iconosphere.

In the broad sense we should use the term pictorial turn to all periods in human development, since vision and imagination have always been forms of cognitive abilities in human and thus have influenced the process of development of visual culture. Strictly speaking however, the real pictorial turn only began with digital media, as only these bring the possibility to fully develop cognitive abilities, for example the already mentioned imagination. Imagination can be taken as the first natural virtual reality in the form of dreaming, fantasising and imagination, but it was technological cyberspace that brought the possibility to turn these dreams into "reality" and even go beyond. For example, dreams of a new and better life can be materialised in videogames such as Second life or The Sims. Cyberspace thus becomes a "screen" where one can project their dream, desires, ideas and fantasies. Marshall McLuhan argued that media act as extensions for senses, so we can now say that cyberspace is becoming a technical extension of imagination.[6]

The process of creating virtual identity is thus influenced by today's visual culture, which in other words means that "seeing someone's identity" means more that knowing something about it. It is done through a large quantity of selfies, videos, but also experiments with avatars in digital videogames.

4. ON VIRTUAL REALITY IN CYBERSPACE OF DIGITAL MEDIA

Sh. Turkle [2005: 279] notes that a computer is a new mirror that has a psychological influence; consequently we objectivise ourselves and build up our new nature in this mirror. Cyberspace of digital media offers almost limitless possibilities for us to shape our identity, which can further be changed, developed or even multiplied. Technological features of cyberspace even offer what normally would be impossible in our physical and social space, for example fast communication, constructing of

[6] Michael Heim [1993: 6], building on an analysis of Gibson's *Neuromancer*, even argues that ontology of cyberspace is, in Plato's sense, erotic. Here Eros, through physical love, raises those who make love to a higher, spiritual truth – the Logos. Heim [1993: 3] refers also to the idea of combining the opposites, which can be found in numerous spiritual traditions. Specifically, it is the language of Carmelite mysticism (John of the Cross, Teresa of Avila) that speaks of spiritual unification through sexual ecstasy. According to Heim [1993: 5], a cybernaut walks through a beautiful dimension of cyberspace and finally reaches a higher form of knowledge – in this case information knowledge.

our avatar in digital videogames, or fast search for and communication with a partner. Communication on the Internet, including creating of virtual identity, definitely has lots of positive aspects; however, in our paper we will deal especially with those that are negative. The main cause of negative aspects, as E. Aboujaoude [2011: 60] points out, lies in the so-called "online disinhibiting effect." It means, in other words, that in online communication we do not care so much about having scruples Aboujaoude [2011: 60], in reference to J. Suler, further argues that this includes anonymity, invisibility, loss of recognition lines between individuals and lack of real hierarchy in cyberspace.

In our quest for negative aspects of virtual reality, we concentrate on narcissism and cybersex.

1. Narcissism. G. Lipovetsky [2008: 18] says that the postmodern era is undergoing another phase of personalisation, in which restricted individualism turns into total individualism, also called narcissism: "By personalisation, individualism is turning into something that American sociologists call narcissism. Narcissism is a result and manifestation of the process of personalisation in a small scale, a symbol or turn from "limited" individualism to "total" individualism, a symbol of the second individualist revolution." Lipovetsky [2008: 21] characterises narcissism as a hypertrophy of "I" that does not isolate people from the others but brings them together in various types of collectives: "Narcissism does not mean only hedonistic individualism, but also the need to meet people who are "the same." Not feeling comfortable with "I" or one's own cultural tradition, a narcissistic person needs others to admire and adore him or her. Such a person often uses power to make this happen. Similarly, Ch. Lasch [2016: 27] states that "a narcissistic person is dependent on the others to be reassured of his or her self-esteem. Such a person cannot live without applause from the audience." Lasch [2016: 38] speaks of an empty and infantile me, heavily supported by mass media. Mass media both intensify narcissistic dreams of fame and propose collective identity with media stars.

In a psychological point of view, E. Aboujaoude [2011: 68] describes a narcissistic person as somebody who needs admiration but lacks empathy. Such attitudes then lead to arrogance and patronising behaviour. Aboudaoude [2011: 69] points out that research shows that as much as 1 % of population meets the criteria for narcissism. Moreover, this trend is fed, stabilised and projected by the Internet, as it nourishes and adores our "Me." Aboujaoude [2011: 69] even speaks of a new term – "narcissurfing," which describes the need to constantly search for and upload posts, photographs and comments about "me." It may consist of posting photographs and videos about "me" on social networks; excessive self-sharing in communication on chatting services, but also search for new information about "me." This trend is even stronger in videogames, where a player is free to do "almost anything" through his or her avatar within the limits of the game, and "play God." For example, in The Sims videogame, players can create their avatar – man or woman, no matter what proportions. Through their avatar, they can climb the social ladder, earn money, build a house, live a sexual life, or die. This is what we can call the most extreme narcissism. Photoshopping pictures of oneself, over-estimating, improving statuses on social network and so on, and this all can be identified as a moderate form of narcissism.

2. Cybersex. Present visual culture with its dominance of pictures, beauty and ideal body shapes on one hand and almost limitless possibilities of the Internet with its influence and anonymity on the other create very good conditions for rise of the so-

called cybersex. R. Divínová [2005: 1] in reference to J. Schneider and R. Weiss, American scientists, states that in more than 60% of cases, going to the Internet is linked with sex: "people can find sexologists, specialised documentation, they can shop in virtual sex shops, find sexual partners for long-term or short-term relationships, watch and download erotic content, masturbate, study their sexual orientation and much more." However, not all of these activities can be defined as cybersex. According to Schneider and Weiss, Divínová explains [2005 : 1], cybersex is "any and every form of sexual behaviour mediated by computer and the Internet." It is therefore possible that the real percentage is lower, but it still is high enough for us to say that our identity in cyberspace is chiefly erotic. A. Cooper [Divínová 2005: 2] explains that cybersex is attractive because it is available, accessible and anonymous, while K. Young [Divínová 2005: 2] believes it is so because it is anonymous, comfortable and offers a kind of escape. Divínová states that the desire to get engaged in cybersex lies in promise to experience sexual satisfaction, experience something new, in desire for intimacy, abreaction, feeling of being attractive, in effort to find a partner for real sex, in excitement of anonymity and in interactivity. Even though cybersex is usually anonymous, virtual identity is created also here, when one searches for and communicates sexual content. Unlike in this, let's say, mental identity, videogames offer a possibility to create one's own avatar that could represent a player in his or her sexual activities. This is possible for example in videogames such as Second Life, or The Sims. Here, virtual identity is getting more "physical" than in anonymous and invisible cybersex.
Beside narcissism and cybersex, there are further risks for identity in cyberspace of digital media, for example cyber bullying. Cyber bullying can take various shapes – harassment, ridicule, sending offensive messages and similar, but behind this all is an important issue - narcissism and sexism, or combination of these.

5. INFLUENCE OF VIRTUAL IDENTITY ON REAL IDENTITY

Virtual reality and identity of man is on one hand physically separated in cyberspace of digital media, on the other hand it is physically and mentally attached to the user. This mental connection is not neutral, but vigorously active because our cognitive abilities need to be modified to fit both technological norm and media content. Consequently, such aggressive adaptation must bring some influence, especially on cognitive abilities of man. J. Lohisse [2003: 176] argues that this influence will not be limited only to actual usage of this medium, but will spread further and change the strategy and way we think. J. Bystřický [2008: 19] adds that "with further usage of technology, we also use a different concept of thinking, not by changing our dispositions, but by fundamental change in strategy of using them." This applies even more in communication technology, which accompanies us each and every day. K. Leidlmair [1999: 19], referring to Heim, notices that by using computer technology, especially the hypertext structure of the Internet, our everyday thinking undergoes radical changes.[7]

[7] See also papers on this issue: Influence of the internet on the cognitive abilities of man. Phenomenological and hermeneutical approach [Gálik, Gáliková Tolnaiová 2015: 4 – 15], Influence of cyberspace on changes in contemporary education [Gálik 2017: 30 – 38], Media and truth in the perspective of the practice and life form of the modern "homo medialis" [Gáliková Tolnaiová 2019: 4 – 19] and The personalistic aspect of truth and *dialogue in the context of Karol Wojtyła's philosophy: John Paul II's ethics of media* [Modrzejewski 2016: 4–16].

M. Spitzer studied the influence of digital media, especially the Internet, on various cognitive abilities of man, such as attention, memory, ability to learn, but also emotions and human body. He [Spitzer 2014: 200] came to the conclusion that extended usage of digital media causes degradation in education and rise of shallowness, with visible and more durable changes in the brain: "A person born in the middle of 1990s or later cannot quite understand what world looked like without computers and the Internet, without mobile phones and iPods, without gaming consoles and digital television. This generation was growing up in a different surrounding; their brains were formed also by neuroplastic changes. … digital media cause deterioration in quality of education in young people … Mental concentration needed for learning is exchanged for digital shallowness." Spitzer, basing on neurobiological research, points out that our brain constantly develops as we use it. Perception, thinking, experiencing, feeling and wanting, this all leaves some traces in our memory. Modern neurobiology is able to study these changes triggered by cognitive processes, which are greatly influenced by media. Spitzer [2014: 16–17] claims that frequent and inadequate usage of computer and the Internet introduces mental and cognitive decline.

N. Carr, similarly to Spitzer, says that our brain is ductile and able to adapt to actual circumstances. Carr points out that we think together with technologies (media), which is somehow reflected in our brain. However, he [Carr 2011: 2–3] also believes that since we started using the Internet, our mental habits have greatly changed and our ability to concentrate and contemplate has been impaired. Basing on extensive neurological and psychological research, he again states that communication on the Internet, which combines various types of media, impairs chiefly our attention. Our brain then acts as a juggler in order to deal with new impulses that the Internet offers.

This study research complies with our insight into narcissism and cybersex. Also in these cases we can see that prolonged "narcissurfing" and cybersex will influence brain's neuroplasticity and thus what once began as an entertainment activity will become strong addiction that will heavily influence real life. In narcissism, it can reveal as a constant urge to insure and strengthen one's identity, even at the expense of others, while in the case of cybersex we may face a considerate shift or even loss of moral safeguards. This is most threatening in the case of children and adolescents as they are not yet mentally stable and their moral principles are still quite unstable.

"Narcissurfing" and cybersex, as constant search for new information either about one's own self or about sex, consequently weakens attention, memory, impairs thinking but also proper experiencing of the world. In regard to attention, Spitzer [2014: 212] warned that the so-called multitasking, which is now almost standard behaviour in our life, leads to shallowness and inefficiency. During experiments, those who were engaged in more than one activity at the same time were definitely slower than the others. It is similar with memory, Spitzer [2014: 70] continues, because constant browsing through varying content results in weaker memory and shallowness. The Internet communication not only changes thinking, memory and ability to keep one's attention, but also social relationships. Spitzer [2014: 116] argues that "heavy usage of online networks not only reduces the number of real friends, but also limits social competence; parts of the brain that are responsible for such interactions deteriorate. This results in higher stress and increasing loss of self-control. We see a downward social spiral that makes it

impossible to live a fulfilling life is society." This negative trend in social contacts on the Internet will then be even more visible in "narcissurfing" and cybersex.

CONCLUSION

Cyberspace of digital media resembles a silver screen onto which one projects his or her ideas, desires and dreams, but also his or her own self in various versions. This "projection" is not inert; it gets back to its originator and influences him or her. We could even say that modern people can learn a lot about themselves through the Internet. As Sh. Turkle expressed, communication on the Internet becomes a mirror. If we agree with K. Wilber that real identity of man has four components (intentional, somatic, social and cultural), then we need to add one more dimension that applies to digital media – a virtual dimension. Virtual dimension of our identity is not unreal though, it does influence our thinking, imagination or emotions. Its virtuality is the result of the fact that it resides outside human body. However, if it influences our mind, then it has some effects on the brain and even, as Spitzer points out, is able to trigger certain changes in its structure. In this respect therefore, virtual reality is, at least partially, linked to the physical body. P. J. Eakin [2015: 7] even claims that "identity in cyberspace is not different, but continual". Physical identity may be privileged, but not absolutely. Sh. Turkle [1999: 643] also believes that thanks to cyberspace and especially videogames, we see more clearly that our real identity is constructed, changeable and multipliable.

In this contribution we spoke chiefly about two negative tendencies that come with identity creation in cyberspace of digital media – narcissism and cybersex. Thanks to its communication influence and visual interface, the Internet can considerably boost the potential for rise of narcissism and cybersex. Narcissism is promoted by general and fast influence of social networks on users, significant opportunities to share information about a person's own self with other users, including photographs and videos. Cyberspace of videogames allows us experiment with our identity and become literally anybody – man, woman, a beauty or a beast and so on. Whatever the reality is, in many cases study research proves that people create ideal versions of themselves, versions that agree with given cultural or gender stereotypes [Jansz, Martis 2007: 144]. This means both men and women want to look attractive and have ideal body proportions. In cyberspace of videogames we can literally play "God – creator" in representations of our avatars and their deeds, or we can decide to destroy them, which could further enhance the tendency towards narcissism. Narcissism is so common now that Lipovetsky speaks of our culture as of a narcissistic one. However, we should then distinguish whether it is a tolerable form of narcissism, or pathological one. Though drawing a distinction line may be very delicate and problematic, a real pathological situation happens when a narcissistic person crosses lines of normality and becomes a disturbing individual.

Great popularity of cybersex, over 50%, is again the result of possibilities that the Internet brings - fast access to sites with erotic content, chatting service, meeting other people online and the already mentioned pictorial turn, or visual culture. These possibilities uncover and intensify libidinal fantasy that, when changed to reality, may lead to shift in norms of sexual behaviour and addiction to cybersex.

Narcissism and cybersex are two risks that currently endanger especially children and adolescents. Therefore society should pay particular attention to education. Media education, with special emphasis to critical thinking, is a necessity [Petranová

2011: 67]. This way children should learn how to use the Internet properly in order to get what is positive and what helps a healthy cognitive, emotional and social development in human [Petranová, Burianová 2014: 267].
The first step is always in realising risks and subsequent education, since - as Spitzer says [2014: 58] - "education frees – frees from temptations, because he, who is well-educated, is able to exercise a critical approach towards himself and towards the others. He is not exposed helpless, but is capable to deal with things immediately."

REFERENCES

Aboujaoude, E., (2011), Virtually you. The Dangerous Powers of the E-Personality. New York: W. W. Norton. 351 p. ISBN 978-0-393-07064-4

Bystřický, J. at al. (2008), Média, komunikace a kultura. Plzeň: Aleš Čeněk. 96 s. ISBN 978-80-7380-117-5

Carr, N., (2011), The Bookless Library, pp. 1 – 3. In Brockman, J. (ed.): Is the Internet Changing the Way you Think? The Net´s Impact on Our Minds and Future. New York, London, Toronto, Sydney, New Delhi, Auckland: Harper Perennial. 408 p. ISBN 978-0-0-202044-4

Divínová, R., (2005), Cybersex, jeho přitažlivost a specifika. [online], [2016-09-21]. Available on: <http://systemic.cz/sex/archive/cze/textbook2005/divinova.pdf>.

Eakin, P. J., (2015), Self and Self-Representation Online and Off. In Frame, No. 28, pp. 11 – 29. Available on: <http://www.indiana.edu/~engweb/faculty/eakin_self_and_self_rep.pdf>.

Eriksen, T. H., (2009), Tyranie okamžiku. Brno: Doplněk. 168 s. ISBN 978-80-7239-238-4

Gálik, S. & Gáliková Tolnaiová, S., (2015), Influence of the internet on the cognitive abilities of man. Phenomenological and hermeneutical approach. In Communication Today. Vol. 6, No. 1, pp. 4-15.

Gálik, S., (2017), Influence of cyberspace on changes in contemporary education. In Communication Today. Vol. 8, No. 1, pp. 30- 38.

Gáliková Tolnaiová, S., (2019), Media and truth in the perspective of the practice and life form of the modern "homo medialis". In Communication Today. Vol. 10, No. 1, pp. 4- 19.

Goodman, N., (2007), Jazyky umění. Nástin teorie symbolů. Praha: Academia. 213 s. ISBN 978-80-2001-1519-8

Heim, M., (1993), The erotic ontology of cyberspace by Michael Heim. Chapter 7 of The Metaphysics of Virtual Reality. Oxford: University Press [online], [2016-09-21]. Available on: <http://project.cyberpunk.ru/idb/erotic_ontology_of_cyberspace.html>.

Jansz, J. & Martis, R. G., (2007), The Lara Phenomenon: Powerful Female Characters in Video Games. In Sex Roles, Vol. 56, Issue 3, pp. 141–148.

Lasch, Ch., (2016), Kultura narcizmu. Americký život ve věku snižujúcich se očekávání. Praha: Triton. 304 s. ISBN 978-80-7553-000-4

Leidlmair, K., (1999), From the philosophy of technology to a theory of media. In PHIL & TECH, Vol 4, No. 3. [online], [2015-1-26]. Available on: <http://scholar.lib.vt.edu/ejournals/SPT/v4_n3html/LEIDLMAI.html>.

Lipovetsky, G., (2008), Éra prázdnoty. Úvahy o současném individualismu. Praha: Prostor. 358 s. ISBN 978-80-7260-190-5

Lohisse, J., (2003), Komunikační systémy. Socioantropologický pohled. Praha: Karolinum. 198 s. ISBN 80-246-0301-2.

Lyon, J. A., (1988), Problems of Personal Identity. In Encyclopaedia of Philosophy. London: Rouletdge, pp. 441–462.

Martinengo, A., (2013), From the Linguistic Turn to the Pictorial Turn — Hermeneutics Facing the 'Third Copernican Revolution'. Proceedings of the European Society for Aesthetics. Vol. 5, pp. 302–312.

Modrzejewski, A., (2016), The personalistic aspect of truth and dialogue in the context of Karol Wojtyła's philosophy: John Paul II's ethics of media. In Communication Today. Vol. 7, No. 1, pp. 4–16.

Olson, E. T., (2009), Self: Personal Identity. In W. Banks (ed.), Encyclopedia of Consciousness. Elsevier. pp. 301-312.

Postman, N., (2010), Ubavit se k smrti. Veřejná komunikace ve věku zábavy. Praha: Mladá fronta. 208 s. ISBN 978-80-204-2206-4

Petranová, D., (2011), Does Media Education At Schools Develop Student´s Critical Competences? In Communication Today. Vol. 2, No. 1, pp. 66 – 83.

Petranová, D. & Burianová, Ľ., (2014), Potential of digital technologies use in the formal pre-primary education. In European Journal of Science and Theology. Vol 10, Suppl. 1, pp. 263-276.

Sartori, G., (1997), Homo videns: La sociedad teledirigada. [online], [2016-09-21]. Available on: <http://ifdc6m.juj.infd.edu.ar/aula/archivos/repositorio/0/116/HOMO_VIDENS.pdf>.

Solík, M., (2014), Semiotic approach to analysing of advertising. In European Journal of Science and Theology. Vol 10, Suppl. 1, pp. 207 – 217.

Sonesson, G., (1989), Semiotics of Photography – On Tracing the Index. Lund University. Available on: <http://faculty.georgetown.edu/irvinem/theory/Sonesson-Semiotics_of_Photography.pdf>.

Spitzer, M., (2014), Digitální demence. Jak připravujeme sami sebe a naše děti o rozum. Brno: Host. 343 s. ISBN 978-80-7294-872-7

Stevens, A., (1996), Jung. Praha: Argo. 176 s. ISBN 80-7203-012-3

Turkle, Sh., (1999), Cyberspace and Identity. In Contemporary Sociology. Vol. 28, No. 6, pp. 643–648.

Turkle, Sh., (2005), The Second Life. Computers and the Human Spirit. Cambridge: The MIT Press. 372 p. ISBN 978-0-262-70111-2.

Vallikatt, J., (2014), Virtually Religious: Myth, Ritual and Community in World of Warcraft. Melbourne: RMIT University, p. 245. Available on: <https://researchbank.rmit.edu.au/eserv/rmit:160839/Vallikatt.pdf>.

Wilber, K., (2006), Introduction to the Integral Approach. [online], [2016-09-21]. Available on: <http://www.kenwilber.com/Writings/PDF/IntroductiontotheIntegralApproach_GENERAL_2005_NN.pdf>.

Wittgenstein, L., (1993), Tractatus logico-philosophicus. Praha: OIKOYMENH. 88 s. ISBN 80-85241-30-7

THE ROLE OF A STATE AND ITS INSTITUTIONS IN THE PROCESS OF POLITICAL SOCIALIZATION OF PERSONALITY IN THE SOCIETIES OF DEMOCRATIC TYPES

Ivan Parubchak

Stepan Gzhytskyi National University
of Veterinary Medicine and Biotechnologies Lviv,
Faculty of Economics and Management,
Department of Public Administration,
50 Pekarska Street, 79010 Lviv, Ukraine
parubchak_io@ukr.net

Abstract

It is investigated that socialization is a necessary condition for the functioning of society. It is learned that political socialization is the most effective factor in maintaining the political system, its strengthening and stabilization. The process of political socialization, political institutions, reproduction and continuity of the most important political values are described. It was found that due to the political socialization man becomes not only the individual but also a citizen of the state. The interrelation of functioning democratic institutions and the transformation of political culture in the state are showed. It is analyzed that the role of political cultural factors in the evolutionary processes of government learn under a form of democratization of society today.

Key words: *evolutionary processes, governance, democratization* of society*, transformation, public relations.*

INTRODUCTION

The issue about the essence of citizenship, the relationship between human and power, as the political system passes its values from generation to generation, were discussed during different periods of development of scientific thought. In today's conditions, when there is an intensive process of politicization of public life, the objective need for a more profound scientific analysis of all politic and governing aspects has considerably increased. The increase of contradictions poses a direct

threat to political stability, institutions of socialization, which traditionally were responsible for the entry of man into society, its education and control over its political behavior.

The concept of political socialization was established as a process of formation of an individual, when the most common, widespread persistent features of the personality, which manifest themselves in socially-organized activities, are regulated by the role structure of society, are formed. Its manifestation was caused by the crisis of traditional institutions of the political system of society, which could no longer ensure the voluntary adoption of new generations of declared democratic values. The speed of change in the way of life, in the social environment that surrounds and forms a person, already complicates the process of political socialization.

Political socialization involves the process of creating such a society, the condition of which lies in the number of parties, groups and organizations that compete with each other and advertise themselves in order to attract individuals to their own side. It was under the influence of the theory of pluralism that the theory of the ideal model of political socialization arose, which resulted in the formation of a person, who entered politics with developed ideas about his participation and taught the orientations that determine his direct political choice. There was a need to introduce new management methods in these conditions, so a reliance on the management of the behavior of the individual in politics was made. Subsequently, practice has shown that political socialization can be used as a reliable instrument of political control, as a method of rooting the ruling values and goals into a person that is imperceptible to a person and does not cause her a sense of protest.

1. THE CURRENT STATE AND PROSPECTS OF STATE INFLUENCE ON THE POLITICAL SOCIALIZATION OF A PERSON

Political socialization plays an important role in teaching people to distinguish between those who have the right to perform the functions of the authorities and to recognize that this right belongs to them. Political socialization embodies a two-way process: on the one hand, it captures the assimilation of certain norms and values that the political system requires; but on the other - demonstrates how the person assimilates traditions and ideas, consolidating them in various forms of political behavior and influence on power.

Political socialization is the formation of a personality, the ability to adapt in society, in processes that occur not only in the political sphere, but in the ability to learn the experience accumulated by older generations; in the ability to find their place in a particular society, as well as the ability to express their own opinion. Preliminary notions about the process of political socialization, when the political goals and values from one generation to another were passed without interference, do not correspond to the modern realities of society. New theoretical models that should explain the process of political socialization at the turning point of human development are in the stage of formation.

Modern society has a high demand for those who meet the necessary standard of education and socialization. It is indisputable that a person who now manages a society must prove his right to do so by going through various tests. In addition, the model of a person who passively subordinates to the authorities does not meet the objective needs of the development of the modern political system. There must be a division of labor between management and subordinates in a society. Political

leadership is possible only under such conditions, and the masses and their interests will be represented by elected political representatives and organizations. In the "subordination" model, a person is understood as a relatively passive control object that does not have an independent value for the functioning of a modern political system. In addition, this representation is based on the experience of management, which refuses to use widely the activity of the individual to maintain the stability of society [Buhme et al. 2011].

Modern management theory inherited models of a personality, adapted them to the new conditions for the functioning of the management system. The idea of the necessity to conquer the personality for the state has not changed, but it is now motivated by the needs of governance. Socialization looks like a process, in which authoritarian political leaders and their followers interact and form a person's positive attitude to power [Alonso et al. 2011]. As a result, a harmonious system should be formed, which on the one hand is supported by feelings of respect for leaders, and on the other - the responsibility of leaders to subordinates. A person was only a phrase of a disguised desire to manipulate not only the masses, but also each individual.

It should be noted that another humanistic line in the development of political processes begins to emerge, which puts forward the ideals of broad participation, involving ordinary citizens in politics. There has been an interest in the human factor, an understanding that people now turn to the political level not remotely and more or less spontaneous result of people's lives and activities, as well as their intentions in modern theory of management and practice in recent years. A vital need is to create a social infrastructure for the political socialization of the individual, the formation of a civic consciousness and a democratic political culture.

It should be noted that a country cannot exist without ideology and ideological institutions, the purpose of which is to recreate a particular ideology in mass and individual consciousness. Stereotypes of mass political consciousness are a natural product of political socialization as a process of incorporating a person into the political sphere of society.

Political socialization is inseparable from general socialization. They determine each other, although the boundaries of their internal stages may not coincide and there may be contradictions between them, especially in cases where the new political regime tries to establish its power on the basis of the old culture or vice versa. In order to make gloomy forecasts not a long-term prospect of society, it is necessary to create a system of democratic political education of the population with the involvement of the most competent and democratically oriented part of the scientific, pedagogical and managerial intelligentsia; a system that already exists in all democratically developed countries. It is impossible to provide a normal process of political socialization and the formation of public consciousness without this. Passive citizenship, which is typical today for the bulk of the population, is another factor that preserves and protects, the political system, the distribution of power in society and the ways of legitimizing samples and methods of governance.

Under the influence of important discussions of various schools, the directions of science, the attitude towards a man as an element of the political system gradually began to change. Political socialization begins to be considered as a two-way process, when, on the one hand, the socio-political environment affects the individual, and on the other - it forms such a political individuality, which has free choice and responsibility for the decisions made. Political socialization should act as a necessary and important component of any statehood. It must ensure the functioning of the

political system in the process of changing generations in politics and promote the formation of a citizen who is able to make decisions on many important issues. It is impossible to imagine the normal functioning of the political system, power structures because this is a mutually reciprocal process between a person and a society that provides legitimacy and justification of the existing political system and power in the country.

2. FEATURES OF SOCIALIZATION FUNCTION IN THE POLITICAL SYSTEM OF THE STATE

The function of political socialization and the involvement of people in the political life of society is inherent in all modern political systems and it contributes to the widespread participation of citizens in each country's policy. In democratic countries, the function of political socialization and the involvement of people in political life is realized not only by government, but also by non-state structures. In the current situation, one should take into account the experience of developed-country democracies that have undergone the transformation period in which Ukraine is today and the specifics of the socio-political life in the country. The greater the degree of political socialization of society is, the higher its culture is, as people with a high level of political socialization take an active part in the political life of society, thus ensuring the development of social relations.

Political socialization helps to maintain and legitimize the political system and the government that governs. It supports the government by forcing and educating its citizens to conform to its rules and to carry out its functions in this system [Probiigolova 2006]. The system operates and successfully manages in such a way that the majority of the population obeys the laws and performs corresponding roles that interact with the purpose of maintaining the functioning of the system. The main task of political socialization consists in the formation of an established political outlook, an independent and responsible political entity on the basis of the free choice of political guidelines for them; political awareness, the essence of which lies in the knowledge, as well as the ability to select qualitatively and analyze the information received by the personality. In the process of political socialization, the formation of consciousness and human behavior is influenced by a large number of both objective and subjective factors.

The process of political socialization determines the factors of different social levels. At the macro-social level, socio-economic relations prevailing in society, the specificity of ethno-national and religious-confessional communication, and the nature of political power have a significant influence on the formation of stereotypes of political consciousness and behavior of citizens [Parubchak 2014]. Recently, in connection with the development of the tendencies of internationalization and globalization of socio-economic, political and cultural relations, the phenomena occurring at the mega-social level are increasingly influencing the process of political socialization: the development of economic cooperation, political integration, regional and global conflicts and crises [Gorzelak 2013].

It should be noted that the factors of different social levels do not have the same effect on specific individuals and different social groups. Each of the factors affects a person through the prism of his individual peculiarities - the specifics of the worldview, the level of intelligence, the moral foundations. Recognizing its reflection in the individual consciousness, the factors of social being become of some significance and act as

signals that motivate a person to a certain mode of action in the realm of politics [Russkin 2008].

Among a large number of subjects of political socialization a special role belongs to social institutions that have a purposeful influence on the formation of political consciousness and behavior of citizens, such institutions are defined as institutions of political socialization. The harmonious type of political socialization reflects the psychologically-normal interaction between man and institutions of power, rational and respectful attitude of the individual to the rule of law, state, awareness of man of his civil duties. The pluralistic type of political socialization refers to the recognition of human rights of equality with other citizens, their rights and freedoms, its ability to change its political passions and move to new value orientations. The weakness of civil society makes ineffective an important factor in socialization the emerging political system. The parties are engaged in more maintenance of group interests of the leadership than serious political-educational work among the masses [Karpyak 2012]. However, the greatest opportunity in shaping the political advantage of individuals is concentrated in the hands of the media, which are now interested not in providing objective information, but in pursuit of sensations, scandals, in order to increase the number of readers, and hence the sponsors, new advertisers. Political socialization is an extremely important and multidirectional political and managerial process. Thanks to political socialization, man gradually becomes not only a person, but also a citizen of the state, its creator.

Political socialization is a complex process, which consists in the assimilation and perception of socio-political experience, both modern and accumulated by previous generations: transformation of knowledge about politics, state policy in internal convictions; developing the ability to defend their political knowledge and interests; to acquire the necessary skills of socio-political activity, assimilation of its main principles and norms. Political socialization has a dynamic character, lasts throughout life and causes new political values and individual identities.

In the context of the transformation of political systems, political socialization is gaining increasing importance, due to the fact that the transfer from generation to generation of socio-political experience, norms and values in the transition period is particularly difficult. Among the representatives of the middle and older generations are prevalent previous values and political orientations, traditional stereotypes of political thinking and behavior, which inevitably conflicts with many aspirations and attitudes of young people. The stability of the country's socio-political development is possible only with the combination of innovations and traditions. The core of political socialization is the enrichment of the personality of the political experience of previous generations, during which a person adapts to the existing political system, acquires the ability to influence it, that is, everything becomes a subject of political life to a greater extent [Lopushinsky 2013].

One of the main problems in society is the creation of an organic system that could provide the most effective development of the country, society, and individual in certain spheres of public life. Such a system should be a civil society, the construction of which is one of the main tasks. Constructing the civil society can be based on the implementation of active innovation potential, namely the potential of active, organizing, creative people. Consequently, it is necessary to turn to political socialization, the main task of which is the formation of such a person. The purposeful influence of the state on the development of social processes should determine political socialization as a process of formation of a democratically oriented

personality who is able to defend his socio-political interests and rights, has a developed political consciousness and a high political culture, actively participates in the political life of the country.

Any concept develops under the influence of subjective and objective factors. No concept can claim universalism, because the process of assimilating of political goals and standards of political behavior in a particular society always has specific features and in each country is conditioned by the peculiarities of its environment. Any person living in a society has certain political functions that determine its political status [Barmatova 2004]. Therefore, the question should not be about political roles, but about the way of realizing ideas by a human as a subject of politics. The process of political socialization is due to the personal factor, the uniqueness of the individual is a criterion that leaves him the right to self-socialization.

3. SOCIO-HUMANISTIC ASPECTS OF POLITICAL SOCIALIZATION OF A PERSON IN A DEMOCRATIC SOCIETY

Political socialization is nothing else than the formation of a politically oriented person who can defend his socio-political interests, who has a developed political consciousness and a high level of political culture. The main institutes that form humanitarian factors of the concept of state governance are the political socialization of a person, is the state, political parties, public organizations, schools, and higher educational institutions. This kind of system of political socialization promotes the transformation of the individual into a conscious and active subject of state formation, which not only gives him motivation for activity and creates conditions and opportunities for participation in political life, but at the same time provides the individual with the necessary amount of knowledge and practical skills, forms in his ability to understand reality in the state [Kozlov 2008].

The catalyst of political socialization of a person in transformational societies is often the socio-political and economic crisis, during which people are politicized mainly under pressure of circumstances. The over-saturation of political life with destructive ideas and requirements creates a dangerous background that dynamises the activity of the person not in the spirit of freedom and democracy [Parubchak 2014]. A politically socialized person is, above all, a responsible citizen who has not only a high degree of development of political consciousness, but also an appropriate level of state position.

In modern theory of management, two areas are distinguished, where the criteria for determining the essence of the process of political socialization are the level of activity and the level of subjectivity of its participants. The founders of the role theory of political socialization are of the opinion that a person during his political development should have instilled predominantly positive attitudes toward the attitude to the political system. The goal of the concept of managing the processes of political socialization of a person in a country should be the formation of citizenship, which is determined by the person adapts to socio-political relations .

The study of the theory of management of the processes of political socialization allows us to answer a number of issues related to the course of this process, namely: studying the content of socialization and values, positions and political beliefs; finding out the homogeneity of values, determining the channels of information transmission and the factors of continuity and duration of the process of political socialization. The simplified representation of the state management of the processes

of political socialization as an one-sidedly oriented process, where the person acts as an object, and not an active force, is given. The process of studying the developments of the newest theory of political socialization and its further development is an important factor for the formation of the concept of political socialization. The search for ways and directions of formation of a stable system of political socialization, possible measures for its optimization, in order to ensure the continuity of political development, preservation of the stability of society. In order to solve these problems, one needs to understand clearly how an individual integrates political goals and values.

Political socialization is a factor in the preservation and stabilization of the political system, a condition for its normal functioning. The formation of a democratic infrastructure for political socialization requires the search for ways of its formation and implementation [Akinsheva 2013]. However, this process involves certain difficulties that arise during the reform of the management system. The study of the theory of management of the processes of political socialization allows to approach objectively to the development of certain approaches of the conceptual foundations of the functional structure of the person's entry into political life, taking into account the peculiarities of the current state of the political system.

Political socialization is the process of a person becoming as a subject of political relations and political activity, it covers all members of society. Political socialization is a purely developmental process through which people gain political orientations and patterns of behavior. The content of the process of political socialization depends on the nature of the relationship between the individual and the authorities in a particular society. After all, a person acquires the status of a political personality as a result of a long interaction with the outside world; personality is largely determined by economic, social, political, national, ideological relations and ties between them.

Recently, the world has had an idea of a fair and stable society, in which the humanitarian components of solving social problems, satisfaction of interests and the necessity of the introduction of political education, based on the principles of systematic, purposefulness, continuity, content and methodical certainty, correspondence to the fundamental human rights and democratic ideals [The Global Competitiveness Report 2011]. The ideal education is harmoniously developed, socially active, nationally conscious man who is endowed with great social responsibility, healthy intellectual, creative, physical and spiritual qualities, family and patriotic feelings, hard work, business acumen, entrepreneurship and initiative. The conflict between everyday needs and interests in real life is acutely experienced at the emotional level, generating a wide range of mass sentiment - from indifference and apathy to aggression and hatred.

In the process of political socialization, a whole set of guidelines is formed that become the source of political behavior for a person. As a result of successful political socialization, the deepening needs of the individual to be a citizen are met. Among the problems of political socialization, the issues of strengthening statehood, increasing the citizen's confidence in their state, awareness of their place and role in the processes of social renewal are put on the foreground. The informational activity of the mass media allows people to judge adequately political events and processes only if they perform an educational function.

The mass media, accompanying a person throughout his life, including after completing his studies, greatly affect the perception of his political and social information, but cannot provide a systematic and profound assimilation of political

knowledge, because it is the task of educational institutions. At the same time, under the guise of political education and pseudo-rational consciousness can be formed in people. The educational role of the media is closely linked to their function of socialization and essentially grows into it. However, if political education involves the systematic acquisition of knowledge and expands cognitive and evaluation capabilities, then political socialization means assimilating it to political norms, values and patterns of behavior.

Political socialization always exists as a set of specific mechanisms of human learning by means of political participation, which are formed on the basis of perfectly defined cultural values and standards. Political education and upbringing are the basis for raising the level of political activity. In order to attain an appropriate level of political activity, a worldview is required, that is formed on democratic principles, the national idea of the state, the main constitutional principles, personal interest in the progressive development of society, as well as participation of people in socio-political activity, public organizations. The important general problem of political socialization of a person in society is the lack of continuity in the transfer of political experience, tradition is a special specific mechanism of accumulation and transfer of such experience. In the political sphere, they are directly related to the realization of the interests of different sectors of the population and the struggle for power.

4. THE SIGNIFICANCE OF POLICAL SOCIALIZATION IN THE DEVELOPMENT OF SOCIAL PROCESSES IN THE STATE

Political values, traditions, patterns of behavior and other elements of political culture are mastered by man continuously, and this process can be limited only by the duration of his life. Perceiving some ideas and skills, a person at the same time can give way to other landmarks, choose for themselves new ways of communicating with the authorities. In addition, the sensitivity to external influence, its ability to perceive and absorb one or another value, standards of behavior depend, above all, on a set of political knowledge, skills and abilities of a person, and, first of all, from its subjective status and roles in politics. However, the process of assimilating cultural samples is carried out on the basis of perception of examples of activity, common and typical patterns of thinking and behavior, the inclusion of individuals in interaction with certain institutions, involvement in priority values.

Young people need political knowledge to solve problems of public life, protect interests etc. In addition, political education is an important means of political socialization of the individual, its integration into the political system, the formation of the features of citizenship, which involves the assimilation of current norms of political life, political ideals and values, methods of political interaction, methods of influence on power and participation in solving common problems. In this sense, political education can be defined as civil education. Owing to it, the modern human must know the world of democracy as a state of world perception and self-perception of people, the nature of their perceptions of themselves, their rights, opportunities and responsibilities, the conditions of stability and importability of the current order, the principles of authority of the authorities. Nowadays, the struggle for democracy means, first of all, to promote the renewal of political culture, to carry out the corresponding content and forms of political education of citizens or civil education, that is, the humanitarian factors of political socialization.

Herewith, it is necessary to emphasize on the dependence of the content of political education on the type of government in the state. In a democratic society, its development is due to the need to preserve the inviolability of democratic values, institutions and patterns of behavior. The specificity of political education should be directed not only to the reproduction of democratic values in society, but also to the formation of a new system of civic values. While the political modernization is being conducted, it is necessary to cultivate democratic values, to disseminate appropriate procedures. When public life lacks democracy, political education itself can become a factor in the spread of democracy. In order to form a democratic political culture by means of political education, it means to bring about the appropriate kind of system of personality attitude [Parubchak 2014]. Such system consists of an individual's relation to himself and others, to the political system of his contemporary society, to the institutions of power, to political life.

This is important because a democratic society is constantly in a search for and maintaining an equilibrium between the observance of imperatives generated by the institutions of the political system and their constructive critique and updating. Political education, based on these principles, should instill behavioral skills in the conditions of the modern state, observance of its laws, but at the same time the ability to uphold guaranteed rights and freedoms. Political education is carried out, as a rule, through the spread of a kind of political culture, adopted by the political system. Political socialization is an important aspect of the holistic process of formation of a person and his participation in the political sphere. It is interpreted as a two-way process, which includes, on the one hand, the transfer of political information, knowledge, its attraction to existing political values and landmarks, its acquisition of social experience, norms and roles, skills and abilities by entering the system of the formed social-power relationships. A politically socialized person can defend his socio-political interests and rights, has a developed political consciousness and culture and takes an active part in the political life of society. On the other hand, there is not only a process of reproduction, but also the further development of the individual of the existing system of social relations through his active activities in the process of inclusion in the socio-political life.

The effectiveness of managing the processes of political socialization depends on the internal and external, the main and specific factors affecting individuals. The influence of each factor is marked selectively in a number of circumstances, including the presence of a person's inner convictions, values and ideals. At the same time, its internal beliefs and values limit the influence of society and political system. However, on the other hand, only the conformity and complementarity of the influence of different levels and contents of socio-political determinants determine the effectiveness of the assimilation of man values, settings and political roles. The general processes of development of the global information space, including the desire for genuine democratization and the creation of a civil society with the alternative form of political communication inherent to it, will increasingly affect the process of state regulation of the person's political socialization.

The process of integrating a person into a social life, and hence the political system, in all societies, is a purposeful and systematic process of learning and mastering the most important knowledge and skills, their transfer from generation to generation. In the broader theoretical context, these ideas have found development in social constructivism, which contains one of the deepest theories of socialization, explores the complex strategy and tactics of human support of their identity in mass societies.

The integration of society is a fundamental problem of theoretical research, it determines the purpose of the theory and practice of socialization and is the assimilation of social and political roles; it can be understood as bringing the structures of motivation of human behavior and expectations of society into conformity. Personality, through learning, is always in a state of change, but its balance is maintained by the work of adaptation and protection mechanisms that control these changes. At the same time, political socialization means, first of all, the assimilation of the role of a citizen. Political socialization is the process of assimilating an individual throughout his life of political knowledge, norms and values of the society to which he belongs. It is an integral part of a multifaceted process, during which there are reproductions and further development of political structures and relations, as well as the development of socio-political qualities of actors who support and implement these relationships in their life.

5. THE ESSENCE OF POLITICAL SOCIALIZATION IN THE FIELD OF FORMATION AND DEVELOPMENT OF SOCIAL-POWER RELATIONS

A politically socialized man reflects both political and social processes that objectively exist in a society, is interested in politics and participates in it, while its participation is active, socially significant. That is, a socially active person, taking part in politics, is guided not only by his own interests, but also by the interests of society, realizes responsibility to society and the state. Someone seeks to establish a certain political order and show constructive political behavior, others are doing everything to destroy the existing political system and demonstrate a destructive attitude, someone easily adapts to any political regimes and authorities.

One of the main forms of political socialization of personality is social adaptation. As it is growing older, the expectations of a personality that is socializing are becoming increasingly complex. It is assumed that a person must move from a state of complete dependence to independence and acceptance of responsibility for the well-being of others. In this case, adaptation means that a person successfully uses the conditions that have developed to fulfill their goals and aspirations. Adaptive behavior is characterized by successful decision-making, initiative, definition of own future, as well as adaptation of the individual to the finished patterns of behavior, the transfer from one generation to generation of goals and patterns of behavior. The cognitive model of socialization indicates that a person is least affected by a variety of factors and agents.

Society needs individuals who are able to think, assimilate and convey information. That is why it is necessary to develop the cognitive abilities of a person, his moral and emotional qualities. The process of socialization - is the gradual maturation of the individual. Modern science defines such important characteristics of the essence of socialization, as the connection of socialization with adaptation; the connection of socialization with the solution of the problem of survival and storage of the gene pool of humanity in life and in natural circumstances; the purpose of socialization is the effective participation of a person in social groups; the result of socialization - a person with a certain degree of social orientation of activity. Political socialization provides the individual with the ability to orientate in the political space and perform certain power functions in it. Due to political socialization, the formation, reproduction and development of political culture is carried out; the notion of "political socialization" is broader than political education, since it covers not only

deliberate or spontaneous influence on personal ideology, but also personal political activity.

The task of political socialization is to teach people to mention their political position. A person needs to get a system of political values to form a citizen, ideas in which he can believe, and orientations in the political environment that allow him to adapt to it. The diversity of concepts of political socialization is explained by methodological peculiarities and conceptual approaches [Galus 2010]. So, political socialization is considered as a means by which members of the political system acquire certain vital orientations. Thus, political socialization is the sum of generally accepted political knowledge shared by all the perceptions about the nature of the political process, the activity of political leaders, these political values, which are regarded as the most general goal, to which the system and installations with which the individual approaches the political objects.

Political socialization includes the whole set of processes of formation of political consciousness and personality behavior, up to the adoption and implementation of political roles and professional identification of political activity. An essence of political socialization depends on many factors of macro environment, micro environment and individual features of a person. The basis of political socialization is the position according to which the person submits to the whole, and in the process of its development consciously and voluntarily learns the values and norms that exist in the political culture of society.

At the same time, it adapts to them and changes them in accordance with their own interests, values and attitudes, so the process of its socialization is realized in conjunction with the existing political system. Political socialization at the level of the individual represents the embodiment of the requirements of the political system in the internal structure of the individual. The central point of political socialization is the formation of adequate ideas about power and its relations. Consequently, the definition of the content of the concept of "political socialization" depends on the concept in which it is considered, from the aspect in which it is analyzed, as well as from the goal of the study. Among the theories of political socialization one can mention the study of electoral behavior, political participation and psychological characteristics of political behavior, as well as their theory of use for practical purposes.

In the process of this type of political socialization, a person knows the political and legal norms, receives information about political and social institutions, mechanisms of their functioning assimilates the rules of conduction in the process of performing the functions of a citizen and a member of society. In order to conduct the study of political socialization, the theoretical positions of both micro and macro theories are significant. It is a sufficiently effective system of political interaction with various political organizations within a certain social system in order to preserve the dynamic balance of the political system and, at the same time, the society itself, through the assimilation by the new members of norms and values that are adopted in political behavior.

The core of political socialization is the enrichment of the personality of the political experience of previous generations, which is expressed in political culture. As its assimilation, a person increasingly adapts to the existing political system, acquires the ability to actively influence it, that is, everything becomes more and more a subject of political life [Zharovskaya 2010].

CONCLUSION

Political socialization of the individual – is a continuous process of its development, which extends throughout the life of man in various social groups and communities. In this process, you can identify various stages that play a different role in the political development of the individual. However, in explaining the specifics of these stages, currently, there is no single point of view. Attention is focused not on specific political aspects of socialization, it focuses on the general psychological aspects of personality development. On the other hand, the urgent problem is the creation of a single concept of political socialization, which would correspond to the specifics of all countries and peoples.

The process of political socialization is influenced by a variety of socio-cultural factors, including national characteristics, religious beliefs and education. There should be a position according to which the person submits to the whole and in the course of his development consciously and voluntarily learns the values and norms that exist in the political culture of society at the heart of political socialization. Personality should be considered as a subject of power, therefore, the process of its socialization is realized in conjunction with the existing political system. In the process of political socialization, the person simultaneously acts as the subject and object of power, political activity and political relations, it simultaneously adapts to them and changes them in accordance with their interests, values and attitudes.

Political socialization should not be done rapidly, but slowly, evolutionary, political upheaval, economic ruin or total decline in the living standard of the population complicate the processes of political socialization. These conditions require the personality of the preparedness for the transition to new situations of social and political development, the introduction of the individual in social relations. It is necessary to distinguish the purposeful and spontaneous forms of political socialization. A purposeful form of political socialization is a political education that is a system of means of influencing people specifically designed by a certain society in order to form its personality in accordance with the interests of this society. The spontaneous form of political socialization is the upbringing of certain social skills in connection with the permanent presence of the individual in the immediate social environment and the conditions of the social environment that influence the political position and political behavior of the individual.

REFERENCES

Akinsheva, I., (2013), Civic Socialization as a Vector of Political Socialization, in Bulletin of Taras Shevchenko Lugansk National University. Pedagogical sciences, Vol. 23(1), pp. 78-84, at http://nbuv.gov.ua/j-pdf/vlup_2013_23(1)__11.pdf (Accessed 15.06.2018)

Alonso, S., Keane, J., Merkel, W., (2011), The Future of Representative Democracy, 328 p. Cambridge University Press.

Barmatova, S., (2004), The Place and Role of Political Communication in the Transformation of Ukrainian Society, in Sociology: Theory, Methods, Marketing, Vol. 2, pp. 107-120.

Buhme, K., Doucet, P., Komornicki, T., Saucha, J., Sewiatek, D., (2011), How to Strengthen the Territorial Dimension of 'Europe 2020' and the EU Cohesion: Policy. REPORT based on the Territorial Agenda 2020 prepared at the request of the Polish Presidency of the Council of

the European Union, at http://ec.europa.eu/regional_policy/sources/docgener /studies/pdf/challenges2020/2011_territorial_dimension_eu2020 (Accessed 15.06.2018)

Galus, O., (2010), Socialization of personality: the essence, conceptual approaches in scientific theories, directions, schools, in Collection of scientific works of the Khmelnytsky Institute of Social Technologies of the University of "Ukraine", at http://nbuv.gov.ua/j-pdf/Znpkhist_2010_2_19.pdf (Accessed 15.06.2018)

Gorzelak, G., Zawalicska, K., (2013), European Territories: From Cooperation to Integration, Warsaw: Scholar, 320 p.

Karpyak, O., (2012), Adaptation of personality in the system of political relations (theoretical and methodological analysis): Monograph, 194 p., Dneprodzerzhinsk State Technical University, Dneprodzerzhinsk.

Kozlov, K., (2008), Social interaction between government bodies and non-governmental organizations, in Theory and practice of public administration: Collection of scientific papers, Vol. 2 (21), pp. 323-329, Kharkiv Regional Institute of Public Administration "Magister" Publishing House, Kharkiv.

Lopushinsky, I., (2013), Features of political socialization in the management processes of the democratic transformation of society, in Public Administration: Theory and Practice: Collection of scientific papers of the Association of Doctors of Science in Public Administration, Vol. 3 (15), pp. 73-81.

Parubchak, I., (2014), Transformation of political culture in the process of social democratization of states during transitional period, in Studia Europaea Gnesnensia. Gnieżnieńskie studia europejskie (StEurGn), 10, pp. 151-168, Poznań-Gniezno.

Probiigolova, N., (2006), Political socialization as a factor of the elite's impact on electoral activity, in social psychology: Special Issue, p. 206-214.

Russkin, V. (2008), Political socialization of the personality: peculiarities of the perception of political information, in Scientific Papers of the Black Sea State University named after Petro Mohyla. Series: Politics, at http://nbuv.gov.ua/j-pdf/Npchdupol_2008_79_66_8.pdf (Accessed 15.06.2018)

The Global Competitiveness Report (2011), World Economic Forum, at http://www3.we forum.org/docs/WEF_Global Competitiveness Report_2010-11.pdf (Accessed 15.06.2018)

Zharovskaya, I., (2010), Power and legal socialization of the person as a characteristic feature of modern society, in State and Law. Legal and political sciences: Collection of scientific papers, Vol. 50, pp. 656-661.

THE PRIVATE-LAW ASPECTS OF SHARING ECONOMY AFTER THE "UBER CASE"

Jana Mitterpachová

Comenius University in Bratislava,
Faculty of Law, Department of Civil Law,
Šafárikovo námestie 6, 810 00 Bratislava, Slovakia
jana.mitterpachova@gmail.com

&

Marek Števček

Comenius University in Bratislava,
Faculty of Law, Department of Civil Law,
Šafárikovo námestie 6, 810 00 Bratislava, Slovakia
marek.stevcek@uniba.sk

&

Marek Ivančo

Comenius University in Bratislava,
Faculty of Law, Department of Civil Law,
Šafárikovo námestie 6, 810 00 Bratislava, Slovakia
marek.ivanco@flaw.uniba.sk

Abstract

The authors analyze the private-law status of on-line platforms in the light of the current legislation and case-law. The focus has been laid especially on the conclusions of the Court of Justice of the European Union in its judgment Asociación Profesional Elite Taxi v. Uber Systems Spain SL. The authors pinpoint various implications of private-law claims arising from the private-law relationships. In addition, the economic aspects and benefits of Uber highlighting the importance of a proper legal regulation concerning the on-line platforms and sharing economy have been considered, as a complex result of which the authors propose certain legislative solutions.

Key words: *sharing economy, on-line platforms, Uber case, de lege ferenda proposals, European Union*

INTRODUCTION

On 20 December 2017, the Grand Chamber of the Court of Justice (hereinafter referred to as "CJEU") issued a pilot judgment concerning one of the most prominent subjects of sharing economy – the Uber platform [Case C-434/15, 2017][1]. The provided service in the matter has been qualified as a transport service. Even though the subject-matter revolved around specific and individually provided services, CJEU has also outlined how it viewed the on-line platforms as legal entities.

CJEU has explicitly declared that the service in question is not an information society service[2], but a service in the strict sense[3] – even though an on-line platform, or rather a company providing a virtual space for provision of services does not actually (physically) provide such a service. In a simple way, Uber company has been "classified" as a taxi service provider even though it has not had any vehicle and has not employed any driver. Needless to say the opinion of CJEU is of a huge importance for any law or a state as such within European Union [Gregor 2016].

Although other, more discussed aspects concerning the provision of these services have emerged lately (e.g. licensing issues for permit to carry out this activity, an obligation to declare income flowing from this activity or the labor law aspects), the private-law aspects, on which the judgment in Professional Elite Taxi v. Uber Systems Spain[4] has undeniable significance, should not be disregarded at all.

For a proper clarification, some of the further described benefits and statistics have been based on data related to the period when Uber was actively operating in Bratislava, Slovakia, for a longer period of time making for a relevant stats pool. However, on March 27, 2018, Uber decided to (shortly) discontinue the operation of its services following the measure ordered by the District Court of Bratislava I in case between Občianske združenie koncesovaných taxikárov and Uber B.V., dated February 16, 2018, File Ref. No. 8CbPv/1/2018 [Case 8CbPv/1/2018, 2018].

The last statement is no longer valid, though. Uber is now again operating in Bratislava since April 25, 2019. This is a result of a partial amendment to the existing legislation on traffic regulation, which has softened the conditions for operation of transport services. Nevertheless, the amendment has not affected the relevance of either the analyzed CJEU judgment or any other provided statements mentioned below in this article concerning also other on-line platforms. In other words, the private-law aspects of on-line platforms remain to be determined yet across the most of EU countries including the Slovak Republic.

---

[1] Case C-434/15 concerning a request for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil n° 3 de Barcelona (Commercial Court No 3, Barcelona, Spain) in connection with the proceedings Asociación Profesional Elite Taxi v Uber Systems Spain, SL. The pertinent proceedings have not been the only proceedings initiated against this platform. There are plenty others as well, e.g. Case C-526/15 Uber Belgium BVBA v Taxi Radio Bruxellois NV (Case C-526/15, 2016), Case C-371/17 Uber BV v Richard Leipold (Case C-371/17, 2018) that were also considered.

[2] Despite the fact that on-line platforms have been considered as an information society service pursuant to Article 1(2) of Directive 98/34/EC amended by Directive 98/48/EC as referred to by Article 2(a) of Directive 2000/31/EC (Directive 2000/31/EC, 2000). The pertinent directives have been, however, repealed and replaced by currently valid and effective Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Directive (EU) 2015/1535, 2015).

[3] That is a service in the field of transport pursuant to Article 2(d) of Directive 2006/123/EC (Directive 2006/123/EC, 2006).

[4] Also abbreviated as the "Uber case" (any necessary grammatical changes shall be made).

1. ON-LINE PLATFORMS AND THE BASICS OF SHARING ECONOMY

The actual mystery of this phenomenon is not just its content, but the very notion of sharing economy also referred to as a collaborative economy. It can be simply defined as a means of economic activity of individuals (peers) motivated to achieve a profit in the digital or rather virtual Internet environment. The subject of "sharing" is an asset, a service, or know-how[5] of one party offered to the other interested party specifically targeting the offer at a place, where the offer is being gleaned. On-line platforms allow for economic interaction (not only) between professional service providers and consumers, which would not have made sense in the recent past due to the transaction costs [Kindl & Koudelka 2017]. To be more specific – the most typical platforms are the ones offering:

a) a transport – either urban (uberPOP) or long-distance (BlaBlaCar);
b) an accommodation (AirBnB);
c) a peer-to-peer financing (Kickstarter, Zonky (CZ), Žltý melón (SR)).

The sharing economy revolves around the factual and economically motivated behavior of subjects of legal-economic relationships that existed before development of the Internet. This long-persisting behavior of people has also found its place on this network thanks to the changes and development of the Internet, and it has been professionalized ever since on a gradual basis by individual subjects.

The sharing economy, unlike a common legal-economic relationship, distinguishes three subjects:

a) a service provider,
b) a recipient of a service; and
c) an on-line platform.

The status of supplier and consumer is relatively obvious in legal-economic relationships, unlike the special status of on-line platform, which was primarily defined only as an intermediary of the provided services. The status and powers of this platform are absolutely crucial for understanding the distinctive features of the relationships arising from sharing economy.

On-line platform presents a "technical solution" that mediates and transactionally facilitates a relationship between original actors of the relationship, whilst at the same time it systematically eliminates the potential information constraints on one or both parties [Kindl & Koudelka 2017]. From a legal point of view, an on-line platform is operated by a specific law subject (usually a legal person). Thus, the technical solution actually becomes a subject of social relationships with a strong economic background regulated by law.

2. LEGAL REGULATION OF ON-LINE PLATFORMS

Since an on-line platform clearly provides services in the electronic communications environment, in Slovakia it is regulated by the following law:

a) at European level by Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (hereinafter referred to also as the "Directive") and partly by Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on

[5] These concepts, however, have rather economical than purely legal connotations. This is understandable as we do not have a legal definition for a defined legal area (either national or supranational, i.e. European one).

promoting fairness and transparency for business users of online intermediation services (hereinafter referred to also as the "Regulation")[6]; and
b) at national level by Act no. 22/2004 Coll. on electronic commerce, which transposed the aforementioned Directive.
Under the Directive (and the aforementioned Act), on-line platforms can certainly be considered to fall within a definition of an information society service defined as any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service [Directive 2000/31/EC, 2000][7].
The Directive allows the provision of such services in the Member States of the European Union in accordance with national law, whereas under Article 3(2) of Directive on electronic commerce, Member States may not restrict the free movement of such services[8].
As regards the aforementioned Regulation, it shall require the providers of online intermediation services and online search engines (e.g. Google search) to implement a set of measures to ensure transparency and fairness in the contractual relations they have with online businesses (e.g. online retailers, hotels and restaurants businesses, app stores), which use such online platforms to sell and provide their services to customers in the EU. The Regulation thus shall harmonize transparency rules applicable to contractual terms and conditions, ranking of goods and services and access to data, whereby it shall present the first regulatory attempt in the world to establish a fair, trusted and innovation-driven ecosystem in the online platform economy.
The specific method of concluding a distance contract with an information society service provider has been partially regulated (with the minimum extent of harmonization) in the Directive and very partially in the Regulation (as regards mostly transparency rules), whilst specific regulation of rights and obligations of the providers from the relevant Member State of the Union, including the rules on the conclusion of distance contracts, has been left to national legislation.
However, the Directive (and, on the basis thereof, the transposed legislation) addresses an important regulation concerning the exemptions from liability related to entities that have "only" a status of a provider of an intermediation service. In such cases, intermediaries fulfilling requirements of the so-called channel (mere conduit), caching and hosting provision of service[9] enjoy a status of the so-called safe harbor. Under a safe harbor notion, we understand a provider, whose transmission activity is merely technical, automatic and passive – i.e. the provider does not interfere with the content that is being transmitted [Cholasta et al., 2017]. However, the definition of this concept and its meaning does not follow directly from the Directive, but is defined by case law of CJEU. This court always assesses the conditions of provided

[6] Date of effect of this Regulation has been set out to July 31, 2019.
[7] The definition of an information society service follows from Directives 98/34/EC and 98/84/EC of the European Parliament and of the Council (Directive 98/34/EC, 1998 & Directive 98/84/EC, 1998) .
[8] However, for the purposes of providing information society services in another Member State, a Member State may take measures against a particular service for the reasons and in the manner set out in Article 3(4) of the Directive.
[9] The conditions for the exemptions from liability of such providers are governed by Art. 12-14 of the Directive.

services ad hoc, i.e. by their extent and depending on whether a provider in question may or may not be able to interfere with those services[10].

3. ECONOMICAL ASPECTS AND BENEFITS OF UBER – SOME OF THE REASONS WHY WE SHOULD CARE ABOUT ON-LINE PLATFORMS

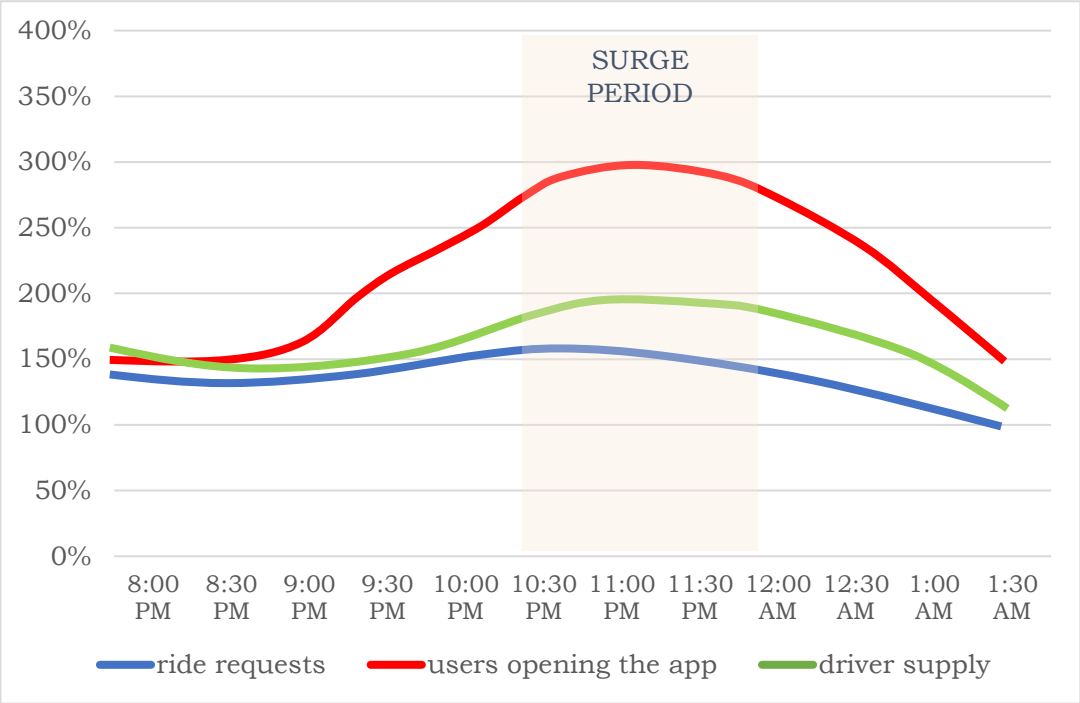
Before proceeding further, it is important to address some of the significant benefits that sharing economy brings to the economy as such. These benefits and economic aspects have been given in relation to the central concept of this article, namely Uber. Uber has grown wildly popular, providing more than a million daily rides as of December 2014 [Cardenas 2014] and was the most valued venture-backed company as of December 2015 [Isaac & Picker 2015]. As specifically regards Bratislava, more than 100.000 registered users have been known to use the application. Illustration of some of these benefits should further lead to the answer why we should be paying more attention to the chosen issue.

Many of the Uber benefits have been interlinked with the dynamic pricing policy of Uber. In times of high demand such as after the end of a musical concert, during a night or during Christmas as well as in times of limited public transport, the Uber algorithm tries to balance a demand with a supply. For that purpose, it uses the so-called "surge pricing", which generally causes several things at once:

- Higher prices affect the number of drivers on the roads. When a "surge period" occurs, Uber sends a series of SMS messages to its drivers and appeals for turning on the application and providing a ride.
- Higher prices make people use Uber even more efficiently. If a customer faces the three-time higher price, whilst knowing that a public transport can reliably drive him home, many of customers change their mind about taking Uber. In this sense, Uber rather does support the traditional means.
- Higher prices ensure the cars are available for emergencies, especially if the customer needs to get to another place quickly and needs a guarantee, whether it is an airport, a maternity hospital or a job interview [CETA 2017].
- From an economic point of view, the Uber algorithm is exceptionally good in balancing a demand and a supply, thus maintaining a constant waiting time (Hall et al., 2015). Let's illustrate the underlying economics by taking a typical example of a surge in action. An example might relate to a sold-out concert. Attendees attempting to get home after the concert (in our illustrative scheme - 10:30 pm) usually cause a large spike in demand. Because of the increased demand relative to the number of available Uber cars in the area, a surge kicks in. The first beneficial effect of a surge is that it increases the number of drivers in the area. This increase in driver supply is a net win for riders in the area because more of them can take advantage of Uber services. The second effect of surge pricing is that it allocates rides to those that value them most. As a result, a supply rises to meet a demand. The third effect is that wait times do not increase substantially. That is to describe the basic economic mechanism, whereof many benefits do arise.

[10] The issue of a safe harbour is defined in several cases e.g. Case C-324/09 L'Oreal v Ebay (Case C-324/09, 2011), Case C-236/08 to C-238/08 Google France (Case C-236/08, 2010), Case C-291/13 Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd et al. (Case C-291/13, 2014), etc.

Fig. 1. Graphic depiction of a surge pricing resulting in a supply rising to meet a demand following a sold-out concert.



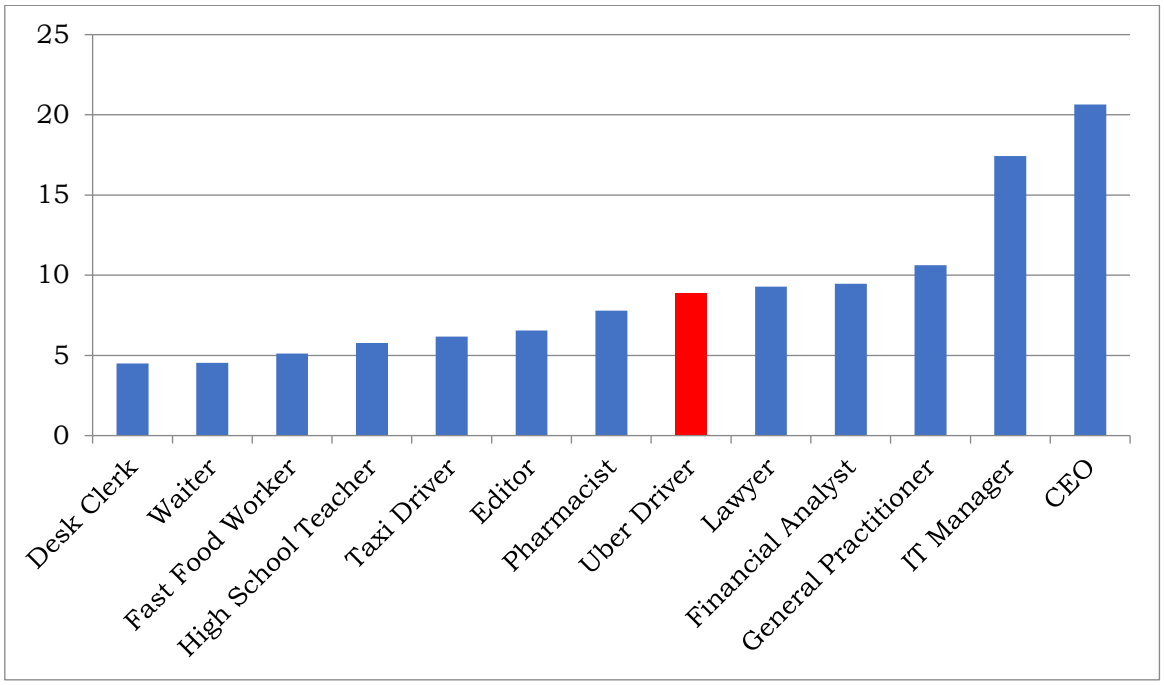
Source: Authors.

Consequently, another important economic aspect interlinked with Uber is the so-called “consumer surplus”. That is the difference between what customers are willing to pay and what they really must pay to get a service. A calculation of the consumer surplus is quite complex, as the information about the price that customers would be willing to pay is rather subjective and private. Thankfully, extensive data provided by Uber have enabled the economists to conclude as regards the consumer surplus in relation to Uber [Cohen et al., 2016]. The result of the study is that, on average, every € 4 spent by a customer gets the countervalue of € 11. Thus, the consumer surplus amounts to € 7. The sum of € 4 spent by a customer is further distributed in approximately € 3 for drivers and € 1 for Uber itself. From the total value of € 11 generated, Uber receives approximately € 1. Following that, it's also noticeable that Uber drivers were found to earn more than those in traditional taxi services (averaging € 988 per month as regards Slovakia on a blanket basis as further depicted in graph). This is also largely because the Uber software allows drivers to better optimize their time and services.

The above conclusions inevitably evoke a general efficiency of the company. In addition, some of the most prominent economists, Alan Krueger and Judd Cramer, summarize the Uber's advantages in four points [Cramer & Krueger, 2016]:

1) More efficient technology for connecting drivers and customers,
2) Greater size of Uber in comparison to taxi companies,
3) Ineffective taxi regulation,
4) The flexible offer model and the "surge pricing" algorithm, which covers a demand during the day better.

Fig. 2. Average earnings (EUR) per hour in Slovakia including Uber driver's income.



Source: Platy.sk (2018) and Chovanculiak (2018). Note: Own figure.

In addition, a further study from August 2016 showed that Uber's entry to the local market has meant a very important reduction of traffic congestion, as well as it has improved transportability and eventually resulted in significant CO2 reductions [Li et al., 2016].

The aspect of security is essential as well. In that sense, a standard taxi driver usually keeps a larger amount of money, which attracts crimes. Criminologist Marcus Felson states that "Cash is the mother's milk of crime." Uber is, however, fully electronic in this area. The research proved that electronic payments led to a drop of 9,8 % in the overall crime rate and caused the rates of burglary, assault and larceny to fall by 7.9%, 12.5% and 9.6%, respectively [The Economist 2014]. It follows that Uber drivers should be statistically at a lower risk of a crime since they usually do not keep larger amount of money. Likewise, the standard taxi driver picks up customers who he might not know at all. The Uber driver, on the other hand, can rely on customer rating and on the fact that customer has a working credit card, which has been associated with Uber application. If a customer uses a fake card or does not have sufficient funds within it, Uber company guarantees a payment to the driver.

Similarly, in terms of passenger, the drivers who drive dangerously, have a car in an inappropriate state, or behave inappropriately, which all leads to a low rating within the application, are forced out of Uber's driver database. More specifically, in Bratislava there was a limit of 4.5 stars out of five. As regards dangerous driving under the influence of alcohol, this leads to an immediate deactivation of the driver's account right after the first reported and proven incident.

The abovementioned data and information have been further supported by several analyses. Dills & Mulholland (2018) provided the study concerning an impact of Uber's entry to the market on the traffic-related accidents and crimes. Under this study, Uber's entry resulted in 6% drop of traffic-related death rate and in 18% drop

of night-time driving fatality rate. The number of drunk driving has declined by an average of 12-18%.
Following the presented arguments, we believe that Uber brings, from either the point of view of the economic or social level, several notable benefits. The same effect should have other on-line platform providers, which should be considered as the special subject of law and reflected in the legislative level addressed further in this article.

4. ACTIVE VERSUS PASSIVE APPROACH TOWARDS PROVISION OF INFORMATION SOCIETY SERVICES

On-line platforms have their status determined by a range of provided services. The controversy flows primarily from a status of this entity (intermediary) as to whether it is merely a passive or (even) an active one.
The first view, under which the status of platform equals to rather a passive, is justified by the fact that a "contract" between a beneficiary and a provider is concluded without any intervention or other action of an on-line platform, which acts only in a passive way in this case. The on-line platform provides to participants only a "space", whereas it does not interfere with actual content. Should we accept this view, the on-line platform would have fallen within a safe harbor as set out in Article 12(1) of the Directive[11]. However, we can come to this conclusion only if we define and view these platforms as falling within the information society services.
In general, on-line platforms provide the following services:

- an opportunity finding,
- a contract conclusion – they serve as a medium providing for a draft of contract and its acceptance,
- a payment option.

As regards Uber, a range of provided services is even wider – the app offers a driver an appropriate route, whilst it also navigates, sets the charge rates, and automatically calculates price money that the driver receives directly from a customer's credit card. In addition, the app provides a wide range of information about the provided service. Some mandatory information is also provided by the service provider. However, very beneficial in terms of the attractiveness of the offer are references and numerical or verbal evaluations of a particular service provider (but also the ones of a service recipient). Thus, the app systematically eliminates the possible information constraints on one or both parties [Kindl & Koudelka 2017], which are a key pillar for a strict regulation of consumer law effectively offsetting both parties.
Moreover, if a service in question is being performed by a non-professional provider[12], we shall regard this service as a peer-to-peer service, i.e. a service performed by persons acting at the same level as customers, where it is not possible to determine who the weaker party is [Resolution 2017/2003(INI), 2017]. There is no doubt that in a case of peers – i.e. a supplier and a provider of sharing economy service – a legal

[11] Even before the CJEU decision in the Uber case, this view had been favoured by J. Kindl and M. Koudelka, who have found it is an information society service within the meaning of Article 2(a) of Directive on electronic commerce in conjunction with Article 1(1) of Directive 2015/1535. Moreover, in their view, the pertinent conclusion has also been supported by Case C-324/09 L'Oreal v eBay (Kindl & Koudelka, 2017).
[12] The view of J. Kindl and M. Koudelka correlates to the view of Advocate General served in Case C-434/2015 dated 11.5.2017 (Case C-434/2015, 2017).

relationship between ordinary natural persons is governed by the provisions of the Civil Code [Civil Code 1964].
The platform itself, however, is a professional service provider and provides, besides the above mentioned functions of service provision, money collection and information point, also the function of a "regulator". That means, it sets out the "game rules" for peers and it creates conditions and environment so as not to breach contractual obligations between the parties. If a breach occurs, the platform should be able to provide the proper conditions for compensation of the entity, whose rights have been breached.
However, if we are to answer whether an on-line platform can provide compensation (redress) resulting from the private-law relationships of the parties to this diversified economic relationship, it is necessary[13] to answer three basic questions:
a) Is an on-line platform a mere intermediary, or more precisely a passive provider of an information society service, which would justify it as a safe harbor, or is it a direct service provider – if so, which precisely?
b) Following the answer to question (a), who shall be liable to an injured person claiming damages and who shall actually indemnify the injured person?[15]
c) Should an on-line platform be liable for damages to the injured person, does a relationship between peers and platform constitute a consumer relationship – is it necessary to apply consumer legislation including provisions on consumer disputes [Code of Civil Contentious Litigation, 2016: Sec. 290 et seq.] then?
Of course, the answer to question a) should determine further answers to questions concerning the status of platform as a provider of services requiring a public regulation (authorization, licensing, tax or fee obligations).
An outline to these questions has been provided by CJEU in case Asociación Profesional Elite Taxi v Uber Systems Spain SL. In the light of this decision, we will try to find answers to the questions raised.

5. JUDGMENT OF CJEU IN CASE C-434/2015

Request for a preliminary ruling was made in proceedings between Asociación Profesional Elite Taxi (hereinafter referred to as "Elite Taxi"), a professional taxi drivers' association in Barcelona (Spain), and Uber Systems Spain SL, a company related to Uber Technologies Inc., concerning the provision by the latter, by means of a smartphone application, of the paid service consisting of connecting non-professional drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative license or authorization.
Elite Taxi brought an action before the Commercial Court No. 3 in Barcelona, seeking a declaration from that court that the activities of Uber Systems Spain have infringed the legislation in force and amount to misleading practices and acts of unfair competition within the meaning of Ley 3/1991 de Competencia Desleal (Act No. 3/1991 Coll. on unfair competition) of 10 January 1991. Elite Taxi also claimed that Uber Systems Spain should be ordered to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet. Lastly, it claimed that the court should prohibit Uber Systems Spain from engaging in such activity in the future.

[13] Under the Slovak law and order.
[15] In legal terminology, it is a matter of an active (a capacity to bring proceedings) and a passive (a capacity to be a party to proceedings) standing, or rather *locus standi*, in civil litigation.

The Commercial Court No. 3 in Barcelona noted that although Uber Systems Spain carried out its activity in Spain, that activity was linked to an international platform, thus justifying the assessment at EU level of the actions of that company. It further observed that neither Uber Systems Spain nor the non-professional drivers of the vehicles concerned had the licenses and authorizations required under the Regulation on taxi services in the metropolitan area of Barcelona of 22 July 2004.

In order to determine whether the practices of Uber Systems Spain and related companies (together hereinafter referred to as "Uber") could be classified as unfair practices that infringe the Spanish rules on competition, the Commercial Court No. 3 in Barcelona considered it necessary to ascertain whether Uber requires prior administrative authorization. For that purpose, the court considered that it should have been determined whether the services provided by that company were to be regarded as transport services, information society services or a combination of both. According to the court, whether prior administrative authorization may have been required, depended on the classification adopted. In particular, the referring court took the view that if the service at issue were covered by Directive 2006/123 or Directive 98/34, Uber's practices could not be regarded as unfair practices.

To that end, the referring court (in Barcelona) stated that Uber contacts or connects with non-professional drivers to whom it provided a number of software tools (an interface), which has enabled them, in turn, to connect with persons who wish to make urban journeys and who gain access to the service through the eponymous software application. According to the court, Uber's activity has been for profit.

Consequently, the national court referred the following questions to the Court of Justice for a preliminary ruling:

1) Inasmuch as Article 2(2)(d) of Directive 2006/123 excludes transport activities from the scope of that directive, must the activity carried out for profit by Uber Systems Spain, consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources – interface and software application (smartphones and technological platform in the words of Uber Systems Spain) – which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of Directive 98/34?

2) Within the identification of the legal nature of that activity, can it be in part an information society service, and, if so, should the electronic intermediary service benefit from the principle of freedom to provide services as guaranteed in EU law and namely Article 56 TFEU and Directives 2006/123 and 2000/31?

3) If it is confirmed that If the service provided by Uber Systems Spain were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of Act No. 3/1991 Coll. on unfair competition of 10 January 1991, concerning the infringement of rules regulating competitive activity, contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorization schemes, when the reference to national laws or to legal provisions is made without taking into account the fact that the scheme for obtaining licenses, authorizations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

4) Directive 2000/31 is applicable to the service provided by Uber Systems Spain, are restrictions in one Member State regarding the freedom to provide the electronic

intermediary service from another Member State in the form of making the service subject to an authorization or a license, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute exemptions from Article 3(2) of Directive 2000/31 in accordance with Article 3(4) thereof?

By its first and second questions, which should be considered together, the referring court asks, in essence, whether relevant legal provisions[16] must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, is to be classified as a "service in the field of transport" within the meaning of Article 58(1) TFEU and, therefore, excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31, or whether, on the contrary, the service is covered by Article 56 TFEU, Directive 2006/123 and Directive 2000/31. In other words, CJEU had to legally assess, whether a service provided by Uber was to be regarded as a transport service or as an information society service with all the associated ramifications.

Following the specific issues, CJEU noted that an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wished to make an urban journey was, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services, as contemplated by the referring court.

Accordingly, an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an "information society service" within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is "a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

By contrast, non-public urban transport services, such as a taxi services, must be classified as "services in the field of transport" within the meaning of Article 2(2)(d) of Directive 2006/123, read in the light of recital 21 thereof [Case C 340/14 and C 341/14, 2015].

It is appropriate to observe, however, that a service such as that in the main proceedings has been more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey. In a situation such as that with which the referring court has been concerned, where passengers are transported by non-professional drivers using their own vehicle, the provider of that intermediation service simultaneously offered urban transport services, which it rendered accessible, in particular, through software tools such as the application at issue in the main proceedings and whose general operation it organized for the benefit

[16] Article 56 TFEU, together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers.

of persons who wish to accept that offer in order to make an urban journey. The intermediation service provided by Uber has been based on the selection of non-professional drivers using their own vehicle, to which the company has provided an application without which those drivers would not be led to provide transport services and persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber has exercised decisive influence over the conditions under which that service has been provided by those drivers. On the latter point, it appears, inter alia, that Uber has determined at least the maximum fare by means of the eponymous application, that the company has been receiving that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it has exercised a certain control over the quality of the vehicles, the drivers and their conduct, which could have, in some circumstances, resulted in their exclusion. That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as "an information society service" within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as "a service in the field of transport" within the meaning of Article 2(2)(d) of Directive 2006/123. This statement has further translated into another judgment of CJEU, where CJEU basically reaffirmed its view [C-320/16, 2018].

That classification is also confirmed by the earlier case-law of CJEU, according to which the concept of "services in the field of transport" includes not only transport services in themselves, but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport [C-338/09, 2010].

Consequently, Directive 2000/31 does not apply to an intermediation service such as that at issue in the main proceedings. Such service, in so far as it is classified as "a service in the field of transport", does not come under Directive 2006/123 either, since this type of service is expressly excluded from the scope of the directive pursuant to Article 2(2)(d) thereof.

Moreover, since the intermediation service at issue in the main proceedings was about to be classified as "a service in the field of transport", it has been covered not by Article 56 TFEU on the freedom to provide services in general, but by Article 58(1) TFEU, a specific provision according to which "freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport". Thus, application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy [C-338/09, 2010].

With regard to non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the main proceedings, the European Parliament and the Council of the European Union have not adopted common rules or other measures based on Article 91(1) TFEU. It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.

On those grounds, the Court (Grand Chamber) ruled:

Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying

down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of Council of 20 July 1998, to which Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as "a service in the field of transport" within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.
In view of the answer to the first and second questions, there is no need to answer the third and fourth questions.

6. THE IMPLICATIONS OF THE CJEU JUDGMENT FOR ON-LINE PLATFORMS AND THE ASSERTION OF CLAIMS AGAINST THESE PLATFORMS

6.1. Status of an on-line platform in private-law relationships

It is clear from the abovementioned conclusions that CJEU has been rather reluctant as regards a direct answer to the question concerning a status of on-line platform. Instead, it considers an on-line platform to be a service inherently linked to a transport service and it ad hoc defines it as a service in the field of transport, as is apparent from Article 58 (1) TFEU.
The reason for this decision is that:
a) peers (natural persons or rather non-professional drivers) would not be able to provide any services without the peer-to-peer service,
b) persons interested in a certain service would not have access to such a service,
c) the intermediary has a decisive influence on the conditions under which a service is provided,
d) the intermediary performs quality control and has a right to draw consequences for potential faults by not allowing to provide a service anymore,
e) the intermediary sets a price that the parties cannot influence,
f) the intermediary also fulfills the function of the payment institution.
It is clear from judgment issued in Case C-434/15 and the earlier court's decisions (and from the actual wording of the Directive) that an extent of the activities carried out by the information society service provider, or an extent of control over the provided activities determines, whether an on-line platform constitutes a safe harbor (and thus, whether it shall be exempted liability for the services) or does not constitute it (and thus, whether it shall be liable if necessary). Should an on-line platform constitute a mere intermediary (according to the scope of the services provided) without the possibility of interventions and supervision on the provided services, it would meet the requirements for a safe harbor status and for the exemption from liability for the provided services. In our opinion, that would be the case if an on-line platform was providing either the activities referred to in point (a) and (b), or also the activities referred to in point d) and f), whilst the service in question enjoys the status of a mere intermediation service.

However, if the abovementioned services would consist also in the activities referred to in subparagraphs (c) and (e) (or other non-listed services), the provided service would not equal to a passive provision of services and thus it would not match the safe harbor requirements. In that case, an on-line platform ceases to be an intermediary and becomes a joint service provider, which provides a service jointly with a provider of an offered/demanded service.

The answer to the question whether an on-line platform should be considered as a service provider results from the assessment of an extent of the provided services.

If an on-line platform was providing only a space in the on-line environment through which other entities would have been able to conclude contracts, it would be considered only as an intermediary[17].

However, if an on-line platform provides a wider range of services in the sense it determines the actual content and the way of service provision, it must be considered then as a direct provider of the service.

6.2. Active and passive standing in disputes against on-line platforms

Similarly to the CJEU's case law, we have not reached a definitive conclusion as regards the status of an on-line platform. However, we tend to incline to an ad hoc assessment of both an on-line platform's status and a scope of liability for the provided services, which should be conducted depending on the range of activities it provides (not including its own intermediation service) to one or both parties to the contract.

In principle, there are two kinds of legal relationships involving an on-line platform, where a following liability for provision of certain services may occur:

a) a liability for an intermediation service – i.e. a liability for selecting a contractor and a fulfillment of his/her obligation,

b) a liability resulting directly from an intermediated relationship.

If a party asserts only a claim for intermediation service or other service provided directly by an on-line platform (such as a payment), a liability shall be held without any doubt by the on-line platform (having a passive standing).

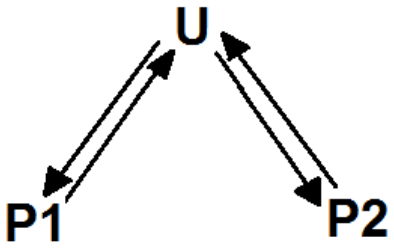
However, if a party asserts a claim from an intermediated relationship, there is currently no legal provision that would justify the liability of a provider of an intermediation service. The only provision, which might analogously resolve such a situation (though only at the level of commercial contractual obligations) is regulated in Sec. 649 (1) of the Commercial Code: "The intermediary shall not be liable for the performance of third persons with whom he negotiated the conclusion of the contract, however, the intermediary may not propose to the client to conclude a contract with a person of whom the intermediary knows, or must know that there is a reasonable doubt that such a person shall duly and in time perform obligations arising from the intermediation contract."

Under that provision, the intermediary shall not have a liability at all – which further implies that he is not liable for a fulfillment of obligations of a person with whom he negotiated the conclusion of a contract. This is particularly true, if he does not propose to enter into a contract with persons rising doubts about their fulfillment of an obligation – and that is a circumstance, which on-line platforms are usually focused on (by means of providers' rating and provided services' rating).

[17] At the same time, however, we cannot forget that the intermediary acts not only for one, but for both parties, which is not rather common for an intermediary.

Nonetheless, a substantive or procedural law currently does not address the situation where a joint responsibility of peers and on-line platforms could be established. As regards a status of platform, it is true that a platform performs a contractual obligation (a service or a reward for it) jointly and severally[18] with a peer in a way that a peer commits to an on-line platform to perform an obligation properly and in a timely manner. The on-line platform (further designated as U – Uber) is to be found on both sides of the legal relationship - that is, together with peer 1 (P1), it provides the service to providers. Also, together with peer 2 (P2), it remunerates the providers of the service. We can graphically depict the relationship as follows:

Fig. 3. Relationship between the Uber and the peers



Source: Authors.

It is clear from the graphical depiction that a relationship between Uber and peers is as follows:
a) the provider (P1) undertakes to provide a performance to particular beneficiary (P2), whilst doing so via (U) platform, which means the provider provides a performance primarily to (U) platform;
b) the beneficiary (P2) is obliged to provide a payment to the provider (P1), but only via (U) platform, which means the beneficiary provides a performance primarily to (U) platform.
We can infer from the statements that if any of the above legal entities (P1 or P2) infringe an obligation, the on-line platform shall have a right to assert its claim against the infringer.
On the other hand, it is also necessary to consider the fact that the on-line platform (even in case it enters into a legal relationship) is just "an intermediary". If it is possible to determine who the provider or the recipient of a service in a relationship is, then the injured person may assert a claim directly against such an individual entity without the platform being a party to the dispute.
However, if there is not a single entity (or one just cannot be identified) that could be liable[19], whilst an on-line platform can be considered as a service provider at the same

[18] We follow the conclusion of CJEU set out in paragraph 40 of the Uber case, in which CJEU expressly stated that "that intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service". It is clear from that conclusion that, in the present case, the two entities provide a joint service consisting of two different activities.
[19] It is also necessary to emphasize that an on-line platform shall verify the identity of the persons entering the legal relationship. It shall also act in accordance with the general preventive obligation to prevent damage. In order to comply with the preventive obligation, an

time; an on-line platform shall have a passive locus standi with respect to the analyzed CJEU judgment. Moreover, an on-line platform shall be jointly and severally liable. Such a liability can be inferred from Sec. 511 (1) of the Civil Code, under which a joint debt arises even if it results from the nature of the performance (which is undoubtedly fulfilled in this regard since if it would not contain any element of that legal relationship, the provision of such a service would not be actually feasible). The conclusion regarding a joint liability is also justified by Sec. 438 of the Civil Code, since in the present case the damage was caused by two jointly operating entities.

On the other hand, the issue of active locus standi is more complex, as there is no legal provision, which would confirm or rule out the liability of an on-line platform. Although it stems from the peers and on-line platform relationship that the "provider" as a peer provides a performance to the platform on behalf of the beneficiary of the performance, it is necessary to take into account Sec. 512 (2) of the Civil Code[20] regulating the indivisible joint claims, or Sec. 513 of the Civil Code[21], regulating the joint claims.

It is true that the entities shall perform directly the intermediation contract. Therefore, if the "customer" peer (who is the beneficiary of the performance) claims and demonstrates that there is a contractual obligation between him and the "provider" peer, which exists due to the on-line platform, the "customer" peer shall have an active locus standi (taking into account the pitfalls referred to in the aforementioned legal provisions).

If an on-line platform that acts as the creditor of a legal relationship had an active locus standi, it would be necessary to distinguish whether it acts only as an intermediary or even as a beneficiary of the service. In case an on-line platform acts both as an intermediary and as a beneficiary of the service (a person to whom the "provider" peer such as a driver or a landlord is obliged to perform his obligation), the platform as one of the creditors shall be also entitled to claim a performance.

However, if an on-line platform acts only as an intermediary, it does not have a legal title to assert the claims arising from a breach of its "client's" obligations under the current legal regulation. In that sense, the client is a person to whom the requested

on-line platform shall also identify and notify the identity of the pertinent entities to the other party for the purposes of assertion of the claims.

[20] Under Sec. 512 (2) of the Civil Code "Where an indivisible performance for several creditors is concerned, the debtor is entitled to pay any of the creditors, unless agreed otherwise. Upon the repayment to one of the creditors the debt shall be extinguished. The debtor is not obliged to pay one of his joint creditors without the consent of the other joint creditors. If no agreement is reached by all the joint creditors, the debtor may deposit the subject of the debt into the custody of the court." In the present case, if the outcome was an indivisible joint claim, the specific situation should be solved between a peer and an on-line platform. Such an obligation should be agreed upon either in the specific agreement or in the general terms and conditions, whereas a consideration should be given to the mutual benefit of requiring a payment by one entity only. In case of a joint claim, the debtor shall be obliged to perform always to the other peer given the nature of the obligation. However, if this was not possible and there was a co-creditors' agreement in the sense of a previous sentence, the debtor's obligation would also extinguish by providing to the on-line platform. This, of course, applies in the case of obligations, in which the duty to perform does not cease to exist through the inability to perform within the meaning of Sec. 575 et seq. of the Civil Code.

[21] Sec. 513 of the Civil Code stipulates that "if the debtor is obliged to provide the same performance to several creditors that are entitled to the performance from him jointly and severally by law, by the court's decision or by contract, then any of the creditors may require the debtor to provide the entire performance and the debtor is obliged to provide the entire performance to the first creditor that requests performance."

service is provided. It follows that a passive standing of an on-line platform excludes not only a liability, but also a possibility of claiming a performance flowing from the potential breach of obligation by the service provider, who has been obliged to provide a performance to the other party via the on-line platform. Thus, the on-line platform may not claim a provision of neither transportation nor accommodation or any damages, since a service in question is being provided to another person.
Nonetheless, an on-line platform can acquire the right to claim performance by means of the right of recourse in case it incurs a damage as a result of a breach of the obligations on the part of the service provider, or in case it has already fulfilled the obligation of the "provider" peer instead of him even though an on-line platform was supposed to act only as an intermediary (the issue of unjust enrichment under Sec. 454 of the Civil Code).

6.3. Judicial assertion of claims against an on-line platform

In all the aforementioned cases, we refer to the relevant provisions of the national law as we simultaneously assume that the provisions of national law apply to relationships between peers and on-line platform. Here, as in other cases, it is also necessary to consider what substantive law shall apply for a specific contractual relationship, based on the Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations[22] (Rome I)[23] or the Act No. 97/1963 Coll. on international private and procedural law.
As regards procedural law governing the providers within EU law jurisdiction, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters shall apply and namely its Article 7. Pursuant to this Article, a person domiciled in a Member State may be sued in another Member State in matters relating to a contract, in the courts for the place of performance of the obligation in question, whereas the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

[22] In case a company provides information society services within the European Union, the registered office of that company must be assessed within the meaning of paragraph 19 of Directive on electronic commerce, under which "the place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service."
[23] Should a service in question be provided by the on-line platform falling under the EU law jurisdiction (e.g. AirBnb operating in Ireland as further proven by company's general terms and conditions) and also by the Slovak entities, Slovak law shall prevail and govern that relationship pursuant to Article 4 (3) of the Rome I Regulation. In such a scenario, further consideration regarding a private-law regulation and discrepancies between civil and commercial relations might be taken into account [Straka 2018].

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

In matters relating to tort, delict or quasi-delict, the court having jurisdiction is a court, where the harmful event occurred or may occur. As regards a dispute arising out of the operations of a branch, agency or other establishment, the court having jurisdiction is a court, where the branch, agency or other establishment is situated. Besides that, the prorogation of jurisdiction under Article 25 is also feasible and may be concluded even in an electronic form.

Thus, the provision of services or the supply of goods to Slovak entities shall be governed by Slovak legal order, whereas the Slovak courts shall have a jurisdiction.

Last but not least, it is also necessary to point out that a relationship between an on-line platform and a natural person shall be considered a consumer relationship governed by consumer legislation including the rules regulating consumer disputes [Code of Civil Contentious Litigation, 2016: Sec. 290 et seq.]. This is because an on-line platform acting as a supplier of goods or services enters into contract with a natural person acting as a consumer.

CONCLUSION – ON-LINE PLATFORMS IN THE PRIVATE-LAW RELATIONSHIPS FROM DE LEGE FERENDA PERSPECTIVE

We have attempted to argue that even though there is currently insufficient national or international (supranational) legal regulation, the issue of private-law (especially) liability relationships regarding the provision or acceptance of on-line platform services is certainly not irresolvable. On the other hand, taking into account the current civil law regulation, the legal relations occurring in the sharing (collaborative) economy have been many times realized in the so-called "grey zone" – outside the legal framework governing these specific relationships. We might expect, though, that such a way of providing services will only have an increasing tendency. As a matter of fact, that tendency should find its reflection in legislation sufficiently generalizing and flexible so that it would not need to address all the nuances that might occur as a consequence of a different manner and scope of the provided services. In our deepest belief, however, that shall be a function of objective law in the 21st century, which faces previously unseen challenges brought about by unprecedented expansion of technology and the surge of new economic relations regulated by law.

This article highlighted the bottlenecks of the current legislation, which must be addressed by means of legislative interventions[24]. In that sense, the interpretation of the current legislation probably does not suffice, because there is literally nothing to interpret at this time – the legal regulation of relationships brought about by a sharing economy does not exist yet.

The changes should concern and involve:

[24] It might seem that politicians' natural response to addressing a real or many times just a hypothetical problem is to simply come up with a new regulation. However, according to a study [Coffey et al. 2016], gross domestic product of the USA would have been 25% higher provided the federal regulation had not been constantly increasing since the 1980s. We can find many benefits of deregulation all over the world. E.g. air traffic [Thompson 2013] and logistics deregulation [Button & Christensen 2014] in the US have boosted the economy and created a solid economic background for many of the services we now see as obvious, such as Amazon. Nevertheless, we believe that in this case it is not appropriate to completely abandon the regulation idea.

- a proper legal adaptation of the intermediation contract, which would address the provision of a service provided with a different than intended purpose, which, when provided jointly, de facto fulfills the definition of a particular service,
- a legal regulation of the legal status of the entities providing the services jointly, which per se amounts to the provision of a specific, united service,
- an explicit transfer of a liability for a provided service from an unidentifiable or indeterminable subject to a subject liable for intermediation service (liable for selecting a contractor which happens to be unidentifiable), which provides the service jointly.

We attempted to outline the basic aspects of private-law relationships arising from the sharing economy. However, since this is obviously just a "white paper", or rather a pure, unpublished sheet of paper, a wider whole-society discussion would not only be more than welcome, but also beneficial. In that sense, the authors of this paper hope this article will contribute to that as well.

REFERENCES

Button, K. and Christensen, D., (2014), Unleashing Innovation: The Deregulation of Air Cargo Transportation, Mercatus Center at George Mason University, Arlington.

Cardenas, P., (2014), Our Commitment to Safety, in Uber Newsroom, Available at: http://newsroom.uber.com/our-commitment-to-safety [Accessed 22-04-2019].

CETA, (2017), Fenomén Uber v České republice (Phenomenon of Uber in the Czech Republic), Available at: http://eceta.cz/wp-content/uploads/2017/05/Fenom%C3%A9n-Uber2017.pdf [Accessed 23-04-2019].

Civil Code, (1964), Act No. 40/1964 Coll. of 26 February 1964, Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1964/40/vyhlasene_znenie.html

Code of Civil Contentious Litigation, (2016), Act No. 160/2015 Coll. of 21 May 2015, Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/160/20181212

Commercial Code, (1991), Act No. 513/1991 Coll. of 5 November 1991, Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1991/513/20190701

Coffey, B., McLaughlin, P. A., and Peretto, P., (2016), The Cumulative Cost of Regulations, Mercatus Center at George Mason University, Arlington.

Cohen, P., Hahn, R., Hall, J., Levitt, S., and Metcalfe, R., (2016), Using Big Data to Estimate Consumer Surplus: The Case of Uber, National Bureau of Economic Research, Cambridge.

Cramer, J. and Krueger, A. B., (2016), Disruptive Change in the Taxi Business: The Case of Uber, in American Economic Review, Vol. 106, pp. 177-182, AEA Publications, Pittsburgh.

Dills, A. K. and Mulholland, S. E., (2018), Ride-Sharing, Fatal Crashes, and Crime, in Southern Economic Journal, Vol. 84, pp. 965-991, University of Kentucky, Lexington.

Hall, J., Kendrick, C. and Nosko, CH., (2015), The Effects of Uber's Surge Pricing: A Case Study, The University of Chicago Booth School of Business, Chicago.

Directive 98/34/EC, (1998), Directive of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998L0034&from=EN

Directive 98/84/EC, (1998), Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of,

conditional access, OJ L 320, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998L0084&from=EN

Directive 2000/31/EC, (2000), Directive of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2000:178:FULL&from=EN

Directive 2006/123/EC, (2006), Directive of the European Parliament and of the Council on services in the internal market, OJ L 376, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0123&from=SK

Directive (EU) 2015/1535, (2015), Directive of the European Parliament and of the Council

laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.241.01.0001.01.ENG&toc=OJ:L:2015:241:TOC

Gregor, M., (2016), Interpretačná záväznosť judikatúry vrcholných súdnych orgánov v právnom poriadku SR (Interpretative obligation of case-law of courts of supreme judicial authorities in the legal system of the Slovak Republic), in Historia et theoria iuris, Vol. 8, pp. 6-14, Právnická fakulta UK, Bratislava.

Cholasta, R., Korbel, F., Melzer, F., and Molitoris, A., (2017), Safe Harbor: Režim vyloučení odpovědnosti poskytovatelů služeb informační společnosti v kontextu pasivní role poskytovatele (Safe Harbor: The exclusion of information service providers' liability in the context of a passive provider), in Právní rozhledy, Vol. 25, pp. 399-405, C. H. Beck, Prague.

Chovanculiak, R., (2018), Vplyv zdieľanej ekonomiky v oblasti prepravy na Slovensku (Influence of sharing economy on the transportation in the Slovak Republic), INESS, Bratislava.

Isaac, M., and Picker, L., (2015), Uber Valuation Put at $62.5 Billion After a New Investment Round, in The New York Times, Available at: https://nyti.ms/1XD9cdT [Accessed 23-04-2019].

Kindl, J., and Koudelka, M., (2017), Regulatorní výzvy sdílené přepravy (Regulatory challenges of shared transportation), in Právní rozhledy, Vol. 25, pp. 229-235, C. H. Beck, Prague.

Li, Z., Hong, Y., and Zhang, Z., (2016), Do On-demand Ride-sharing Services Affect Traffic Congestion? Evidence from Uber Entry, in 2016 International Conference on Information Systems, ICIS 2016 Association for Information Systems, Dublin.

Platy.sk, (2018), Statistics, Available at: https://www.platy.sk/platy [Accessed 28-04-2019].

Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), OJ L 177, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008R0593&from=EN

Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN

Regulation (EU) No. 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, OJ L 186, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150

Resolution 2017/2003(INI), 2017, European Parliament resolution on a European Agenda for the collaborative economy, OJ C 331, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017IP0271&from=EN

Straka, R., (2018), Zmluvná pokuta a moderačné právo súdu v súkromnom práve (Contractual penalty and moderation right of the court in private law), in Banskobystrické zámocké dni práva [Conference proceedings], Vol. 3, pp. 225-236, Belianum, Banská Bystrica.

The Economist, (2014), Less coin to purloin, Available at: https://www.economist.com/finance-and-economics/2014/04/05/less-coin-to-purloin. [Accessed 28-04-2019].

Thompson, D., (2013), How Airline Ticket Prices Fell 50% in 30 Years (and Why Nobody Noticed), in The Atlantic, Available at: https://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/ [Accessed 30-05-2019].

CATALONIA: ENDEAVOR FOR INDEPENDENCE

Valentyna Hodlevska

Vinnytsia Mykhailo Kotsiubynskyj,
State Pedagogical University,
vul. Ostrohsky, 32, 21100, Vinnytsia, Ukraine
maolpava@ukr.net

Abstract

The historical background of the nationalist and separatist sentiments in Catalonia, factors of the actualization of the problem of separatism at the beginning of the 21st century and the reasons for the transition of Catalonia-Spain relations to the active phase are investigated. Particular attention is paid to the analysis of the driving forces of the modern separatism in Catalonia. The Catalan initiative made important legal and political mistakes that were decisive for its failure and led to increased social tensions and political instability in Spain and Catalonia. The announcement of the verdict to the Catalan separatists will largely determine the relationship of the state with Catalonia and will serve as a firewall for future attempts to gain independence unilaterally.

Keywords: *Spain, Catalonia, nationalism, separatism, referendum, charter of Catalonia, constitution of Spain.*

INTRODUCTION

One of the most developed and richest autonomous regions of Spain, Catalonia, is going through a difficult period. The reason for this is the region's aspiration for independence. In the past three and a half centuries the question of the independence of Catalonia has never been as acute as in the last decade.

The issue of independence of this region has always remained relevant for the local political elite, which sought to regain lost independence. Throughout its existence as part of Spain, the region has fought for cultural, economic and political independence. But due to the lack of political resources and levers of influence on the central authorities, the desire for secession was most often replaced by the requirement to expand the rights of the region as part of the Spanish state. After the fall of the F. Franco regime, the regional authorities, despite their desire to expand the political powers, focused on peaceful coexistence with the central authorities, sought to find a compromise. The beginning of the 21st century can be described as

a turning point in the development of the relations between the center and the regions in the Spanish state. Prerequisites arose that created the basis for the formation of separatist sentiments - both in the society and among the regional elite.
The existing problem affects the coexistence and political dynamics not only of Catalonia, Spain, but also of Europe as a whole.
The purpose of this article is to determine the roots of the Catalan separatism, the factors of the actualization of this problem at the beginning of the 21st century and the reasons for the transition of the Catalonia-Spain relations to the active phase.
In our study general scientific and special historical and political science methods were applied. The general scientific methods (deductive and inductive, analysis and synthesis) were used as specific cognitive tools necessary to implement the principles of historicism, systematicism and objectivity. The general and special historical methods (historical-typological, statistical, comparative-historical, problem-chronological) allowed us to make a comprehensive analysis of the problem of the Catalan separatism.
The empirical basis of the article includes such types of documents as legislative acts of Spain and Catalonia, statistical data, published results of the opinion polls, speeches of the party leaders, periodicals.
The degree of scientific development of the topic is very voluminous. The thorough information about the history of Spain of different periods that we used is contained in the studies of Ch. Powell, R. Cotarelo, V. Prego, E. González Calleja, P. Preston, Sosa-Velasco Alfredo J. and others. The history of Catalonia and the development of Catalan nationalism is studied by A. Balcells, whose work is mainly focused on the events of the 19-21 centuries; Claret Jaume, studying the period of Francoism, especially the formation of Catalanism; A. Smith, studying the origins of Catalan nationalism, as well as S. Henkin, G. Volkova, V. Danilevich, A. Tamarovich, A. Baranova and others.
The materials in this publication may be useful for further more in-depth study of the problem of modern secession movements, as well as to identify possible solutions to the problem of separatism in modern Spain.

HISTORY OF THE CATALAN NATIONAL MOVEMENT

The Catalan separatism has deep roots. The central and southern parts of the present-day Spain were ruled by Cordoban and Granad caliphs and emirs for seven hundred years, and the northeast was recaptured by the Franks in less than a hundred years and since then experienced French influence, not eastern.
In 798 Charlemagne granted his close associate Sunifred the Count of Barcelona. A special Catalan language began to form.
In 985 the famous Cordoban caliph al-Mansour briefly captured Barcelona. Brutal repression began, as a result of which Barcelona and the surrounding territories were looted. That is why the Count of Barcelona Borrell II turned to the Carolingians for help, but never received it [Méndez et al. 2017]. Three years later the Arabs were expelled. Count Borrell II declared his possessions an independent state and refused to swear allegiance to the first monarch of the Capetian dynasty, Hugo Capeto. The supporters of Catalan independence consider this event “the birth of Catalonia”.
In 1164, through a dynastic marriage, Barcelona County became part of the Kingdom of Aragon, which in the 13-15 centuries was a powerful power and controlled, in

addition to a significant part of the Mediterranean coast of Spain, Naples, Sicily, Sardinia and Mallorca [Woolard 1989].

Before the unification of most of the lands of the Iberian Peninsula in 1479 under the authority of the Catholic kings Ferdinand and Isabella, the Catalan lands had a number of privileges [Balcells 1996: 11]. So, being in alliance with the kingdom of Aragon since 1137, Catalonia had its own authorities, a court, the right to manage finances, establish taxes, etc. The political structure of Catalonia was advanced for its time. As a counterweight to the royal power in the Catalan lands, from the 13th century a class-representative body of the nobility, clergy and city dwellers began to gather, the "Corts Catalanas", that many researchers consider to be one of the first European parliaments. In the 14th century from the members of the Corts, who gathered at least once a year, a permanent body called the Generality began to form, which operated between the meetings. Thus, a society with a developed awareness of its "particularity" has become part of Spain, which has long been accustomed to enjoy wide autonomy and civil rights [Khenkin S. 2015: 119].

In the middle of the 17th century Catalonia was swept by an uprising (the so-called "war of the reapers"), the purpose of which was its separation from Spain. For help, the local elite turned to the French king Louis XIII. Thanks to French support, the Catalans managed to fight back from the Spaniards for ten years - until 1651. But France at that time was in a state of political turmoil and could not continue to support the Catalans. The uprising was crushed in 1652. This conflict gave Catalonia its national anthem, "Song of the Reapers," but at the same time it led to the loss of part of the territory that, following the results of the Pyrenees treatise, was lost to France [Torres 2008].

The Catalan historiography of the 19th and early 20th centuries presented these events as the "revolt of Catalonia" against the policy of "denationalization" of the Habsburg monarchy [Torres 2008: 20]. Subsequent studies emphasized the "social" nature of the uprising, rather than the "national" one. Thus, the "uprising of Catalonia" became a kind of double uprising: on the one hand, the struggle of the "poor against the rich", and on the other, the reaction of some rich people who saw threats to their privileges in attempts to "modernize" the Catholic monarchy of Philip IV.

The national movement of the Catalans for the return of the traditional rights of the Catalan countries intensified after the introduction of the Nueva Planta Decrees. These decrees were signed during and immediately after the War of the Spanish Succession (1701-1714) [1]. Catalonia in this conflict supported the Archduke Charles, the youngest son of the Holy Roman Emperor Leopold I, who was defeated.

On September 11, 1714, the troops of the second pretender to the Spanish throne, Philip V, took Barcelona (currently Catalonia Day is celebrated on September 11th). The Utrecht Treaty, which ended the war, meant the revival of the French Bourbon dynasty in Spain with Philip V as king. This monarch established an absolutist system of the government, which meant for the territories of the old Aragonese Crown, such as Catalonia, the end of their own institutions and constitutional order. Catalonia ceased to have its own state and finally became part of the Spanish monarchy.

[1] A major European conflict that began in 1701 after the death of the last Spanish king from the Habsburg dynasty, Charles II. Charles bequeathed all his possessions to Philip, the Duke of Anjou - the grandson of the French king Louis XIV. The war began with the attempt of the Holy Roman Emperor Leopold I to defend the right of his dynasty (also the Habsburgs) to Spanish possessions.

The Decrees of the Nueva Planta destroyed all the local political structures that differed from the model of a more centralized Castile. In fact, the system of "general sovereignty" of the central royal authority and local governments was replaced by a centralized model, following the example of France, where the Spanish Bourbon dynasty came from. In Catalonia the local Parliament was dissolved. The Catalan-speaking territories no longer had the right to carry out economic, fiscal, legal control; the minting of their own money was canceled.

In the economic field the consequences of war and military occupation have been overcome. Catalonia went through a gradual process of development of the agriculture, trade and production, which laid the foundations for the industrialization of the country in the next century.

Despite the repression by the Spanish monarchy and the lack of their own political and administrative structures, the Catalans retained their national identity and began the struggle to regain their rights. As early as 1734, the French translation of the political work entitled "An Exit for the Sleeping" (Cat. Via fora els adormits), calling on the European states to restore the independence of the Catalan countries and create either a "free Catalan republic" or recreate an independent Kingdom of Aragon.

The crisis of feudalism, the development of the capitalist relations stimulated the emergence of the movement of the Catalan Renaissance (Renaixença). Its name arose from the desire to revive the Catalan language as a literary and cultural language after centuries of diglossia in relation to the Spanish language. So-called Catalanism is emerging, aimed at establishing the Catalan identity. Catalanism is gaining ground initially in the cultural, and then in the political sphere - a number of works appear proving the existence of the Catalan "uniqueness", a special Catalan "national spirit". The ideologists of Catalanism criticized the center for ineffective administration policies, neglect of the needs of the periphery.

The Renaissance began in August 1833, when the publication the "Odes to the Homeland of Bonaventure Carles Aribau" appeared in the newspaper "El Vapor". It was followed by 27 Catalan poems by H. Rubio i Ors, published in the "Diario de Barcelona" in 1839, Rubio i Ors wrote: "Catalonia can still strive for independence; not for politics, because it weighs very little compared to other nations that can put on the scales, in addition to the volume of its history, an army of many thousands of people and detachments of hundreds of ships; but to the literary, to which politics does not apply" [Claret et al. 2014: 57].

Catalanism was reinforced by the rapid industrialization and modernization of the Catalan society in the second half of the 19th century. Rapid social and economic shifts widened the gap between Catalonia and most of the more backward regions of Spain, as well as the imbalance between its economic power and "zero political influence", not being represented in the Madrid corridors of power. The changes that were taking place caused a mixed reaction among the Catalans, in which pride for their land was intertwined with the desire to rebuild Spain in the Catalan manner, to gain greater independence, and even to isolate itself from the "Spanish backwardness". Catalanism became the foundation for the formation of the Catalan nationalism, the birth of which coincided in time with the sharp weakening of the Spanish colonial empire and statehood as a whole. Catalan nationalism largely arose as a search for an alternative to the crisis of the Spanish state [Khenkin 2015: 121].

The development of Catalan nationalism is activated in the early years of the restoration of the bourbons in Spain after the failure of the federal experience of the First Republic. According to John E. Elliot, the term "Catalanism", "still reduced to a

cultural movement began to acquire serious political significance during the so-called revolutionary sixth anniversary, from 1868 to 1874" [Elliott 2018: 252].

In 1885 the appeal of the intelligentsia and the bourgeoisie of Catalonia to the King of Spain Alfonso XII with the requirements to restore certain rights of the Catalans appeared - a Petition to protect the moral and material interests of Catalonia. The Petition was submitted by Joaquim Rubio i Ors in March 1885 to the king on the occasion of his visit to Barcelona. The "Petition for Protection" is considered the first modern manifestation of the Catalan national movement in the legal field of Spain. The following requirements were set out in the document: recognition of Catalan as an official Spanish language; preservation and reform of the Catalan civil law; the establishment of the Catalan Supreme Court; the establishment of a Catalan administration; promotion of the economic protectionism; enhancing the commercial character of Catalonia. The principles of the "Petition for Protection" were the basis for the "Manrez Principles" (Bases de Manresa), published in 1892, which proposed the restoration of the medieval Catalan constitution, which was valid until 1714. The "Manrez Principles" was "the first Catalan program to reorganize the Spanish state" [Smith 2014].

In 1901 the ideologist of Spanish conservatism, E. Prat da la Riba, created the Regionalist League, the political party of Catalonia, which in the same year entered the Spanish parliament [Navarra Ordoño 2013]. The League represented the interests of the big national bourgeoisie, merchants, and the Catholic Church. Around it linguistic societies, schools, courses, dance groups, tourist clubs and other public organizations were grouped, striving to develop the Catalan language, culture and traditions and thus establish a regional identity that was different from Castilian.

In 1906 E. Prato da la Riba published the work "Catalan Citizenship", which made a clear distinction between the nation (the natural community with its history) and the state (artificial political organization). Catalonia is designated as a separate nation. It is concluded that each nation should have its own state, and submission of a nation to a foreign state is a "pathological anomaly". At the same time, E. Prato da la Riba wrote: "We are not fighting the Spanish state, we want something else: to rebuild it on the principles of equality and justice, creating a more adequate and perfect organization in which Catalonia can follow the path of freedom and progress".

The nationalists considered Catalonia a nation with their history, language, literature, art, national character. At the same time, as a rule, they did not call for a "separation from Spain". Although Catalan nationalism was a heterogeneous trend and its adherents shared different views - from autonomy within Spain to independence - the former prevailed. In the vocabulary of the leaders of the nationalist movement the concepts of "regionalism", "autonomy", and "federation" prevailed. And the propagation of the concepts of "nation" and "state" has since become an important feature of the Catalan nationalism [Khenkin 2015: 122].

In 1914 Madrid allowed the creation of an autonomous administrative body - the so-called "Mancomunitat", for the first time uniting four Catalan provinces (Barcelona, Tarragona, Lleida, Gerona) into a single administrative unit. The decree on allowing the provinces to unite in administrative communities (which in other words meant the creation of the Catalan community) was signed by the king on December 18, 1913. For the first time since 1714 the Spanish authorities recognized the existence of the Catalan community at the official level.

The first president of the Catalan community was E. Prat de la Riba [Balcells 1977: 95]. The most important achievements of the community were the modernization of

the infrastructure of Catalonia - the laying of telephone lines, port management, optimizing the structure of the roads, railways, the introduction of new technologies in agriculture and the like.

During this period, the Institute of Catalan Studies [Navarra Ordoño 2013: 116], the library of Catalonia, an industrial school, a higher art school, and a school of the local administration were also created.

The Catalan community did not have much political authority, but following its example, the Autonomous Region of Catalonia and other autonomous regions of Spain, as well as the Generality of Catalonia were subsequently formed.

In 1919, a professional military officer involved in politics, Francesc Macia, created the Democratic Nationalist Federation, which proposed turning Spain into a confederation of Iberian peoples, and in 1922 created the Catalan state party. This party first proposed the complete state independence of Catalonia from Spain.

The process of cultural and political stabilization in Catalonia was interrupted during the dictatorship of the General Primo de Rivera (1923-1930). The Catalan community was canceled, the party of the Catalan state moved to an illegal position. The anti-Catalan measures taken by the dictator Primo de Rivera led to further disappointment among the Catalan conservatives, who initially trusted him because of the early support for regionalism [Sueiro Seoane 1992]. F. Macia was forced to emigrate to France. There he planned a military invasion of Spain and the forceful capture of Catalonia from the town of Pra-de-mol-la-Prest in Northern Catalonia. He was captured by the French gendarmerie, but this only added to his popularity in Catalonia.

One form of resistance was to bring information about events in Catalonia to the international organizations. To this end, the Catalan action (Catalan political party created in 1922) wrote a manifesto that was presented at the headquarters of the League of Nations in Geneva. It condemned the repression against Catalonia and called for a referendum in favour of the Catalan autonomy under the supervision of the League of Nations [González Calleja 2005]. The anti-Catalan politics of Primo de Rivera also came across the Catholic Church of Catalonia, which was led by the Archbishop of Tarragona, F. Vidal and Barraquer and the Bishop of Barcelona, J. Miralles. They refused to order the parish priests to preach in Spanish.

After the fall of the dictatorship of the General Primo de Rivera, F. Macia returned to Catalonia in February 1931 and joined his party, the Catalan state, in the Left Republican Party of Catalonia, leading it. On April 14, 1931, after the municipal elections in Spain, which gave the majority of his party, F. Macia proclaimed the Catalan Republic as part of the Federation of Iberian Republics [Roglan 2006].

After the proclamation of the second Spanish Republic, the Spanish Parliament on September 9, 1932, Catalonia is recognized as autonomy and receives its own Charter. The self-governing body of Catalonia officially receives the name Generality, known from the Middle Ages.

F. Macia became the President of the Generality, and after his death, on January 1, 1934, Lewis Companys i Jover [Gonzàlez i Vilalta 2011]. However, due to the acute internal political struggle and stubborn resistance of the right-wing forces – the supporters of the “united and indivisible Spain”, the region really enjoyed the fruits of autonomy for only three years - from the coming to power in Spain of the Popular Front in February 1936 to the capture of Catalonia by the Francoists in February 1939.

The victory of F. Franco in the civil war significantly worsened the situation of the national and historical regions. For caudillo all the national and territorial autonomous movements were carriers of anti-state ideas and separatism. F. Franco abolished the autonomy of Catalonia, liquidated the institutions of the regional and local self-government, and banned the national and regional parties and organizations [Danilevich 1995: 121].

After the end of the civil war, most of the deputies of the Parliament of Catalonia and almost all the Catalan politicians were forced to leave for emigration. First in Paris, and after the Nazi capture of France in London, the National Council of Catalonia was created. In August 1940 the president of the pre-war General L. Companys was captured by the Gestapo, and in October of the same year he was executed by the representatives of the Franco regime near Montjuic Castle, Barcelona [Preston 2012]. After the death of L. Companys, Joseph Irla was elected the President of the Generality in exile, and in 1954 he was replaced by Jose Tarradelyas.

After the end of World War II, the Franco regime, forced to adapt to the post-war democratic world order, embarked on a path of limited liberalization, expressed, inter alia, in concessions to the Catalan nationalists. Books and magazines began to be published in the region in limited numbers, and events were held in Catalan. In the 1960s and the first half of the 1970s the self-correction of Francoism became especially apparent. Reliefs in the field of cultural and linguistic policy stimulated the formation of the civil society structures in Catalonia that opposed the official policy of decatalization [Khenkin 2015: 124].

So, in November 1971, at the suggestion of the Coordination Commission of the Political Forces of Catalonia, the Assembly of Catalonia was created - an unofficial association of the majority of anti-French Catalan organizations, which lasted until 1977. It included most of the Catalan parties that were banned during the Franco dictatorship, as well as trade unions, movements, progressive sectors of the church, etc. Among the demands of the Assembly were the demands of social and political freedoms, amnesty for opponents of the Franco regime, the restoration of the Charter of the autonomy of Catalonia as a step towards the self-determination of the Catalan people.

The Assembly brought together diametrically opposed political organizations: communists, various nationalist movements, parties that advocated the independence of Catalonia, socialists, rightists, etc. Among the actions organized by the Assembly are peaceful assemblies in Ripoll in 1972, in San Cugat del Valles and in Vic in 1973.

The political Catalanism, which survived the harsh repression of the first two decades of Franco's dictatorship, reappeared since the 1960s. As John Elliott noted, "despite the repression, and partly because of this, the Catalan sense of identity reappeared, reinforced by the experience of those years" [Elliott 2018: 300-301].

IN THE CONDITIONS OF DEMOCRACY

Despite the repressions of the times of F. Franco, including the last years of the dictatorship, the struggle for the democratic and national rights of the Catalans became more and more intense.

The death of caudillo in November 1975 marked the beginning of a transition to democracy. The Assembly of Catalonia stepped up its campaign with the slogan "Freedom, Amnesty, Autonomy", which led to two demonstrations in Barcelona in

February 1976. The successful peaceful transition from the authoritarian dictatorship to democracy in Spain has traditionally been associated with the activities of the first democratic government led by Adolfo Suarez, who was appointed new Prime Minister by the king in July 1976. The actions of his cabinet in a democratic transition most scientists recognize almost standard [Hodlevska 2009].

The new government initiated a political reform that recognized universal suffrage, the creation of a bicameral parliament, the activities of the political associations and parties, to take measures to reduce tensions in the country, and provided democratic conditions for the elections to Cortes and the development of the Constitution [Hodlevska 2009].

This transition period allowed the reconstruction of a free political movement in Catalonia. Along with this, for the first time in many years, the celebration of September 11, the National Day of Catalonia, took place.

The government of A. Suarez issued a decree on the restoration of the Generality of Catalonia, which was headed by H. Tarradelyas, who returned to Spain. He created the Executive Committee of the Generality, where all the parliamentary forces of Catalonia were represented.

Meanwhile, at the national level, a new constitution was developed and adopted, which was supported by an all-Spanish referendum on December 6, 1978.

The new Constitution introduced the term “nationality” and thus affirmed the multinational character of the Kingdom of Spain. The Constitution established a system of distribution of powers between the state and autonomous communities and specified the content of two types of autonomies: territorial (regional) and local (administrative). The territorial autonomy is understood as autonomy, the carriers of which are “nationalities and regions”. Autonomy is granted to them in the form of autonomous communities through the relevant charters of autonomies. This autonomy is qualitatively higher than the local one. It provides for the level of decisions that is most compatible with the principle of the state unity. The autonomous communities may have their own legal legislation, representative and executive authorities. By local autonomy is meant recognition of the interests of the local corporations, whose activities in accordance with the Constitution do not require the provision of political decision-making functions to them. They do not have their own legislation [Godlevskaya 2013].

The possibility of obtaining two-level autonomy was essential through the different willingness of the regions to take on a greater or lesser measure of independence and responsibility. Thus, different interests, the desire of the political and social forces within each region, the diversity of goals of the political elite and the general population were taken into account.

On October 25, 1978, a referendum was held in support of the Charter of Catalonia. 88.2% of the citizens voted “pro”, and only 7.8 voted “con”. On December 18, 1979, the “Organic Law on the Autonomous Status of Catalonia” was adopted, which regulated the issue of the powers of the local parliament, administration, finance and the economy (31). An interesting study is conducted during these events in this region. According to its results, 55% of the Catalans preferred autonomy, 20 - in favour of centralism, 10 - for the federation and only 11% for the independence of Catalonia [Powell 2001].

The Charter recognized Catalonia as a “separate nationality,” and the Generality as an institution that personifies the political self-government of Catalonia.

Compared with the 1932 charter, the 1979 charter defined more rights of the Catalan government in education, culture and the media, but less in the judiciary. The procedure for financing the autonomy was not clearly defined, which became the basis for the development of a new edition of the charter in 2006.

The main principle of the Charter was the "general sovereignty". The Spanish state retains the sovereign rights, however, it recognizes the Charter of autonomy and gives the Generality the necessary powers for the national restoration of Catalonia, which suffered during the dictatorship of Franco. The second principle was "expanding the scope and standardization of the Catalan language": print media began to be published in Catalan (education in the language and its use in the official sphere were forbidden in Franco's time), Catalan-speaking radio stations and television channels formerly funded by the Generality appeared; subsequently, almost every more or less large city has its own local television channel and several radio stations.

Soon on March 20, 1980, elections to the autonomous parliament took place. The largest number of votes and seats in the parliament was received by the party of the Catalan nationalists "Convergence and Union" – 28% of the vote (43 seats in parliament) [Prego 1999].

"Convergence and Union" represented the local business circles associated with the central authority, the cultural and educational elite, and the church, to a certain extent, separated from the central hierarchical elite. The most important for the self-determination of the parties (both local and national) in Catalonia was the choice of orientation to a population group depending on its penchant for Catalan or Spanish "nationalism". It was necessary to take into account that the population is divided into three groups. The first consisted of those citizens who considered themselves more Catalan than Spaniard. On them the local nationalist parties (for example: "Convergence and Union")relied. The second group consisted of those who related themselves equally to both Catalans and Spaniards. They were based on the Spanish Socialist Workers Party and the Communist Party of Spain. The third group brought together those who felt more Spaniard than Catalan, and who opposed the state decentralization [Hodlevska 2009].

Catalonia received an autonomous charter quickly and without much controversy, which is explained by the experience of functioning, albeit short-term, autonomy during the Second Republic, the relative development of the civil society, the reasonableness of the claims of the national movements and the disposition of the elites to dialogue with the center.

J. Pujol, a representative of "Convergence and the Union", was elected the President of the Parliament. Starting from these elections, the power gradually began to shift from the Spanish state to the Generality.

The model of "general sovereignty" was put into effect from 1982 to 2004, when Felipe Gonzalez and Jose Maria Aznar served as Prime Ministers of Spain.

The Catalan nationalist movement has always been, for the most part, peaceful. The only notable exception is the Terra Lliure group, which was active between 1978 and 1995. The Catalan national extremists faced a shortage of human and economic resources and quickly left the political scene. The Spanish Prime Minister Filipe Gonzalez granted amnesty to those members of the organization who did not participate in terrorist acts.

In 2005–2006 the political and legal struggle around the new autonomous Charter of Catalonia was at the epicenter of the social and political life in Spain. Some provisions of the draft new document violated the Constitution of Spain or were contrary to the

constitutional norms. The most heated discussion was caused by the intention of the drafters of the new Charter to define Catalonia as a "nation" [Khenkin 2015: 127].
So, in September 2005, a proposal for a new Autonomy Charter was officially submitted to the Parliament of Catalonia. And, on February 18, 2006 a big demonstration took place under the slogan "We are a separate nation and we have the right to make decisions ourselves".
On June 18, 2006 the citizens of Catalonia adopted a new Charter by voting in a referendum, which replaced the previous one, adopted in 1979. It should be noted that only 49% of voters participated in the referendum.
The Charter of the autonomous community has become the initial institutional norm of this political entity and the basis of its self-government. The Charter of Catalonia of 2006 is an attempt to change the relationship between the political institutions of Catalonia and the central government of Spain, as well as to find the best way to determine the national identity of the Catalans within the Spanish state.
The new text contained significant changes compared with the Charter of 1979, first of all, it concerned the civil rights, institutional structure, distribution of powers between the center and Catalonia, financial issues. The goal of the Catalan politicians was to overcome the limitations arising from the previous Charter, to expand the powers and scope of decision-making, to improve the financing of the government institutions in Catalonia. In addition, the amendment process was used to streamline the regulation of the institutional system of the Generality.
The discussion of the Charter provoked a mixed reaction in Spain. According to various surveys, approximately half of the population believed that they should agree with the desire of the majority of Catalans to determine their own future, and the other half perceived the Charter as undermining the unity of Spain.
The Charter contains moments that allow us to talk about Catalonia as a political nation. During the adoption of the document, a controversy raged around the ruling of the Constitutional Court of Spain, which states that "they have no interpretative legal content in the preamble of the Charter of references to Catalonia as a nation". A survey of the sociological center Metroscopia showed that for 61% of Catalans the verdict is insulting, but 55% of Spaniards did not see humiliation in this. Another survey of the same agency showed that 79% of Spaniards do not recognize Catalonia's right to be called a nation. However, 54% of Catalans consider themselves to be a nation, and 42% reject this concept [Tamarovich 2013].
In June 2010, the Constitutional Court of Spain declared the 14 articles of the Charter partially or completely unconstitutional. So, the judges were not satisfied with the article, according to which the inhabitants of the autonomy are called Catalans, not Spaniards. The article that endowed the Catalan language with a higher status than the national Spanish (Castilian) also provoked rejection. Of fundamental importance was the statement according to which there is no legal reason to consider the inhabitants of Catalonia a separate nation. "The references to the "Catalonia as a nation" and the "national reality of Catalonia" contained in the preamble of the Statute of Catalonia have no interpretative legal value", the Constitutional Court ruling said [Khenkin 2015: 129].
The events around the Charter exacerbated the difficult situation around the region. Since 2009 a series of informal referenda on independence organized by the separatist organizations have taken place in a number of cities [Tamarovich 2013].
These referenda did not have legal force, but seriously influenced the public sentiment. A manifestation of protest activity that had never been seen before was

the manifestation of September 11, 2012, on the National Day of Catalonia in Barcelona, which was attended by about one and a half million people who demanded independence from Spain under the slogan “Catalonia - a new state in Europe”.
After the regional elections held in November 2012, as a result of which the absolute majority in the parliament was made by deputies of the parties that support independence, in January 2013, the Parliament proclaimed the Declaration of Sovereignty (“Catalonia is a sovereign political and legal entity within Spain”), and in 2014, a referendum on secession was planned, at which it was necessary to answer the questions “Should Catalonia become a state?” and if the answer is yes, “Should the state of Catalonia be independent?” [Resolució 17/X del Parlament de Catalunya 2013].
The Spanish government opposed the referendum. As a result, by a decision of the Spanish Parliament of April 13, 2014 and the Constitutional Court of Spain of September 27, 2014 and the subsequent decision of the Catalan government of October 14, 2014, the referendum was frozen, and a political future poll was conducted on November 9, 2014 Catalonia, which has no legal force, in which 80.8% of the voters voted for independence, with a turnout of 2.25 million people.
On September 27, 2015, Catalonia held early parliamentary elections. The majority of the votes went to the ruling Catalan coalition “Together for “Yes“” (Junts pel Sí), which advocated the independence of Catalonia. On October 27, 2015 this coalition and the “Candidates for National Unity” agreed on a draft parliamentary resolution on independence. The document announced “the beginning of the process of creating an independent state of Catalonia in the form of a republic” [Resolució 1/XI del Parlament de Catalunya 2015].
On November 9, 2015 the Catalan parliament voted in favour of a resolution to secede from Spain (73 votes “pro”, 62 “con”). The adoption of the resolution was preceded by a decision of the plenum of the Constitutional Court of Catalonia, which allowed the parliament to do so. The decision was made unanimously by 11 judges. After summing up the election results, the leaders of the victorious parties announced that they had received a “clear mandate for independence” and announced that they were planning to implement a roadmap for the region to become independent. The document provided that within 18 months the state structures should be formed and the text of the new constitution of Catalonia should be drawn up [Resolució 1/XI del Parlament de Catalunya 2015]. On December 2, 2015 the Constitutional Court of Spain declared the resolution on the independence of Catalonia unconstitutional.
In January 2016, the Generality of Catalonia was led by Carles Puigdemon, who supported the independence of the region from Spain and was actively involved in the secession process.
On October 6, 2016 the Parliament of Catalonia approved a resolution in which the Catalan government was recommended to hold a mandatory referendum on the independence of Catalonia no later than September 2017. And already on June 9, 2017 a referendum on the independence of Catalonia was announced on October 1, 2017. The following question was put to the referendum: “Do you want Catalonia to be an independent state in the form of a republic?”
On October 1, 2017 the autonomy authorities unilaterally held a referendum in which 90% of the participants (out of 43% of the voters who took part in the vote) voted for the separation of Catalonia [El País, 6.10.2017].
As a result of attempts by the Spanish government to prevent voting in Catalonia by the use of brute force by the Spanish police against the voters at polling stations, on

October 3, 2017, the Catalan unions organized a general strike, paralyzing the social and economic life of the region.

The popular Spanish newspaper "El Pais" called the events of October 1 in Catalonia the failure of Spain. "What happened yesterday is the failure of our country, the interests and rights of all the citizens of Spain are harmed". The newspaper believes that the Catalan government and parliament are responsible for the "gigantic harm", however, the article says, nothing can justify the passivity and negligence of Prime Minister Rajoy [El Pais, 2.10.2017].

Marius Carol, editor-in-chief of the daily Barcelona newspaper "La Vanguardia", described the incident as the collapse of the politicians. "The politicians exist to solve problems, not create them", he said in his column, adding that failure to prevent a crisis is a common fiasco [La Vanguardia, 02.10.2017].

The conservative publication "La Razon" called for a tough response to the "blow" from the authorities of Catalonia. And also stood up for the defense of the national police and the civil guard that was sent to Catalonia on the eve of the referendum. The police, as La Razon writes, "acted with their inherent professionalism and proportionally reacted to the aggressiveness of the radicals" [La Razon, 02.10.2017].

"Spain is a country that cannot be humiliated by treacherous and traitorous nationalism," said another conservative newspaper, "ABC", in a column entitled "For Spain's Unity". "Today is one of those days when we can appreciate the real power of the state", the newspaper emphasized [ABC, 01.10.2017].

"El Mundo" wrote that October 1 will be remembered as an ominous day when the irresponsibility of the Catalan authorities on the one hand and the indecision of the Spanish government on the other caused chaos. The newspaper urged the authorities to act immediately: "There is no time for a policy of containment and polite invitations to a dialogue", - the publication said [El Mundo, 1.10.2017].

On October 27, 2017 the independence of Catalonia was declared in the region's parliament. In response, the Senate of Spain voted by majority vote to apply the 155th article of the Constitution, which allowed the regional authorities of Catalonia to be removed from the government, to introduce direct control from Madrid, and to announce early parliamentary elections in Catalonia. During the vote in the upper house of the Spanish parliament, 214 senators voted "pro", 47 voted "con", one abstained.

On November 3, 2017 eight members of the Catalan government were arrested by the Spanish authorities, the next day an international arrest warrant was issued for the President of the Generality of Catalonia, Carles Puigdemon.

On December 21, 2017 early elections to the Catalan parliament announced by the central authorities of Spain were held, as a result of which an absolute majority remained with the block of the supporters of independence of the region (47.5% of the vote and 70 out of 135 seats). C. Puigdemon, who fled after the referendum in Brussels, called the voting results a victory for the Catalan Republic over the Spanish authorities.

Due to the uncertainty that prevailed in Catalonia in the first weeks after the referendum, more than 2000 companies said they were moving offices to other regions of Spain. Instability and street protests forced some tourists to refuse to travel to Barcelona. The economists sounded the alarm, talking about potential losses of 2.5% of GDP growth if the crisis dragged on. However, the negative forecasts did not materialize. After the December elections in Catalonia the economy stabilized - and losses amounted to only 0.1% of GDP.

The European Commission has recognized the referendum on independence, held in Catalonia, illegal. The European Council President Donald Tusk said the decision of the Catalan parliament is changing nothing in the EU: Spain remains the only negotiating party. At the same time Tusk called on Madrid to dialogue.

On March 24, 2018 the Supreme Court of Spain began criminal proceedings against C. Puigdemon and 12 other politicians and activists who advocated for the independence of the region. The Parliament of Catalonia on May 14, 2018 elected Kim Torra the new head of the regional government and on June 2 the new government began its work, putting an end to the application of Article 155 of the Constitution of Spain.

The first trial of the case of the Catalan separatists began on December 18, 2018 in the Supreme Court of Spain in Madrid. And from February 12 to June 12, 2019 the second process lasted. Nine former Catalan officials, including the former vice president of Catalonia, Oriol Junqueras, are accused of organizing an uprising. O. Junqueras faces up to 25 years in prison. Three more face imprisonment for less stringent articles - disobedience and misuse of the public funds. More than 500 witnesses were called to testify in court, including the former Spanish Prime Minister Mariano Rajoy. The former head of Catalonia, C. Puigdemon, said that the process, in his opinion, was “not an act of justice, but revenge” of Madrid and “a shame for Europe”.

The announcement of the verdict is scheduled for October 14, 2019. It will be the most important in the democratic history of Spain. To a large extent, the resolution will determine the state’s relations with Catalonia and will serve as a firewall for future attempts to gain independence unilaterally.

The court ruling will not solve the political problem of challenging the independence of Catalonia, but it is very likely that the former members of the government will be unable to hold any public office in the coming years.

The content of the verdict will depend on whether the court defines the attempt to gain independence of Catalonia as a crime against the constitutional order (the position of the prosecutor of the Supreme Court), or as a crime against the public order. The resolution will also have to determine whether the challenge of independence raised by the former leaders of the Generality was carried out at the expense of the state funds. No less important point will be the decision regarding the role of the Catalan police in the referendum.

To explain the rise of separatism in the Catalan society and the transition of the conflict between Catalonia and the Spanish state in the active phase, three main factors can be distinguished. Firstly, the government of J. Maria Aznar (2000-2004) did not respond to the demands for greater autonomy for Catalonia, at a time when the separation was not even mentioned. Secondly, the legal contestation of the Autonomy Charter of 2006 and its subsequent rejection by the Spanish Congress and the Senate after it was authorized by the Parliament of Catalonia, as well as by the Catalan people in a referendum. Thirdly, raising awareness of the impact of the accumulation of an annual deficit of 8% of Catalonia’s GDP in connection with the financial arrangements established by the Spanish state [Guibernau 2013].

CONCLUSIONS

The Catalan initiative made important legal and political mistakes that were decisive for its failure. In the field of legality and in order to avoid the Spanish law, the

separatists wanted to impose an interpretation of the right of peoples to self-determination contrary to what is established by the international norms and practice of the states. In the field of the international politics, they based their external forecast on a combination of propaganda in the media and public diplomacy to put pressure on the governments of great powers and European institutions, underestimating the importance of the obligations and interests established with the Spanish state. Finally, they tried to justify the separatist aspirations at the international level by resorting to democratic legitimacy, which the political reality of Catalonia does not electorally support. The separatists were not ready for a long and dangerous path to success, and they had no arguments for consensus. There is not even overwhelming support in Catalonia itself. And they have already gone too far in the confrontation with Madrid to successfully bargain with it about wide autonomy.

The very desire to secession of the region is nothing more than a product propagated for its own purposes by the authorities of the region, and which is becoming more and more popular every year among the population. The real attitude of the population of the region and all the Spaniards towards this aspiration is very different, but the understanding that Catalonia depends on Spain, and Spain depends on Catalonia, and the separation carries with it more and more disadvantages than pluses, remains decisive.

The independence of Catalonia would mean that it would automatically be outside the European Union. Moreover, the subsequent entry of Catalonia into the European Union would take a long time, and perhaps it would not have happened at all for the reason that the only one has the right to block the candidate from joining the EU. After independence, Catalonia would also gain state borders, which would automatically entail the introduction of indefinite customs and tariff barriers from the neighboring and other EU member states. The independence of Catalonia would be associated with its withdrawal from the euro zone, it would be deprived of the right to participate in the development of the monetary policy of the European Union. Most likely, the Catalan elites did not have the task of gaining real independence. Perhaps they wanted only a few economic preferences, to participate in the general Spanish budget, since they rightly believe that they form a rather serious part of it. Since the illegality of their actions the authorities of Catalonia cannot but understand.

The result was the failure of the separatist process that led to an increased social tension and political instability in Spain and Catalonia, which exacerbated the solution to the political problem. Only a political agreement can guide and provide a stable solution. In the end, the formulation of a political pact is also the result of history and is legally ordered, but it requires the ability and willingness to create the conditions for establishing a new relationship between Spain and Catalonia.

REFERENCES

Méndez A., Rodríguez J., (2017), Análisis general del nacionalismo catalán. In: La razón histórica. Revista hispanoamericana de Historia de las Ideas, Vol. 36, pp. 232-242, www.revistalarazonhistorica.com

Balcells A., (1977), Cataluña contemporánea I (Siglo XIX), Siglo XXI Editores, Madrid.

Balcells A. (1996), Catalan Nationalism: Past and Present, St. Martin's Press, Inc., New York.

Balcells A., (2004), Breve historia del nacionalismo catalán, Alianza Editorial, Madrid.

Carol M., (2017), El fracaso de la política, La Vanguardia, 02.10.2017.

Claret, J., Santirso M. (2014), La construcción del catalanismo. Historia de un afán politico, Los Libros de la Catarata, Madrid.

Constitució provisional de la República Catalana Aprovada per l'Assemblea Constituent del Separatisme Català reunida a l'Havana durant els dies 30 de setembre, 1 i 2 d'octubre de 1928. Retrieved from http://webs.racocatala.cat/estelada/c1928.pdf

Cotarelo R., (1992), Valores y prinsipios de la Constitucion de 1978. In: Transicion politica y consolidacion democratica. Espana (1975 – 1986), Centro de investigaciones sociologicas, Madrid, pp. 163-201.

Danilevich I., (1995), Avtonomizacziya Ispanii. In: Polis, №5, C. 121, Moskva.

De la Granja, J., Beramendi J., Anguera P., (2001), La España de los nacionalismos y las autonomías, Síntesis, Madrid.

Decret de Nova Planta, 1716, Retrieved from https://web.archive.org/web/20080905193955/http://www.tvcatalunya.com/historiesdecatalunya/documents/doc102339810.htm

Elliott, John H., (2018), Catalanes y escoceses, Unión y discordia [Scots and Catalans], Taurus, Barcelona.

Firmeza frente al golpe (2017), La Razon, 02.10.2017.

González Calleja E., (2005), La España de Primo de Rivera. La modernización autoritaria 1923-1930, Alianza Editorial, Madrid.

Gonzàlez i Vilalta, A., (2011), The Catalan Nationalist Option: Italian Fascist Intrigues in Barcelona (1931-1943). In: Bulletin for Spanish and Portuguese Historical Studies, Vol. 36 (1), pp. 45–69, Association for Spanish and Portuguese Historical Studies, Berkeley.

Godlevskaya V., (2013 b), Formirovanie gosudarstva avtonomij v Ispanii v usloviyakh ustanovleniya i konsolidaczii demokratii. In: Vestnik Tomskogo gosudarstvennogo universiteta. Istoriya, №5 (25). S.165–173, Tomsk.

Guibernau M., (2013), Secessionism in Catalonia: After Democracy. In: Ethnopolitics, Vol. 12, No. 4, pp. 368– 393.

Hodlevska V., (2009), Perekhid vid avtorytaryzmu do demokratychnoho suspilstva v Ispanii (1960-1982 rr), UNIVERSUM, Vinnytsia.

Hodlevska V., (2013 a), Konsolidatsiia demokratychnoho suspilstva v Ispanii (1982–1996 roky), UNIVERSUM, Vinnytsia.

In the face of Catalan insurrection, the law but not just the law, (2017), El Pais, 2.10.2017.

Ispaniya. Konstitucziya i zakonodatel`ny`e akty`, (1982), Progress, Moskva.

Kalinin V., (1996), Ispanskaya konstitucziya 1978 g. In: Iz istorii evropejskogo parlamentarizma: Ispaniya i Portugaliya, S. 123-125, RAN, Institut vseobshhej istorii, Moskva.

Khenkin S., (2015), Katalonskij konflikt vchera i segodnya. In: Evropa: vy`zovy` separatizma. Aktual`ny`e problemy` Evropy`, C. 117-138, INION RAN, Moskva.

Los resultados definitivos del referéndum no cuadran con los provisionales, (2017), El País, 6.10.2017.

Navarra Ordoño A., (2013), La región sospechosa. La dialéctica hispanocatalana entre 1875 y 1939, Universidad Autónoma de Barcelona.

Ni un minuto que perder frente al independentismo, (2017), El Mundo, 1.10.2017.

Resolució 17/X del Parlament de Catalunya, sobre la iniciació d'un diàleg amb el Govern de l'Estat per a fer possible la celebració d'una consulta sobre el futur de Catalunya, 13 de marzo de 2013, Parlamento de Cataluña, Retrieved from https://www.parlament.cat/actualitat/Resolucio_17_X.pdf

Resolució 1/XI del Parlament de Catalunya, sobre l'inici del procés polític a Catalunya com a conseqüència dels resultats electorals del 27 de setembre de 2015. In: Butlletí Oficial Del Parlament De Catalunya. Retrieved from https://www.parlament.cat/document/bopc/153123.pdf

Por la unidad de España, (2017), ABC, 01.10.2017.

Powell Ch., (2001), Espana en democracia. 1975 – 2000, Plaza Janez, Barcelona.

Prego V., (1999), Diccionario de la Transicion, Plaza Janez, Barcelona.

Preston Paul, (2012), The Spanish Holocaust, Harper Press, London.

Statue of Autonomy of Catalonia 2006, Article 164.5 on Public Security – http://web.gencat.cat/en/generalitat/estatut/estatut2006/titol_4/

Roglan J., (2006), 14 d'abril: la Catalunya republicana (1931-1939). Cossetània Edicions, Valls.

Sueiro Seoane, S., (1992), El complot catalanista de Prats de Molló: una intriga internacional oculta tras un suceso interno. In: Espacio, tiempo y forma. Serie V, Historia contemporánea, pp. 385–396, Universidad Nacional de Educación a Distancia, Madrid.

Smith A., (2014), The Origins of Catalan Nationalism (1770-1898), Palgrave Macmillan, Basingstoke.

Tamarovich A., (2013), Dvizhenie za nezavisimost` Katalonii: prichiny` i predposy`lki separatizma. Izvestiya Irkutskogo gosudarstvennogo universiteta Seriya Politologiya. Religiovedenie, № 2 (11), ch. 2. S. 148-156, Irkutsk.

Torres X., (2008), Naciones sin nacionalismo. Cataluña en la Monarquía Hispánica (siglos XVI-XVII), Publicacions de la Universitat de València, Valencia.

Woolard K., (1989), Double Talk: Bilingualism and the Politics of Ethnicity in Catalonia, Stanford University Press, Stanford.

Ustav avtonomii Katalonii 2006, Zheneralitat Katalonii. Retrieved from https://www.parlament.cat/document/cataleg/150268.pdf

Via fora als adormits y resposta del Sr. Broak, secretari que fou del sieur Mitford Crow al Sr. Vallés son corresponent de Barcelona, sobre las materias políticas presents. Retrieved from http: http://mdc.csuc.cat/cdm/ref/collection/llibimps16/id/31045

Volkova G., (2016), Katalonskij naczionalizm i problemy` territorial`noj czelostnosti Ispanii.

Sravnitel`ny`j analiz lokal`nogo opy`ta In: Sravnitel`naya politika/ 2 (23) / 2016. – C. 85-95.

Zaripova A., (2018), Konflikt mezhdu czentrom i Kataloniej v Ispanii: analiz politicheskogo diskursa. In: Izvestiya Saratovskogo universitet. Seriya Socziologiya. Politologiya, T. 18, vy`p. 2, S. 232-237.

DEVELOPMENT OF VOLUNTEER RESOURCE CENTERS IN THE PERCEPTION OF STAKEHOLDERS: EXPERIENCE OF THE RUSSIAN FEDERATION IN THE INTENSIVE FORMATION OF VOLUNTEERING INFRASTRUCTURE

Maria Pevnaya

Ural Federal University,
Institute of Public Administration and Entrepreneurship,
Chair of Sociology and Technologies of State and Municipal Management,
620002, Mira Street 19, Yekaterinburg, Russia
m.v.pevnaya@urfu.ru

&

Jerzy Kaźmierczyk

Poznan University of Economics and Business,
Department of Education and Personnel Development,
61-875, al. Niepodleglosci 10, Poznan, Poland,
Tyumen State University,
Institute of Finance and Economics,
625003, Volodarskogo street 6, Tyumen, Russia
jerzy.kazmierczyk@ue.poznan.pl

&

Anna Kuzminchuk

Ural Federal University,
Institute of Public Administration and Entrepreneurship,
Chair of Sociology and Technologies of State and Municipal Management,
620002, Mira Street 19, Yekaterinburg, Russia
a.a.kuzminchuk@urfu.ru

&

Anna Tarasova

Ural Federal University,
Institute of Public Administration and Entrepreneurship,
Chair of Sociology and Technologies of State and Municipal Management,
620002, Mira Street 19, Yekaterinburg, Russia
a.n.tarasova@urfu.ru

Abstract

The article aimed at assessing the activities of the established regional volunteer resource centers from the perspective of the principal stakeholders of this process. Analysis of documents and a questionnaire survey of Russian volunteers and expert were used. As a result, the authors have defined the problems that resource centers face, as well as the prospective directions of activities in accordance with the needs of the nonprofit sector and the population. The public strategy for the development of volunteering infrastructure "from the top-down leads to similar problems manifested in the development of hybrid network nonprofit organizations, aimed at professional organization of volunteers in different areas.

Keywords: *volunteering, volunteer resource centers, volunteer-involving organizations, volunteering infrastructure, Russia*

INTRODUCTION

Almost all countries of the world face the changes in the social policy agenda due to the volatile economy and social transformations. The concept of general welfare in the Western Europe is under serious challenge, which it sometimes cannot withstand. As governments across Europe counter economic crises by restricting welfare services and resources, the emphasis on non-state provision and community-based solutions to growing socio-economic problems increases [Milbourne & Cushman, 2015; Baszyński & Kańduła 2010; Kalinowska-Sufinowicz 2013; Yakubovskiy et al. 2017]. In the developing countries, as well as in the former socialist countries, significant changes take place in terms of the redistribution of the interaction between the public and the nonprofit sectors and the relations between public officers and citizens [Iarskaia-Smirnova & Romanov 2013].Collaboration between governments, business and the voluntary and community sectors is now central to the way public policy is made, managed and delivered [Sullivan & Skelcher 2017]. In the countries of the Western Europe researchers register the development of public initiatives aimed at involving wider social groups, including elderly people, immigrants and people with disabilities, in volunteering activities [Jaźwiński 2017; Jones & Heley 2014; Lub & Uyterlinde 2012; Paszkowicz & Garbat 2015]. Such volunteering programs are aimed at overcoming exclusion, improving the quality of life and welfare of different groups of citizens. However, such projects need professional organizations to be made more manageable. In the former communist countries the projects aimed at involving the youth in volunteering are being developed [Pantea 2015; Schmidt 2016; Szeman 2014].

In the context of the ongoing social and economic processes, the number of volunteers is growing all over the world [State of the World's Volunteerism Report 2018]. However, volunteering rates (shares of adult population that volunteer) are considerably higher in high-income countries. For example, the geography of the volunteer economy mirrors closely, but by no means exactly, the geographic distribution of global GDP. By comparison, in Western Europe, volunteering represents the equivalent of 17.6% of government consumption expenditures, and in the Far East, it is around 8% [Salamon et al. 2011: 217-252].

Charities Aid Foundation (CAF) reports, based on the data of annual Gallup poll, fix the differences between the popularity of volunteering in the majority of Western

European countries and the former communist countries. Thus, according to the report of 2018 among 145 countries Belarus occupies the 74th position, Georgia – the 83rd, Poland – the 99th, Ukraine – the 103rd, Hungary – the 115th, Armenia – the 130th, Romania – the 139th [World charity rating 2018]. The results of the Europe-wide research held in 2010 fixed the lowest level of participation in voluntary activities in Bulgaria (10% of the population), followed by Romania and Poland, each with 18% of the population and the Baltic countries with percentages ranging between 24-27% of the population. In Western European countries, as a result of the demographic phenomenon of the aging population, there are older volunteers, while in Eastern Europe, most of the volunteers are young people aged between 15-25 years old [Dobrescu 2012: 189-190].

Researchers prove that the differences between the popularity of volunteering are related to the democratic processes, the development of the third sector and the activities of democratic institutions [Lowndes & Wilson 2001]. The promotion of volunteering activities requires institutional conditions, providing citizens with the opportunities of participation in different associations and organizations [Dekker & Halman 2003]. A well-developed infrastructure, creating conditions for community participation and education for the labor market perspective, is of utmost importance in this regard [Bos 2014].

In 2018, United Nations (UN) Volunteers Program presented their regular report on the state of the world's volunteerism. Every three years UN Volunteers Program publishes the results of the global research aimed at gaining a better understanding of the essence of volunteering. This report shows that volunteering as a universal social behavior is one of the most important resources for sustainable development of local communities in very different countries, and it provides conditions for involving individuals in the system of support on the part of citizens, business, and municipal administration institutions [The website of the UNV programme]. Such collaboration helps to confront risks, economic, social and ecological shocks, and requires an all-round support of public officers on different levels.

UN Volunteers Program formulated the priorities for the development of "volunteering ecosystem", taking into account the interests of the local communities, the possibilities, decisions and actions of the government and local public officers in different states. Special attention is paid to the importance of economic contribution of the state to the development of volunteerism with due account to the expenditures and benefits for different social groups, organizations and establishments in order to confront the increasing social inequality. The key stakeholders in this concept are the citizens, as potential and actual volunteers, and the organizations of the third sector, which protect their interests and interact with public officers. The aims of investing in volunteerism and supporting it by the government should be in line with the strategies, priorities and plans of development of specific territories. It is highlighted in the document that the implementation of these ideas requires the development of volunteering infrastructure [State of the World's Volunteerism Report 2018]. Theorists and practitioners managed to elaborate this notion. For UNV, volunteering infrastructure is defined as: an enabling environment, operational structures and implementation capacities to promote volunteerism, mobilize volunteers and support them in their work. The enabling environment includes the body of policies and laws that protect volunteers and provide incentives for volunteer action. Operational structures include schemes through which volunteers are mobilized, deployed and supported. Implementation capacities include functional and technical resources of

volunteer organizations to adapt to changing circumstances, function at high standards of efficiency and achieve results [Grandi et al. 2018]. Three key elements converge to make this definition operational: enabling environment, operational structures and implementation capacities.

Significant results have been achieved in different countries in terms of the first key element. 117 countries have existing or draft policies or legislation specific or generally relevant to volunteering to May 2018. Determined efforts for legalization and development of the volunteering policy have been made almost in all Eastern European countries [Krakowiak & Pawłowski 2018]. Dynamic actions are taken for the promotion of the second key element, namely the development of the volunteer-involving organizations and agencies that support volunteering. It also includes networks and coordinating bodies such as volunteer centers, umbrella organizations, and related networks.

For instance, since 1998 the program aimed at the organization of the international exchange of student volunteers has been carried out in the EU with the support of UN; it contributed to the formation of the network of resource centers on the basis of universities in the Eastern Europe. During the International Volunteers Year (2001) large-scale national projects were implemented by the centers, aimed mainly at the development of volunteering in the cities and countries. In Russia, the public policy aimed at supporting volunteerism was officially announced by the President of the Russian Federation on the threshold of the Olympic Games in Sochi (2014). The regulatory framework was developed swiftly; the processes of establishing resource centers all over the country were launched.

Thus, these processes led to the reformation of the public sector in Russia and the redistribution of the state responsibility for solving social problems. The effectiveness of the implemented managerial solutions largely depends on the position of the principal stakeholders in the Russian regions, who should get the real benefit from the volunteering infrastructure developed at the initiative of public officers on the level of municipal administration.

The aim of this article is to give a critical assessment to the development of volunteering infrastructure in the Russian regions at the initiative of public officers through the analysis of opinions of Russian volunteers, leaders of the nonprofit sector and the heads of the newly established resource volunteer centers.

To accomplish the research aim, the authors used source literature in English, Polish and Russian devoted to volunteering (Emerald and EBSCO). A survey conducted in Russia was also carried out.

Following the introduction, this paper includes a brief analysis of the volunteering development and organizations supporting it. Then the research sample and the method adopted are described. Finally, the research results and conclusion are presented.

1. STUDY OF THE INFRASTRUCTURE FOR THE DEVELOPMENT OF VOLUNTEERING AND THE FUNCTIONING OF VOLUNTEER-INVOLVING ORGANIZATIONS AND AGENCIES THAT SUPPORT VOLUNTEERING

Volunteer management is typically considered by researchers at two levels – institutional and organizational [Smith et al. 2016]. The literature presents studies where the problems of inter-sectorial interaction and the functioning of specific organizations of the nonprofit sector that attract volunteers are studied. However, in

the framework of this article, scientific works on the problems of institutional regulation of volunteering are of particular interest. The institutional regulation of volunteering, from our point of view, can be indirect and direct. By indirect institutional regulation we mean the creation of favorable socio-economic and political conditions for the development of volunteerism and the activation of its potential. Researchers note that the prevalence of formal volunteering in this or that country is positively influenced by higher GDP per capita [Schofer & Longhofer 2011; Stadelmann-Steffen 2011], developed democratic institutions [Smith & Shen 2002; Zhou 2012], high government spending on social security per capita [Hackl et al. 2012; van Ingen & van der Meer 2011]. Institutional factors contributing to the spread and development of volunteer organizations are widely studied, including gross domestic product (GDP) per capita, average level of formal education, extent of civil liberties, government expenditures per capita, prevalence of association-support infrastructure organizations, and experience with democracy [Schofer & Longhofer 2011].

A favorable institutional environment for volunteer activities requires specific measures on the part of state and municipal authorities to activate the volunteer movement, which may include: the development of laws and regulations aimed at protecting the interests of volunteers and regulating relations between volunteers and non-profit organizations [Nale et al. 2016]. Researchers include such government decisions as developed state programs for the development and support of volunteers, the promotion of volunteering, etc. The implementation of such programs requires an organizational infrastructure, which should, and is able to implement these programs. According to Koen P.R. Bartels, Guido Cozzi and Noemi Mantovan, governments and voluntary organizations should cultivate local abilities and volunteering infrastructure based on collaborative relationships [Bartels et al. 2013]. Researchers suggest the following concept of the volunteering infrastructure for organizations that provide infrastructure to promote, stimulate, and develop volunteering in general:

- volunteer support: contacting or matching individuals who want to volunteer with organizations that need volunteer effort.
- management support: consulting and supporting volunteer involving organizations, how to make their activities more attractive and inviting for prospective volunteers.
- community support: bringing about the conditions and supporting initiatives that enhance (new forms of) volunteer effort or citizen involvement within the community in a general sense [Bos 2014].

National governments can usually promote greater voluntary association prevalence by funding a variety of decentralized infrastructure-support organizations to help associations get founded and grow strong (e.g., research centers at universities, training centers, certificate and degree programs at universities, and free or low-cost consulting centers) [Smith et al. 2016]. National governments can develop and promote the differences in governmental implementation strategies of volunteer centers [Lorentzen & Henriksen 2014].

By infrastructure organization (support organization) the researchers of the nonprofit sector mean an organization «that has the primary purpose of assisting, supporting, or facilitating other nonprofit groups, volunteer programs, volunteering, civic participation, and related nonprofit sector activities by individuals or groups» [Smith et al. 2016: 1398]. There are Volunteer Centers throughout Canada and Great Britain

which also benefit from a network of "Volunteer Bureaux" coordinated by The Volunteer Centre in Great Britain. Similar clearinghouses can be found in other European countries, though not as diversified in their services as in England, Canada, or the United States. Network organizations of volunteer centers in the USA have the longest history. Still, despite more than 50 years of history, the concept of Volunteer Centers (or other types of nonprofit infrastructure organizations) has yet to receive support in many communities [Ellis 1989; Prentice & Brudney 2018].

Developing the ecosystem for sustainable volunteering in the countries with a weak third sector, requires government resources and government efforts, as well as a planned consistent policy aimed at promoting volunteering, infrastructure development and system support for the third sector [State of the World's Volunteerism Report 2018, Schmidt 2016]. Researchers note that in Russia the third sector faces significant limitations [Mersianova & Benevolenski 2017]. The NPOs lack professionals, volunteer management is not well-developed; besides, before the active state campaign aimed at promoting volunteering on the eve of the presidential elections, the prevalence of volunteering among the population was limited.

Some works are devoted to the study of the activities of specific infrastructure organizations designed to unite the interests of all stakeholders to protect the third sector, study it and improve its functioning [Young 2010]. The activity of large national umbrella organizations created to support and develop volunteerism in different countries is analyzed [Lorentzen & Henriksen 2014]. For example, in Japan, the government finances volunteer centers throughout the country that are responsible for the promotion, registration and management of volunteer activities [Avenell 2010].

A significant number of studies are devoted to the analysis of volunteer management issues at the level of specific organizations; the authors formulate basic steps for successful volunteer management [Hager 2004; Hager & Brudney 2004]. However, despite the fact that volunteer resource centers are considered as one of the most effective areas of Volunteer Resources Management, there are not so many works that analyze the tasks of volunteer resource centers in the sustainable development of local communities. Their relevance on the part of potential and actual volunteers, the ability to integrate the efforts of officials and employees of NPOs, and the potential for the development of interaction between the state and the third sector are not evaluated.

2. DATA AND METHODS

The studies have covered the specific range of innovative changes under the conditions, created for the activities of Russian volunteers, the achievements and challenges in the implementation of the state policy in this direction. The documents and the data of the governmental information resources were also used. The results of the analysis of documents have been supported by two questionnaire studies of Russian volunteers and experts (held in September-December of 2018).

The first study is the survey carried out in December 2018 among Russian citizens having the experience of volunteering. It characterizes the organized volunteer movement in different subjects of the Russian Federation, the assessments of the key aspects of organization of volunteer activities in different subjects of the Russian Federation from the viewpoint of the members of the volunteer community. The sampling included Russian citizens from 14 to 60 years old who had the experience

of volunteer activities, organized by nonprofit organizations, involved in the projects carried out by universities and secondary specialized colleges in the region, centers and institutions functioning within the frames of municipal administrations, leisure and social organizations of all subjects of the Russian Federation (N = 830, quota sampling). The sampling was based upon three characteristics: gender, age and the share of volunteers in the structure of the population of each federal district [Mersiyanova 2018]. 44% of the participants were male, and 56% female. The sampling included 14% of respondents with secondary general education, 23% of respondents with college diplomas, 22% of respondents with incomplete higher education, and 41% of respondents with higher education. In terms of the territory of residence, 16% of respondents came from the cities with the population of more than 1 million people, 57% of respondents from the cities with the population from 250 thousand to 1 million people, 16% from the Russian cities with the population from 250 to 50 thousand people, and 11% from the towns with the population of less than 50 thousand people.

The second study was a semi-formalized survey of experts organizing volunteer projects in various subjects of the Russian Federation in social, educational institutions and regional NPOs, as well as the heads of regional volunteer resource centers (N = 121, type of sample – target). The study allowed to evaluate the development of resource regional volunteer centers. Among experts, 72% were women, 28% men; 82% had higher education, 12% incomplete higher education, 3% had a diploma of secondary special education, 3% general secondary. 11% of experts had experience in the organization, which they were representing, of over 15 years, 8% from 10 to 15 years, 15% from 5 to 10 years, 66% less than 5 years. 48% of experts represented the organizations, where volunteer activities were among their duties, 33% worked in educational institutions as teaching staff members, 14% were the specialists in other institutions, 5% occupied other positions. 41 experts were the heads of the regional resource volunteer centers.

Since relatively few time has passed since the establishment of the resource centers as infrastructural organizations, empirical studies measured the following variables: “awareness of stakeholders about the established resource centers”, “assessment of the effectiveness of the resource centers at the first stage”, “expectations of stakeholders from the functioning of the established regional resource volunteer centers. "

3. RESULTS OF THE STUDY

3.1. Infrastructure of the volunteering development in Russia

Prior to the Universiade in Kazan in 2013, there was practically no infrastructure for the development of volunteering in Russia. Resource centers and the training of volunteer organizers only got their start due to the 2014 Sochi Olympics [Gorlova 2016]. Over the past five years, the volunteer movement has been rapidly developing in Russia. Volunteer initiatives of citizens are increasingly becoming the subject of public attention. 2018 was declared the Year of the Volunteer by the President of Russia. In recent years, there has been a sharp increase in the institutionalization of volunteering management in Russia. The state-sponsored organizational infrastructure of volunteering is quite positively assessed by both officials and all interested parties.

In accordance with the methodology of the UN Volunteers Program within the first direction of the development of volunteering infrastructure in Russia, the first steps have been already taken for the creation of the body of policies and laws that provide incentives for volunteer action. In 2016, the federal expert council for the development of volunteering started to operate; later it was transformed into the Coordinating Council under the Public Chamber of the Russian Federation. Under the authority of the President of the Russian Federation, an action plan for the development of the volunteer movement [Action Plan 2019] was developed. In November 2018, amendments were made to federal law No. 135-ФЗ "On charitable activities and charitable organizations", which determined the status of volunteer organizations, organizers of volunteer activities and volunteers, enshrined the requirements that such organizations and individuals must comply with. The Agency for Strategic Initiatives presented the strategic initiative "Development of Volunteering in the Regions", the result of which was the development of a standard of state support for volunteering in the constituent entities of the Russian Federation [Standard of Volunteer Support 2017].

As for the second direction of the development of the infrastructure for volunteering (development of volunteer-involving organizations and agencies that support volunteering), active measures are taken to develop the network of resource volunteer centers. Since 2014, in the implementation of state policy in the field of volunteering support, a targeted strengthening of the infrastructure has been formed, contributing to an increase in the number of volunteer organizations, social projects and civic initiatives. To date, the infrastructure of the volunteer movement is represented by numerous volunteer centers that operate on the basis of educational organizations, specialized state and municipal budget organizations, as well as non-profit organizations in various organizational and legal forms, for which volunteering is a leading or one of the leading activities. In Russia today, there are more than 20,000 organizations like this [Rostovskaia & Kozak 2019].

In accordance with the Minutes of the meeting of the Organizing Committee of the Year of the Volunteer in the Russian Federation of February 21, 2018 No. 1, an order was formulated to envisage the development and approval of regional programs (subprograms, plans) for support and development of volunteering, which include activities to form the infrastructure for supporting volunteering in the subjects of the Russian Federation (resource centers for the support of volunteering). The largest volunteer organization in Russia, the "Volunteer Centers Association" [Volunteer Centers Association 03/18/2019] implements the federal program "Resource Volunteer Centers"]. Under the resource volunteer center (RVC), the program refers to a professional organization that provides a range of organizational, consulting, and methodological services to organizations and citizens in the field of volunteering in accordance with the objectives of the socio-economic development of the subject and in order to increase socially useful employment and the population and the effective use of volunteer resources [Federal program Volunteer 10/07/2019].

The goal of the program is to develop the infrastructure for supporting volunteering in the regions of Russia, increasing the level of competence of managers and members of teams of resource centers, supporting each volunteer resource center on an individual development path, taking into account the specifics and socio-economic priorities of a particular region [Federal program Volunteer 10/07/2019]. Within the framework of the program under consideration, methodological support and certification of resource centers, training of teams, implementation of federal

programs and effective social practices at the regional level are provided. A network of volunteer resource centers that are part of the Volunteer Centers Association is formed in all subjects of the Russian Federation.

The roadmap of the program "Resource Volunteer Centers" for 2018-2019 provides for the establishment of the resource volunteer centers on the basis of an already existing or newly established nonprofit organization, or a partnership of a nonprofit organization and an educational institution. Within the frames of the Program it is planned to unite resource volunteer centers in a single network within the sphere of the Volunteer Centers Association, which will help to build effective horizontal ties, carry out the exchange of experience, and consolidate the efforts of the volunteers' community aimed at improving the volunteer movement infrastructure.

At the end of 2018, within the framework of the federal program, 30 resource volunteering centers were already operating in Russia, of which 13 were created in the organizational and legal form of state (budget) institutions, 11 in the form of non-profit organizations, 2 centers were created on the basis of educational organizations, 4 centers unite several legal forms. In 50 other subjects of the Russian Federation, centers are in the process of active formation.

3.2. Activities of regional volunteer centers in the assessment of volunteers

When measuring the awareness of stakeholders about the established resource centers, we asked the respondents the question: "Has a resource center for volunteering support been created in your region?" 53% of the volunteers surveyed answered in the affirmative, 19% negatively, and 28% found it difficult to answer. 69% of volunteers surveyed in the Central Federal District are aware of the existence of a volunteer resource center in their region. 62% of respondents in the Ural Federal District, 59% in the Far East, 58% in the North Caucasus and 54% in the Northwest Federal District know about the availability of a resource center. In other districts (3 of 8), less than half of the volunteers are aware of the existence of a volunteer resource center, while in the Southern Federal District 36% said that there is no volunteer resource center in their region.

To assess the effectiveness of the volunteer resource centers at the first stage, respondents who knew about their creation and functioning were asked: "If a resource center operates in your region, please rate it on a 5-point scale for the effectiveness of its activities for the development of volunteering." The following distribution of grades was obtained – more than half of the respondents (54%) rate the work of the center at "5", and 33% at "4". The assessment of the activity of the resource center does not depend on the federal district where the respondents live, how often they engage in volunteer work, which organizations they help, and whether they consider themselves to be volunteers or not. The socio-demographic characteristics of the respondents also do not affect the assessment of volunteer resource centers – most respondents are unanimous in their appreciation of their work. According to respondents familiar with the activities of volunteer resource centers, these organizations are best able to identify the problems and needs of volunteers (61%), organize interaction between volunteer organizations and officials (57%), and popularize volunteerism in the regions (52%).

3.3. Assessment of the development of regional resource volunteer centers by the organizers of volunteer activities in different subjects of the Russian Federation

When measuring the awareness of stakeholders about the established resource centers, we asked the experts – organizers of volunteer projects in social, educational institutions and local NPOs the question: “Has a volunteer resource center been established in your region?”. 58% of the experts noted that a volunteer resource center was established in their region; 41% of respondents cooperate with the center, and 16% do not interact with it in any way. Experts, in whose region of residence the resource center of volunteering was established, evaluated both the effectiveness of its activities in general and in terms of some specific areas.

To assess the effectiveness of the volunteer resource centers at the first stage, experts who knew about their creation and functioning were asked to evaluate the effectiveness of their activities for the development of volunteering on a 5-point scale. In general, the efficiency level of volunteer resource centers was 3.9 out of 5 points (average score, N = 46). 30% of respondents rated the work of volunteer resource centers at 3 points out of 5. Expert estimates do not depend on the type of organization, the size of the settlement, the federal district, and other parameters due to the small sampling.

Probably the reason for such assessments is the contradiction between the way resource volunteer centers (in the person of their leaders) evaluate their work and the way their activities are characterized by representatives of volunteer organizations who should interact with these volunteer resource centers. We asked the experts – organizers of volunteer projects and heads of volunteer resource centers – to evaluate the effectiveness of the tasks that resource centers perform in the region.

Most of the experts believe that volunteer resource centers, generally, effectively organize the interaction between volunteers, volunteer organizations and officials. This view is shared by 57% of the organizers of volunteer projects and 73% of the leaders of the volunteer resource centers. The task which comes second is the popularization of the volunteer movement in the region. 57% of the organizers of volunteer projects and 83% of the heads of volunteer resource centers suppose that this task is solved efficiently. In assessing these two points, both the organizers of volunteer projects in institutions and local NPOs, and the leaders of volunteer resource centers were relatively unanimous.

At the same time, significant differences in evaluating the performance of volunteer resource centers by their leaders and the organizers of volunteer projects persist in many areas. The biggest gap is related to the aspects of evaluating the information support for the activities of volunteer organizations in the region and identifying the problems and needs of volunteers. Volunteer resource centers in the person of leaders give high marks to their work, but probably do not fully meet the expectations of colleagues: volunteer project organizers and representatives of volunteer organizations expect more activity from volunteer resource centers in the direction of interaction with local non-profit organizations.

To assess the expectations of stakeholders from the functioning of the established regional volunteer resource centers, the experts were asked an open question: "How exactly can a regional volunteer resource center help your organization?"

Despite the gap in evaluating the effectiveness of volunteer resource centers, the organizers of volunteer projects and local NPOs need their support. 29% of

respondents believe that the creation of a resource center in the region would contribute to the development of volunteerism. A volunteer resource center can help organizations to inform and coach their staff. Its task is to carry out coordination activities, ensure interaction with all volunteer organizations in the region, local NPOs, with officials, volunteers, etc., to act as a mediator in the negotiations. Respondents note the importance of the educational and methodological function of volunteer resource centers, their assistance in attracting volunteers, and the popularization of volunteer activities in mass media (Table 1).

Table 1. How can a resource center help to volunteer organizations (N=74), results of processing the answers to the open question*

Variants of support a resource center can offer to volunteer organizations	Frequency	%
Information support and consultancy	16	22
Coordination activities, ensuring interaction with all local nonprofit organizations of the regions, public offices, volunteers etc.	15	20
All-round support and contributing to the development of organizations (general comments)	13	18
Methodological support and training of volunteers	12	16
Volunteers database, help in engaging volunteers	6	8
Promotion of volunteering initiatives, providing assistance in getting media and social media coverage and information distribution	6	8
Financial aid, finding facilities	5	7
Protection of the interests of the organization	1	1
Nothing specific	3	4
Not sure	4	5
Total	81	109

* total amount of % is more than 100%, as some of the respondents gave more than one answer.
Source: own study, 2018.

Organizers of volunteer projects in social and educational institutions and local nonprofit organizations need support in fundraising (consultancy in preparing grant applications and projects, cost estimating and reporting), they consider resource volunteer center as a source of well-qualified consultancy and a platform for exchanging experience ("such centers could organize duly the work with all famous volunteer centers", "they could work on solving the problems arising in the volunteer activity in the region. Also, by exchanging experience with other resource centers you can increase your level").
Organizers of volunteer projects also consider resource volunteer centers as the source of:

- Financial support (fundraising and grants);

- Providing facilities for organizations (co-workings, event venues);
- Information support and promotion of events in mass media;
- Developing a database of volunteers and providing support in finding volunteers for projects;
- Protection of interests of the organization and NPOs.

At the same time, the resource centers themselves face the same problems: lack of funds, lack of qualified personnel, low level of activity of population and the necessity to recruit more volunteers, lack of methodological regulations, necessity to train staff, lack of facilities.

Resource volunteer centers feel the need in the organization of effective interaction with local NPOs and regional authorities – they do not have enough support to start a constructive dialogue. Some heads of the newly established resource centers pay attention to the regional specificity of work – territorial remoteness of some locations, limited navigation during the winter period which presents difficulties for the organization of the large-scale events in the region. It should be note that the heads of such center are generally more oriented at the large-scale volunteer actions and events, included in the regional plans of supporting volunteering and financed from the regional budget in a target manner.

Summarizing, the most high-demand areas of work of regional volunteer resource centers — the forms of support for volunteer organizations, volunteer organizers, and volunteers (Table 2) is the training of volunteers (68% consider it important), in the second place – the coordination of the third sector in the region, the organization of interaction between volunteers, local non-profit organizations and officials (49%), information support for volunteer projects (49%). The direction which comes third is the provision of facilities to volunteer groups.

Table 2. The most high-demand forms of support for the volunteer organizations, volunteer organizers and the volunteers in the region*

High-demand forms of support	Frequency	%
Training of volunteers (including the development of methodological materials)	28	68
Organization of interaction between volunteers, nonprofit organizations and public officers	20	49
Information support of volunteer organizations and projects	20	49
Providing a co-working / venue for volunteer activities	19	46
Providing financial support to volunteer associations and projects on a competitive basis	17	42
Providing consultancy (legal, grant, accounting, etc.) and other services aimed at solving the problems of volunteers	14	34
Other	118	288

* total amount of % is more than 100%, as some of the respondents gave more than one answer.

Source: own study, 2018.

It should be noted that these directions are relevant both from the viewpoint of the organizers of volunteer projects in social and educational institutions and local nonprofit organizations, and of the heads of volunteer resource centers; there are no significant differences between them. Thus, the effectiveness of operation of the volunteer resource centers largely depend on how they are going to develop the areas, being in demand of all volunteer organizations and local nonprofit organizations in general.

CONCLUSIONS

The article indicates a contradiction in the assessments of the activities of volunteer resource centers by their leaders and organizers of volunteer projects in social, educational institutions and local NPOs in terms of the information support and the focus on coordinating the activity of all volunteer organizations on the part of the established volunteer resource centers in Russian regions.

Volunteer resource centers represented by their leaders give high assessments of their work, however, they do not quite meet the expectations of colleagues from the non-profit sector in relation to the orientation towards regional politics – the indicators set by officials reflecting government assistance to volunteering. The creation of a national umbrella organization is a management decision successfully implemented in such countries as Denmark. On the one hand, such model of organizational infrastructure formation is based on centralized trends. In case of lack of competencies among the organizers and employees of the regional volunteer resource centers, local programs and teaching materials, with due account to the problems that were highlighted in this article, such solution is feasible. However, it increases the risks of the integration ability of regional volunteer resource centers, as it does not take into account the broader acceptance of local welfare variations. Independent legal form in which local associations are members may have helped Danish centers bring about a sense of local ownership. In Norway, volunteer centers had weak ties to other local voluntary associations and were at times perceived as a threat to them [Lorentzen & Henriksen 2014].

Representatives of volunteer organizations and organizers of volunteer projects expect that the resource volunteer centers would focus on the needs of volunteer and nonprofit organizations rather than on the expectations of the officials. Orientation of the regional resource volunteer centers on the collaboration with local nonprofit organizations may strengthen the nonprofit sector. Only in this case it is possible to expect some real growth of volunteerism in the country, just as it happened in Poland, where the civil society organizations have played a central role in this process [Ekiert et al. 2017]. It is also important to note that such effect of volunteering.

It is also important to note that such effect of volunteer engagement in a former communist country was achieved, inter alia, due to the engagement of volunteer not only in traditional social work with poor and undereducated population, but as well to social work related to leisure activities (sport, tourism, hobby), having a positive effect on the life of society and external environment [Brenk 2016; Metelski 2018]. In this case, satisfying the needs of local nonprofit organizations in terms of the training of volunteers, information and consulting support on the part of the regional resource volunteer centers may guarantee the variability of the forms of social work, having a positive impact, in the local nonprofit organizations, and thus to attract more volunteers.

At the same time, the problems which resource volunteer centers as the organizations of the third sector face are, to a large extent, the same that all other nonprofit organizations face. Polish researchers identify the remaining vulnerabilities that continue to plague Polish nonprofit organizations as a consequence of its reliance on short-term contracts, limited access to public procurement procedures, and a general pull-back of the state from the provision of human services [Nale et al. 2016].

The state strategy of developing the volunteer infrastructure "from the top down", implemented in the majority of former communist countries, leads to the similar problems, related to the dependence of resource volunteer centers on the financial and information support of the state, and their bind to the economically developed territories of the country. Thus, in Romania the majority of nonprofit organizations and volunteers in the age from 14 to 25 are located in the economically developed regions, being most attractive for human resources. In such regions usually volunteer resource centers and national umbrella organizations are developed. During the last five years a number of umbrella national organizations have carried out large-scale volunteer actions "Days of waste collection" or "Trees planting campaigns". These national initiatives were widely covered by the mass media across the country and gain huge popularity. Still, such mobilization campaigns represent only a one-time volunteering activity, which cannot have an actual impact on the local community and its development [Dragan & Popa 2017].

As the practice of using direct democracy instruments in European Union countries [Musiał-Karg 2016], the development of volunteer infrastructure for the countries of Eastern Europe is effective for EU integration, EU development and overcoming the crisis. Such solutions have both prospects and risks.

Despite the problem points presented in the conclusions of our study and the highlighted discussion issues, further development of the organizational infrastructure of volunteering in Russia is an objective reality. From the position of key stakeholders, namely real Russian volunteers, the activities of these organizations are in demand in the regions, and the population's expectations from their development are positive. Thus, further studies of this problem can be developed in two directions. First, as part of a comparative study in the former communist countries, it is important to evaluate and describe the nature of the interaction between hybrid national organizations and local nonprofit organizations in search of an answer to the question: does the activity of such organizations create a culture of volunteer participation, solidarity and trust in local communities? Secondly, within the framework of the Russian case study, it is important to study the organizational development of the umbrella network of regional volunteer resource centers and their impact on volunteer participation in regional organizations of the third sector, answering the question: did the expectations of the population and leaders of local nonprofit organizations from the established volunteering infrastructure come true?

ACKNOWLEDGMENT

The work was supported by Act 211 Government of the Russian Federation (contract № 02.A03.21.0006) and the grant of the President of the Russian Federation MK-5869.2018.6.

REFERENCES

Action Plan for the Development of Volunteer Movement in the Russian Federation, No 4723п-П44 (2019), Retrieved from https://www.garant.ru/products/ipo/prime/doc/71659706/ (Accessed 4.03.2019)

Avenell, S., (2010), Facilitating Spontaneity: The State and Independent Volunteering in Contemporary Japan, in Social Science Japan Journal, 13(1): 69-93.

Bartels, K.P.R., Cozzi, G., Mantovan, N., (2013), 'The Big Society', Public Expenditure, and Volunteering, in Public Administration Review, 3(2): 340-351.

Baszyński, A., Kańduła, S., (2010), Zadania samorządu terytorialnego w świetle koncepcji zawodności rynku i państwa, in Ekonomia i Prawo, VI, 101-117.

van den Bos, C., (2014), Using Volunteering Infrastructure to Build Civil Society, Erasmus University, Rotterdam, Retrieved from https://volunteeringqld.org.au/docs/Using_Volunteering_Infra_to_Build_Civil_Society.pdf (Accessed 30.07.2019)

Brenk, M., (2016), Volunteering in Poland – tradition and modernity, in Socialia 2015, Gaudeamus, Hradec Králové: 292-298, Retrieved from http://repozytorium.amu.edu.pl:8080/bitstream/10593/19324/1/01.pdf (Accessed 23.08.2019)

Dekker, P., Halman, L., (2003), The Values of Volunteering: Cross-Cultural Perspectives, Springer Science & Business Media, New York, 226 p.

Dobrescu, E.M., (2012), Volunteering in Eastern European Countries, In: Limits of knowledge society Epistemology and Philosophy of Sciences & Economy. Proceedings of the International Conference Iaşi, 6-9 October 2010, Iaşi – România: 189-197, Retrieved fromhttps://www.researchgate.net/profile/Puiu_Nistoreanu/publication/236631616_Limits_of_knowledge_society/links/0deec5217a08951024000000/Limits-of-knowledge-society.pdf#page=189 (Accessed 20.06.2019)

Dragan, A., Popa, N., (2017), Social Economy in Post-communist Romania: What Kind of Volunteering for What Type of NGOs? in Journal of Balkan and Near Easter Studies, 19(3): 330-350, DOI: 10.1080/19448953.2017.1277088

Ekiert, G., Kubik, J., Wenzel, M., (2017), Civil Society and Three Dimensions of Inequality in Post-1989 Poland, in Comparative Politics, 49(3), Retrieved fromhttps://scholar.harvard.edu/files/ekiert/files/ekiertkubik_wenzel_cp_2017.pdf (Accessed 25.04.2019)

Ellis, S.J., (1989), Volunteer Centers: Gearing Up for the 1990s, United Way of America, USA, Retrieved fromhttps://www.energizeinc.com/sites/default/files/volctrs.pdf (Accessed 25.06.2019)

Federal program Volunteer Resource centers, Association of volunteer centers, (2019), Retrieved from https://avcrf.ru/programs/8 (Accessed 10.07.2019).

Gorlova, N.I., (2016), Infrastructure Support Volunteer Initiatives and Institutional Catches Development Volunteerism, in Volunteer, 3(19): 6-20.

Grandi, F., Lough, B., Bannister, T., (2018), Global Trends in volunteering infrastructure a background paper for the 2018 state of the world's volunteerism report: the thread that binds, United Nations Volunteers (UNV): 6, Retrieved from http://unv-swvr2018.org/ (Accessed23.03.2019)

Hackl, F., Halla, M., Pruckner, G.J., (2012), Volunteering and the State, in Public Choice, 151(3/4): 465-495.

Hager, M.A., (2004), Volunteer Management Capacity in America's Charities and Congregations: A Briefing Report, DC: Urban Institute, Washington, Retrieved from

http://webarchive.urban.org/UploadedPDF/410963_VolunteerManagment.pdf (Accessed 25.04.2019)

Hager, M.A., Brudney, Jeffrey L., (2004), Volunteer Management Practices and Retention of Volunteers, DC: Urban Institute, Washington, Retrieved from https://www.researchgate.net/publication/237421554_Volunteer_Management_Practices_and_Retention_of_Volunteers (Accessed 25.04.2019)

Iarskaia-Smirnova, E., Romanov, P., (2013), Social workers affecting social policy in Russia, In: Social workers affecting social policy. An International perspective, ed. J. Gal & I. Weiss-Gal, Policy Press, Bristol: 101-119.

van Ingen, E., van der Meer, T., (2011), Welfare State Expenditure and Inequalities in Voluntary Association Participation, in Journal of European Social Policy, 21(4): 302-322.

Jaźwiński, I., (2017), Kapitał ludzki w polityce regionalnej, Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin.

Jones, L., Heley, J., (2014), Practices of participation and voluntarism among older people in rural Wales: choice, obligation and constraints to active ageing, in Sociologica Ruralis, 56(2): 176-196.

Kalinowska-Sufinowicz, B., (2013), Polityka społeczno-gospodarcza państwa wobec pracy kobiet, Wydawnictwo Uniwersytetu Ekonomicznego w Poznaniu (UEP), Poznań.

Krakowiak, P., Pawłowski, L., (2018), Volunteering in hospice and palliative care in Poland and Eastern Europe, in Face of Volunteering in Hospice and Palliative Care, ed. R. Scott & S. Howlett: 83-93.

Lorentzen, H., Henriksen, L.S., (2014), The Invention and Institutionalization of Volunteer Centers: A Comparative Analysis of Norway and Denmark, in Nonprofit and Voluntary Sector Quarterly, 43(3): 589-608, https://journals.sagepub.com/doi/abs/10.1177/0899764013476765 (Accessed15.06.2019)

Lowndes, V., Wilson, D., (2001), Social capital and local governance: exploring the institutional design variable, in Political Studies, 49: 629-47.

Lub, V., Uyterlinde, M., (2012), Evaluating state-promoted civic engagement and participation of vulnerable groups: the paradoxical policies of the Social Support Act in the Netherlands, in Journal of Social Policy, 41(2): 373- 390.

Mersianova, I.V., Benevolenski, V.B., (2017), NKO kak postavshchiki sotsial'nykh uslug: verifi katsiya slabyhh storon [NPOs as Social Services Providers: Organizational Weaknesses Verifying], in Public Administration Issues, 2: 83-104 (in Russian).

Mersiyanova, I.V. (ed.), (2018), Evaluation of the economic and social effectiveness of volunteering: methodological approaches and implementation problems, Higher School of Economics, Moscow, 198 p.

Metelski, A., (2018), Rola sportu w sukcesie zawodowym, in Współczesne problemy ekonomiczne w badaniach młodych naukowców. Zarządzanie organizacją, finanse i inwestycje, ed. E. Gruszewska, A. Matel & E. Kuzionko-Ochrymiuk, Polskie Towarzystwo Ekonomiczne, Białystok, 75-87.

Milbourne, L., Cushman, M., (2015), Complying, transforming or resisting in the new austerity? Realigning social welfare and independent action among English voluntary organizations, in Journal of Social Policy, 44(3): 463-485.

Musiał-Karg, M., (2016), Remarks on the role of direct democracy in the process of European integration – the examples of British and Hungarian referenda in 2016, in European Journal of Transformation Studies, 4(2): 5-17.

Nale, S., Les, E., Pielinski, B., (2016), Erratum to: Poland: A New Model of Government–Nonprofit Relations for the East? in Voluntas: International Journal of Voluntary and Nonprofit Organizations, 27(6): 2974, DOI 10.1007/s11266-016-9798-9.

Pantea, M-C., (2015), Understanding non-participation: perceived barriers in cross-border volunteering among Romanian youth, in International Journal of Adolescence and Youth, 20(3): 271-283

Paszkowicz, M.A., Garbat, M., (2015), Studenci z niepełnosprawnościami w przedsiębiorczości, in Osoby z niepełnosprawnościami na współczesnym rynku pracy. Ku pełnemu uczestnictwu w rynku pracy, ed. M.A. Paszkowicz, M. Garbat, Oficyna Wydawnicza Uniwersytetu Zielonogórskiego, Zielona Góra: 175-190.

Prentice, C.R., Brudney, J.L. (2018), Are you being served? Toward a typology of nonprofit infrastructure organizations and a framework for their assessment, Journal of Public and Nonprofit Affairs, 4(1): 41-58.

Rostovskaia, T.K., Kozak, E.M., (2019), Formation of an effective volunteering support infrastructure, in CITISE, 1(18): 30. In Russian.

Salamon, L.M., Sokolowski, S.W., Haddock, M.A., (2011), Measuring the economic value of volunteer work globally: concepts, estimates, and a roadmap to the future, in Annals of Public and Cooperative Economics, 82(3): 217-252.

Schmidt, J., (2016), Nature of NGO Volunteers' and Employees' Motivation. Implications and Recommendations for Managerial Staff. in Problemy Zarządzania, 14/3(61): 45–69. http://doi.org/10.7172/1644-9584.61.3

Schofer, E., Longhofer, W., (2011), The Structural Sources of Association, in American Journal of Sociology, 117(2): 539-585.

Smith, D.H., Shen, C., (2002), The Roots of Civil Society: A Model of Voluntary Association Prevalence Applied to Data on Larger Contemporary Nations, in International Journal of Comparative Sociology, 42(2): 93-133.

Smith, D.H., Stebbins, R.A., Grotz, J., (2016), The Palgrave Hand- book of Volunteering, Civic Participation, and Nonprofit Associations, Palgrave Macmillan, Houndmills, 1501 p.

Stadelmann-Steffen, I., (2011), Social Volunteering in Welfare States: Where Crowding Out Should Occur, in Political Studies, 59(1): 135-155.

Standard of Volunteer Support in the regions, Agency for Strategic Initiatives, Retrieved from https://asi.ru/eng/social/volunteers/ (Accessed 11.06.2019)

State of the World's Volunteerism Report, (2018), The thread that binds: Volunteerism and community resilience, United Nations Volunteers (UNV) programme, Retrieved fromhttps://unv-swvr2018.org/files/51692_UNV_SWVR_2018_WEB.pdf(Accessed 1.07.2019)

Sullivan, H., Skelcher, C., (2017), Working Across Boundaries: Collaboration in Public Services Government beyond the Centre, Red Globe Press, Macmillan International Higher Education, 271 p.

Szeman, Z., (2014), A new pattern in long-term care in Hungary: Skype and youth volunteers, in Anthropological Notenbooks, 20(1): 105-117.

The website of the UNV programme, Retrieved from https://www.unv.org/swvr (Accessed 21.05.2018)

World charity rating 2018, (2018), Retrieved from http://www.cafrussia.ru/page/mirovoi_reiting_blagotvoritelnosti_1 (Accessed 20.04.2019)

Yakubovskiy, M., Liashenko, V., Kamińska, B., Kvilinskyi, O., (2017), Economy modernization of industrial regions (based on the example of Ukraine), in Economic transformation in

Ukraine: comparative analysis and European experience, ed. P. Głowski & O. Kvilinskyi, Warsaw: Consilium, 12-29.

Young, D.R., (2010), Nonprofit Infrastructure Associations as Reluctant Clubs, in: Voluntary Regulation of Nonprofits and NGOs: An Accountability Club Frame- work, ed. M.K. Gugerty & A. Prakash, UK: Cambridge University Press, Cambridge: 101–24.

Zhou, M., (2012), Participation in International Human Rights NGOs: The Effect of Democracy and State Capacity, in Social Science Research, 41(5): 1254-1274.

COMPARISON OF EXTERNAL INDEBTEDNESS AND DEBT SUSTAINABILITY DEVELOPMENT IN V4 COUNTRIES

Jana Marková

University of Economics,
Faculty of Finance and Accounting,
W. Churchill square 4, Prague 3, 130 67, the Czech Republic
markovaj@vse.cz

&

Ilona Švihlíková

University College of Business,
Department of Economics,
Spálená 76/14, Prague 1, 110 000, the Czech Republic
svihlikova@vso-praha.eu

Abstract

Foreign indebtedness is an important indicator of macroeconomic and financial stability of given economy. Especially regarding the financial crisis of 2008 this indicator regained importance. This article offers a comparative analysis of Visegrad countries regarding the external indebtedness and debt sustainability. Poland, Hungary, Slovakia and the Czech Republic went through a similar transformation process and with the exception of Slovakia they still have their own national currencies. Foreign indebtedness is thus one of the crucial indicators for their monetary development, also regarding that in the past these countries were viewed as one region, which represented the possibility of spill-over effects. The aim of the article is to find out if a negative trend in the development is present in V4 countries as far as the external indebtedness is concerned.

Keywords: *foreign indebtedness, solvency, liquidity, debt sustainability, capital inflow*

INTRODUCTION

Foreign indebtedness is an important indicator reflective of macroeconomic and financial stability of a given economy. Foreign indebtedness has gained importance with the financial and debt crisis of 2008.

In the emerging market economies foreign capital was a welcomed source, both in the form of FDI or in the form of debt capital, as it helped to compensate for the lack of domestic capital. Evaluation of the impact of foreign capital on the domestic economy is a difficult task, though. It is however widely agreed that inflow of foreign capital in whatever form does have impact on all macroeconomic indicators, although it is difficult to quantify it precisely.

The increase in foreign indebtedness and its GDP ratio is not only problem of developing countries, it is spread in transition economies and developed economies as well. The reasons for this development can be found in strong integration and interconnectedness of economic activities among countries. Another reason is the gap between domestic saving and the need of domestic investment. This is a remaining problem of transition countries.

V4 countries, or the Visegrad countries belong to the group of transition countries. They experienced a similar path of transformation, show similar patterns of inclusion into the world labour division and recently have found similar political position on a number of important issues (immigration, e.g.). For these reasons these countries are often viewed by the investors as one region, which can also mean that problems in one country can have a spill-over effect on the rest[1].

The aim of this article is based on the method of a comparative analysis, which should reveal a potential negative trend that could have a negative impact on the whole region of V4, be it in the form of losing investors' confidence leading to outflow of foreign capital, or in speculative attacks on the respective currencies.

1. THEORETICAL BACKGROUND

Foreign indebtedness can be defined as overview of financial liabilities of domestic economy sectors towards non-residents in debt (e.g. liabilities with contractually given maturity, for which the creditor gets a yield in the fork of interest). Foreign indebtedness does not include investment into equity, both belonging to FDI, or equity that does not fulfil the criteria of FDI. This is the gross foreign debt, which includes loans, bonds, promissory notes and also inter-company loans in the framework of FDI. As in the case of investment position, the position of each debt item corresponds to respective transaction with debt financial liability on the financial account of the balance of payments.

Besides evaluation the gross foreign debt, there is also the net foreign debt, which are practically foreign debt liabilities minus foreign debt assets.

Debt commitments are always connected with certain risks both for the creditor and for the debtor. Creditor runs the risk of default of the debt as a whole, or part of it, or the risk that the debt will be paid off later than agreed. The debtor runs the risk – in case of non-obliging to the contract – of having difficult access to obtain another loan. Debt commitments carry the risk of change in the value of repayments, because of increasing inflation in the given country, change in the interest rates, or unexpected change of the exchange rate. The risk of exchange rate changes is

[1] Investors usually use the term CEE countries, which include Poland, The Czech Republic, Slovakia and Hungary, sometimes Romania. V4 has been used rather in political issues, however for precision we use V4 countries to mark distinctly that we concentrate on these four countries in our analysis.

important in countries with flexible regimes of exchange rate, when the debtor is not hedged against these risks.

Too high foreign debt can press onto depreciation of domestic currency and weaken the trust of foreign investor in the given country. This makes foreign loans difficult to get for domestic subjects, what can lead to increase in new loans used to repay old debts, and in the spiral of increasing foreign indebtedness.

Analysing the foreign indebtedness, it is necessary to distinguish between solvency and liquidity. Solvency can be defined as the ability of the country to continuously discharge its external debt commitments. Countries are solvent as long as their present value of net interest payments does not exceed present value of other current account inflows (mostly export incomes) without imports (IMF, 2003). Practically, it is difficult to determine precisely when the country becomes insolvent, as the debtors usually stop repaying their commitments long before this situation occurs. Reasons can be both social and political. IMF therefore claims that solvency means to a large extent the willingness to repay [IMF 2003].

The liquidity problem is a situation, when the lack of liquid assets hinders repaying of foreign commitments. A liquidity problem can be connected with solvency, but it can also arise separately, even in the case when the country does not have problems with solvency. A typical case is a panic of investors, followed by a sharp decrease in trust and fast outflow of capital out of the country. This contributes to strong pressures on the foreign exchange reserves. Liquidity problems can arrive due to fall in export revenues, increases in interest rates (domestic, or foreign), on due to increase in import prices. Vulnerability towards liquidity crises is influenced by the structure of the debt and maturity and also availability of assets suitable for foreign debt repayment.

Foreign indebtedness belongs to major indicators showing an impeding debt crisis. There are crucial indicators, such as 40% of gross debt to GDP, or 35% of investment position balance to GDP. There are many more indicators, such as ratios of time and sectoral gross debt structures, foreign debt to export of goods and services, debt service to exports, etc. [Durčáková, Mandel 2007].

These traditional indicators of foreign debt sustainability may have some methodological imperfections and the limiting values are rather speculative, however, they are to be respected as they have serious psychological impacts on the behaviour of foreign investors.

Their main value is based on the follow-up of the development, they offer identification of trends. This is important, as the value of the indicators cannot be taken absolutely and they cannot be compared in different countries on various degrees of development. Absolute values can be used for comparison of countries that show signs of similarity.

All sectors of economy that are in debtor position towards non-residents can be a part of the foreign debt. In the statistics we can find three sectors: the central bank, government institutions, institutions accepting deposits (beside central bank) and others. “Others” is a heterogenous sector, but as it is not insignificant, it is often described as corporations.

Sectoral division is not sufficient. The debt of individual sector is further divided into long-term and short-term, analysed on the basis of instruments (currency in circulation and deposits, debt securities, trade loans and other liabilities). Inter-company loans are usually analysed separately because of the specific character of the debt commitment.

2. METHODOLOGY AND DATA

This article is based on the method of a comparative analysis, which enables to reach the given aim of the article.

Comparative approach as such consists of "the systematic detection, identification, classification, measurement and interpretation of similarities and difference among phenomena" [Boddewyn 1965]. In our article we also focus on the future prediction, thus aiming at the objective of the article, which is to detect a potential negative trend in foreign debt development in one and/or other V4 countries, which could have a negative impact on the whole region.

The sample for comparison includes four countries (V4), the Czech Republic, Slovakia, Hungary and Poland. The time series includes a long series of data, from 2004-2017, therefore enabling a longer and deeper view in the topic of foreign indebtedness. The time series starts in 2004 when all four countries joined the EU and finished in 2017 as to offer the most current data, which can provide a future outlook and detect possible risks for the whole region.

The dataset was obtained partly from Eurostat which, however, does not offer all the relevant data in detail. Therefore, further data were obtained from the central banks of the respective countries.

Inter-company loans in Hungary and Poland are not divided in the categories of long-term and short-term, therefore inter-company loans in these countries are not included in the long-term and short-term foreign debt. This must be considered for comparison with the Czech Republic and Slovakia where this time structure is available.

The chosen ratio indicators used in comparative analysis offer a complex, in-depth view of the foreign indebtedness. They include gross foreign debt to GDP, net foreign debt to GDP, gross foreign debt to export of goods and services, long-term debt to gross foreign debt, foreign government debt to gross foreign debt, foreign exchange reserves to short-term debt, net investment position to GDP.

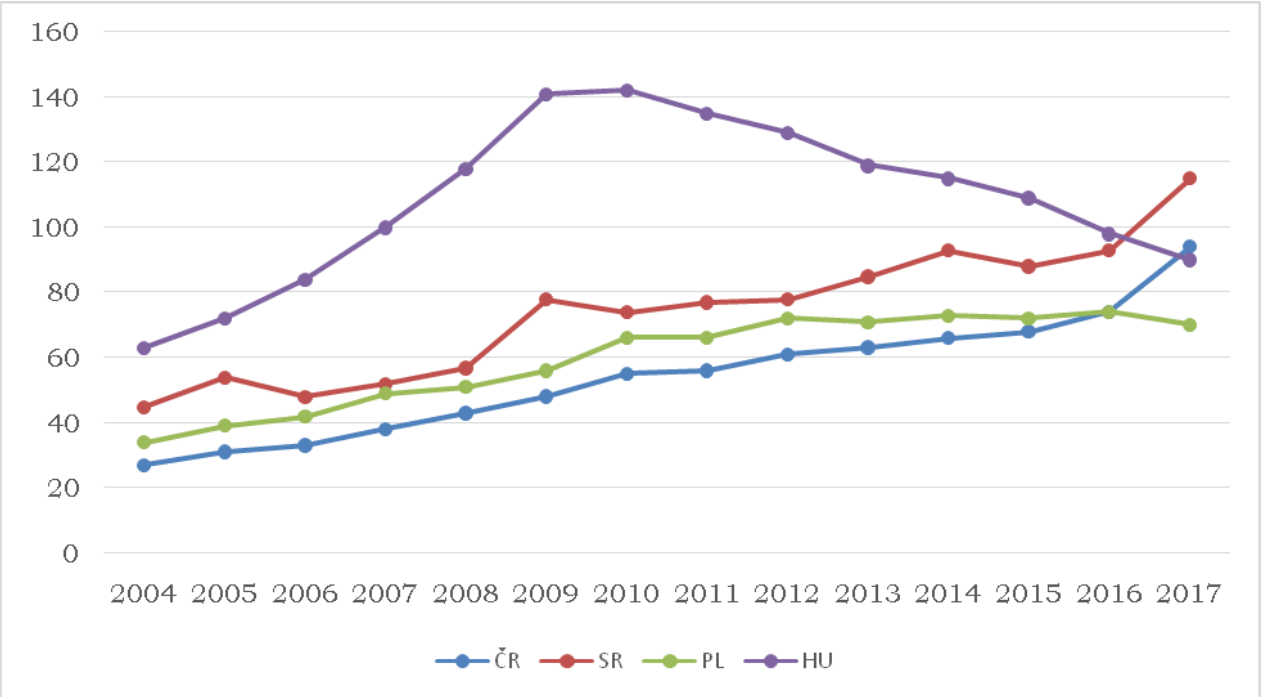
3. EMPIRICAL ANALYSIS AND FINDINGS IN V4 COUNTRIES

The first ratio indicator is the gross foreign indebtedness, usually measured to GDP. Reference level is considered to be at 40%. The significance of this indicator lies in the fact that it measures the debt to the "source base", thus signals need to shift production capacities to increase exports so that sources to repay the debt can be produced. IMF considers this indicator to be the indicator of solvency [Durčáková, Mandel 2007].

Graph 1 shows the trend in gross foreign debt to GDP in V4 countries. In the case of Poland, Slovakia and the Czech Republic we can see a long-term increasing trend. For Hungary the gross foreign debt to GDP peaks in 2010 and since then shows a decreasing tendency.

Higher indebtedness and significantly diverging trend of the Hungarian debt from the beginning of the time series, is a heritage of the past, of the high indebtedness of the previous governments. Economic growth based on debts led to the increase in inflation, which was dampened by higher interest rates. Much lower interest rates abroad were used for loans by all sectors, including households. Increasing indebtedness was manageable till the outbreak of financial crisis in 2007. Financial crisis worsened the already bad situation, IMF´s loan of 25 billion USD helped to avert bankruptcy for Hungary.

Graph 1: Gross foreign debt development to GDP in % in V4 countries



Source: author's own calculations according to CNB 2018; NBS 2018; NBP 2018; MNB 2018.

In the whole time series, the Hungarian debt exceeded the debt of other V4 countries and in 2008 the ration of gross foreign debt to GDP got nearly to 120%. The biggest part of the gross foreign debt is a governmental debt (about 40%). Also, the increase in inter-company loans was important as its share grew from 15% (2004) to 25% (2009), from 8.8 to 33.0 billion euro. Currently it is about 30% of gross debt, their inflow stabilized at around 30 billion euro a year (MNB, 2018). Since 2010 the ratio of gross debt to GDP has been decreasing, reaching 90% in 2017.

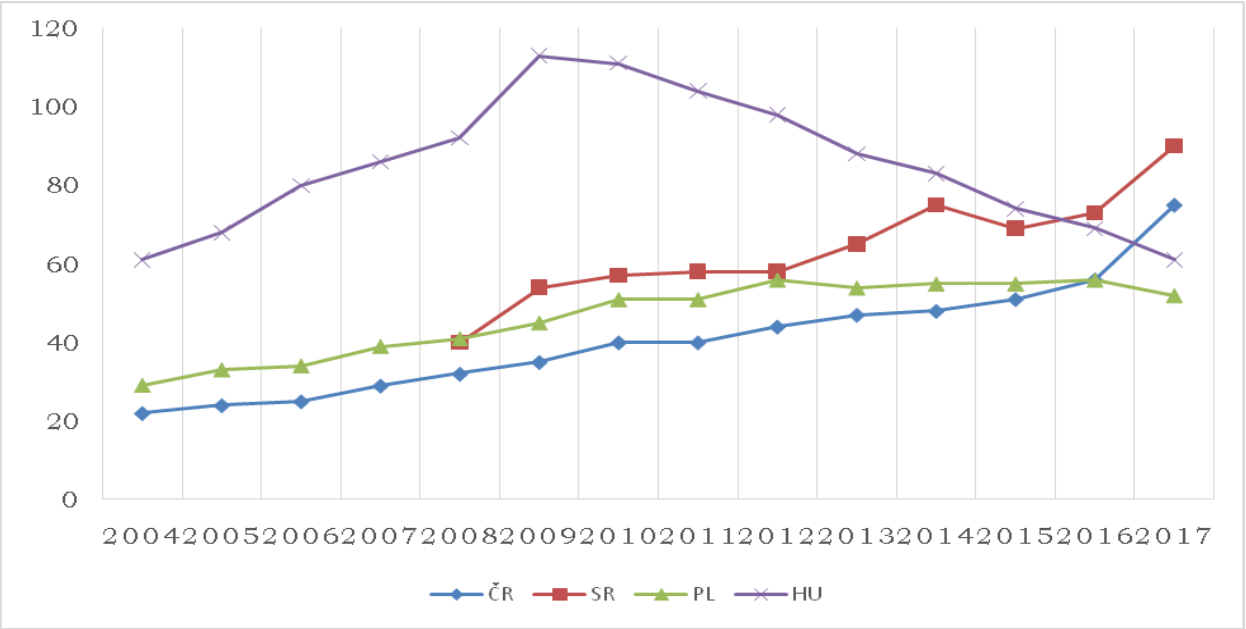
Other V4 countries recorded an increase, although rather slowly, till 2016. In 2017 the Czech Republic and Slovakia witnessed a jump in the ratio of about 20 p.p., in Poland the ratio mildly decreased.

In all V4 countries the ratio of gross foreign debt to GDP exceeds benchmark value of 40%. This could be the evidence that V4 countries may run the risk of debt crisis.

However, it must be considered that the inter-company loans are partly responsible for the increase in foreign debt. According to the new manual, BPM6, they are evidenced on gross basis. The share of inter-company loans in V4 countries oscillates at around 20-25%, in Hungary it is 30%. If we thus removed the inter-company loans from the gross debt, then the ratio to GDP would reach more favourable values.

Although the inter-company loans increase the foreign indebtedness of the host country, they are special in comparison to traditional banking loans, taken from abroad by domestic subjects. The inter-company loans are usually long-term, the maturity more than one year, very often more than four years. Some of these loans are even interest-free, they do not increase the debt servicing costs. In the case of short-term problems, they would not add to tensions caused by short-term capital outflow and they are not a debt of domestic subjects towards non-residents.

Graph 2: Development of gross foreign debt (without inter-company loans) to GDP in % in V4 countries



Data on inter-company loans in Slovakia are not available till 2008.

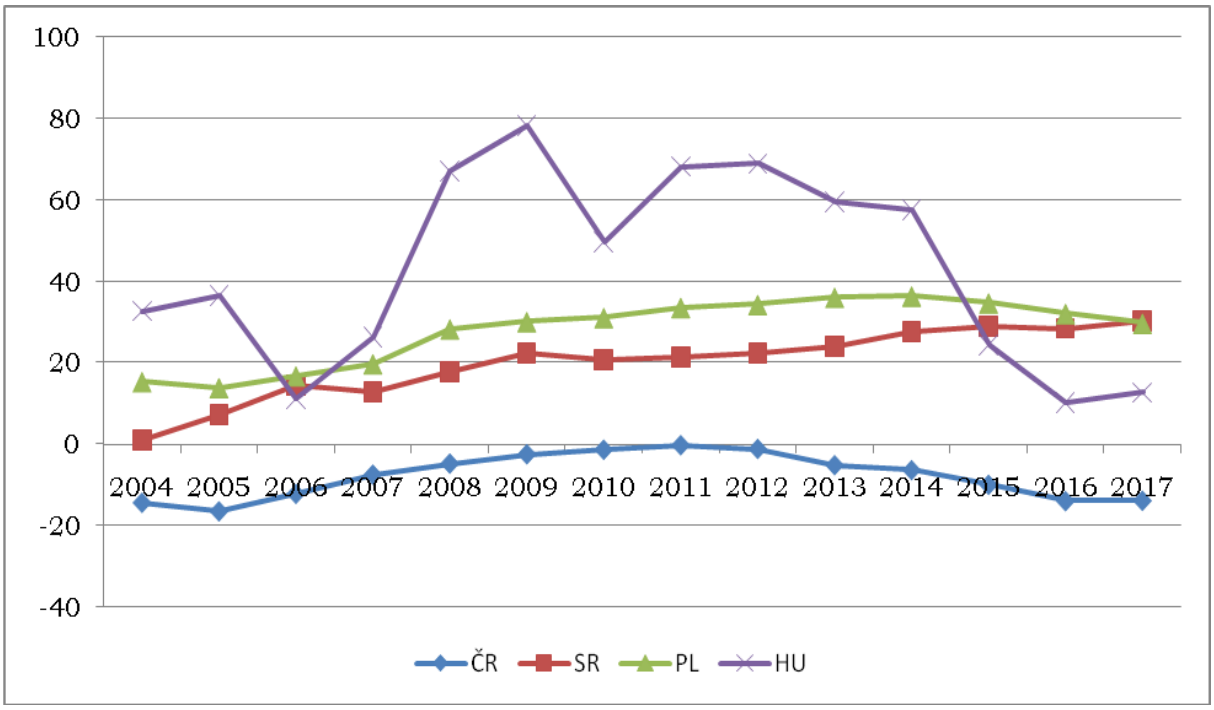
Source: author's own calculations according to CNB 2018; NBS 2018; NBP 2018; MNB 2018

Similar situation is by the commercial banks´ liabilities, the shown debt is often not a real one, thus made by used resource abroad, but it is made of commitments towards foreign clients in the form of deposits on accounts and investments into debt securities. The same goes for commitments of central banks, which represent the value of foreign bank´s deposits and repo operations realised with foreign banks by the management of foreign exchange reserves. Central banks are in all selected countries the least indebted sector, their share on the whole debt not exceeding 1%. The exception is Slovakia, which entered the euro zone, and the corresponding debt share increased up to 37% in 2009. After it started decreasing to 17% in 2016, but immediately afterwards went up again to the mark of 30%. It is mostly in the form of short-term debt made of deposits of foreign subjects.

If a V4 country is truly vulnerable, it is by large margin Hungary. The share of government debt on the short-term debt is about 20%, by other countries it is about 1%. This problem remains, although in last seven years Hungary succeeded in halving the short-term debt. Indebted are municipalities and companies as well. Problem could be also the notorious mortgages, usually denominated in Swiss francs.

The next indicator is net foreign indebtedness. This indictor offers a more real view of the foreign indebtedness. Net foreign indebtedness is defined as the difference between gross foreign debt und foreign claims. Graph 3 confirms that the development of this indicator by Hungary has a very different development from other V4countries. It practically copies the development of gross foreign debt to GDP. Hungary saw a positive development as the net foreign debt decreased from 78% GDP in 2009 to 12% currently.

Graph 3: Development of net foreign debt to GDP in %, in V4 countries



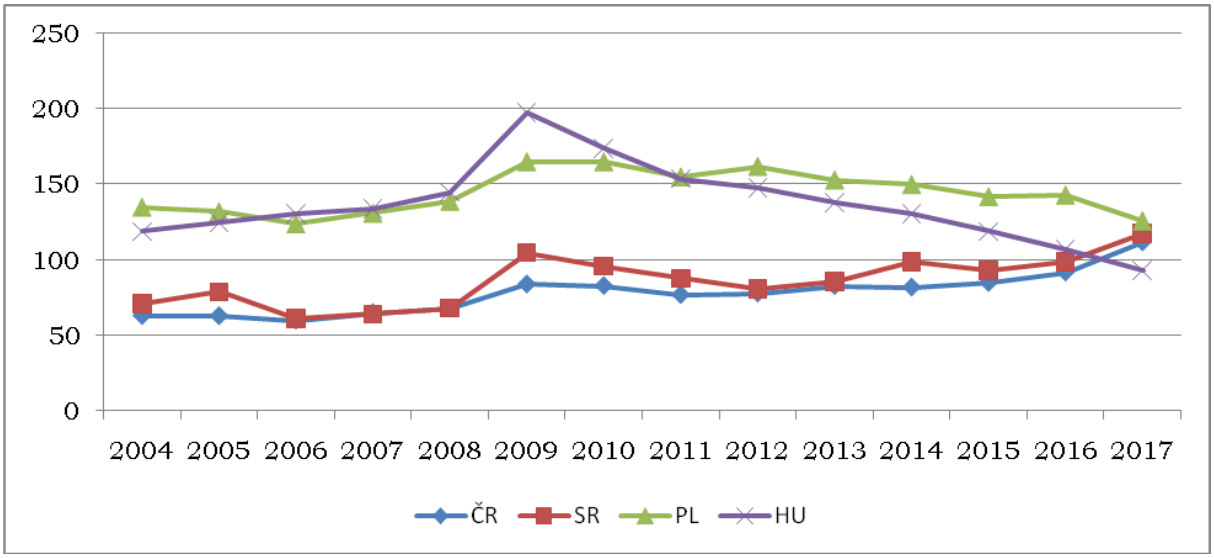
Source: (Eurostat, 2018a)

http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tipsii20&plugin=1

The best situation in this regard is in the Czech Republic, which even got to negative values, that means it has more financial claims than liabilities. The reason are the reserve assets of the central bank, which started increasing after the central bank abandoned the strategy of targeting inflation and in 2013 shifted to the exchange rate commitment. The Czech crown was depreciated to the level of 27 crown for euro. The exchange rate commitment was abandoned in April 2017 and led to a substantial increase in foreign exchange reserves. The short-term indebtedness of the Czech national bank (CNB) increased in 2017 to double values. That is connected with the foreign investors' expectations about the crown appreciation and with the positive interest rate differential.

The ratio of foreign debt to exports is a further indicator of solvency. is. It is a useful trend indicator, which shows the capacity of the country to pay off the foreign debt. Lower values show faster ability to repay foreign debt. Value of 600-800% reflects low ability to pay off foreign debt. These values can be found in indebted countries of the euro area like Greece or Ireland. Czech Republic is closely under the "ideal" value of 100%. However, in none of the countries the situation is critical. The worst situation is in Poland, but still under 150%. Hungary again shows a different trend, after peaking in 2009 the indicator was gradually decreasing to 93%.

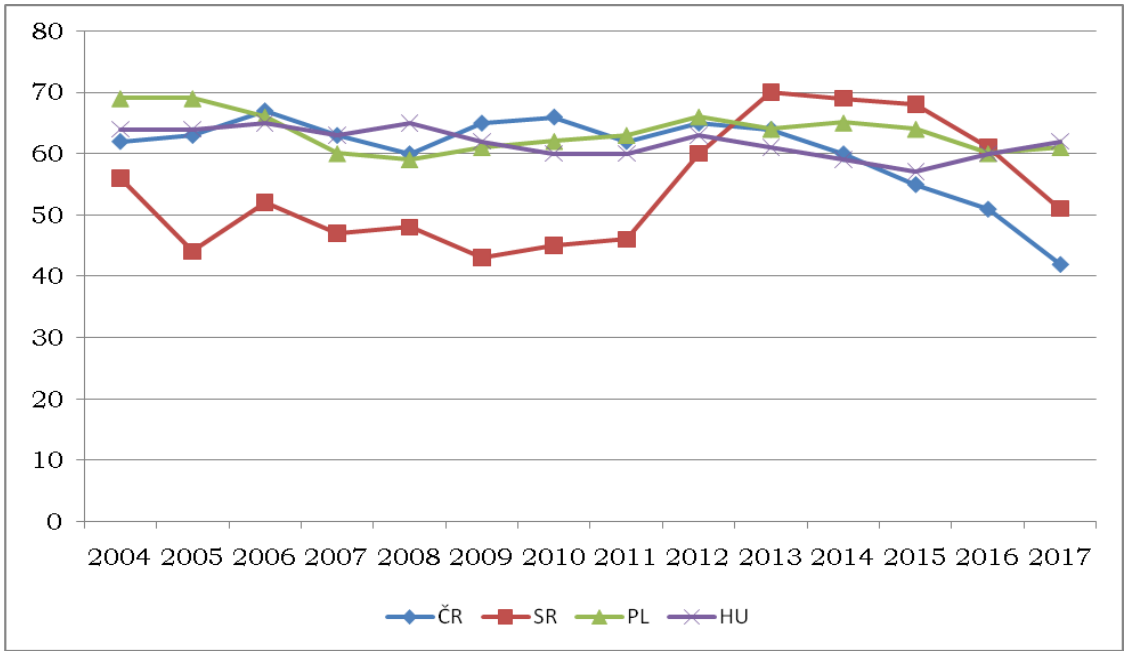
Graph 4: Development of gross foreign debt ratio to exports of goods and services in % in V4 countries



Source: author's own calculations according to CNB, 2018; NBS, 2018; NBP 2018; MNB 2018

Another indicator of solvency is the share of the long-term debt (with maturity longer than one year) on the total foreign debt. The lower the share of the long-term debt, the bigger the dependency on short-term financing. Detailed information on the maturity structure of individual debt instrument can define better the possible risk of repaying. The limit value is 40%, which means that at least 60% of the total foreign debt should be the long-term debt with maturity of at least one year. Exceeding this value can be viewed by foreign investors as critical, because with first sign of crisis usually comes to the outflow of short-term capital abroad.

Graph 5: Development of long-term debt on gross foreign debt in % in V4 countries



Source: author's own calculations according to CNB, 2018; NBS, 2018; NBP 2018; MNB 2018

V4 countries, as graph 5 shows a warning sign for the Czech Republic are the long-term debt values. The worsening of the ratio between the long-term and short-term debt appeared in 2013. The share of the short-debt started to rise. A detailed look reveals that the increase was in the banking sector. The increase is connected with the exchange rate commitment of the CNB, which caused interest for assets denominated in CZK from foreign investors in the whole banking sector, both by the central bank and commercial banks, where the deposits were accumulated as well. Short-term liabilities by CNB increased from 38 Mio EUR in 2012 to 5 776 Mio. EUR in 2017. By commercial banks the corresponding figures were from 11 307 Mio EUR to 59 107 Mio EUR. The share of short-term debt was therefore increasing, reaching 58% in 2017.

Slovakia witnessed a change in the time structure of foreign debt, when it entered the euro zone. The short-term debt of the central bank increased significantly from 116,2 Mio. EUR to 18 016,7 Mio. EUR in 2009. At the same time short-term debt by commercial banks decreased from 10 867,2 Mio EUR to 2 625,3 Mio. EUR. Mother companies of daughter banks in Slovakia were withdrawing liquidity on their accounts abroad. Short-term liabilities increased in the balance of the central bank, commitments toward commercial banks decreased because of minimal reserve requirements, but the commitments towards TARGET 2 increased (NBS, 2009). This was reflected in a substantial decrease in long-term debt by 5 p. p.

In 2011 Slovakia witnessed a more important reversal in the development between the short-term and long-term debt, this time in favour of the long-term debt, which grew by 24 p.p. in two years and its share started to move towards 70%. The main reason was the rise in long-term government debt, more than double till 2014. In absolute terms it meant an increase from 12 108 Mio. EUR in 2011 to 28 757 Mio. EUR in 2014. In 2016 the long-term debt however dropped to 51%.

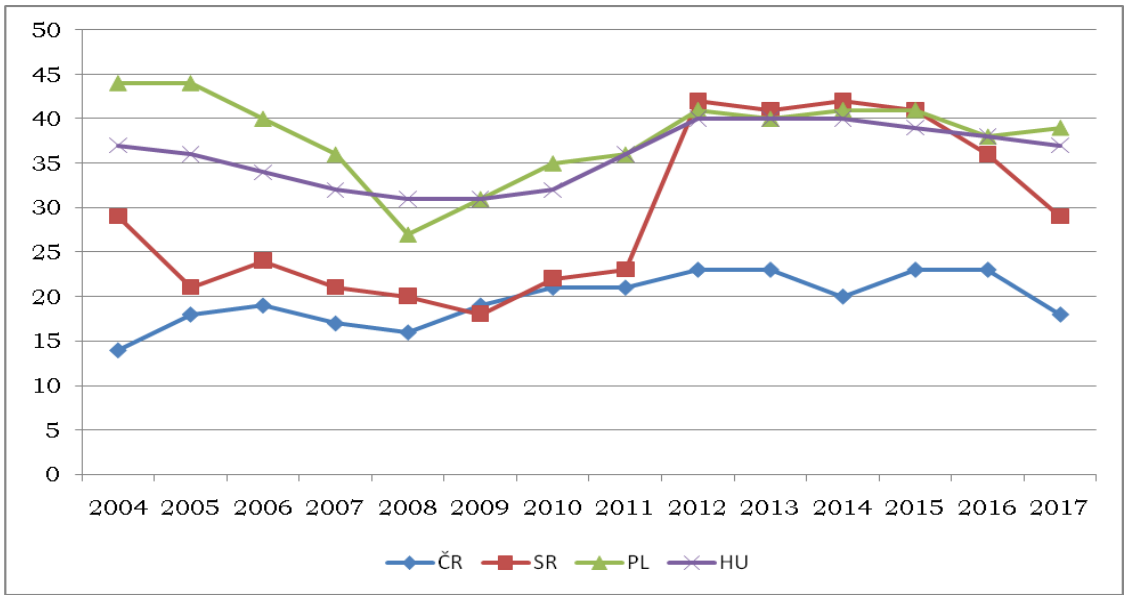
The situation in Poland and Hungary, where the level of long-term debt to gross debt moves around acceptable level of 60%, is more positive, In the case of Poland and Hungary the data are without inter-company loans (see section Methodology and data), as the time structure of these loans is not available. If we included also long-term inter-company loans, then the values would be substantially higher, regarding the share of these loan on the total debt.

The indebtedness in the government sector shows a rather negative trend in absolute terms of long-term debt. The main reason are foreign investors´ purchases of government bonds and credit from the European investment banks used for infrastructure investment. The lowest share of government sector on gross debt (see Graph 6) can be seen in the Czech Republic, other V4 countries have the value of 40%. Slovakia experienced steep decrease in this share, by 7 p.p.

Government sector debt on foreign gross debt is an important category to watch, as it really represents (unlike the increase in domestic public debt) indebtedness of future generations of given country, namely the holders of the financial claims are foreign subjects, which means the yields from these liabilities will go abroad.

Ratio of foreign exchange reserves to short-term debt belongs to liquidity indicators. IMF considers it to be the most important indicator of foreign exchange reserves adequacy, especially for countries, which have unsure capital market access. This ratio can be used for further prediction of vulnerability towards liquidity crises.

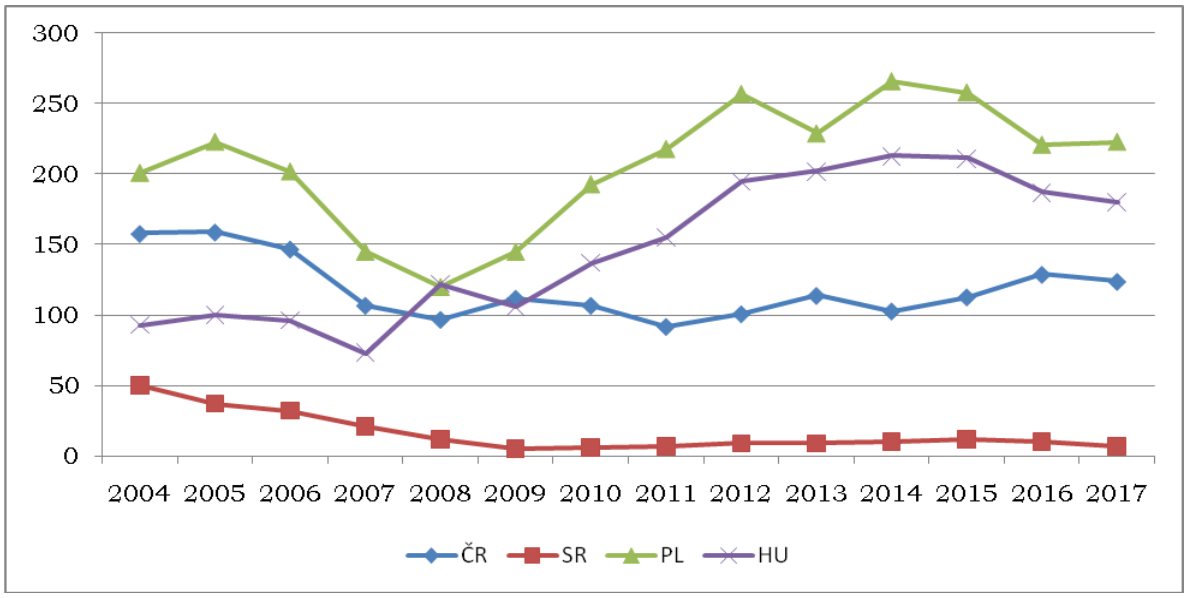
Graph 6: Development government sector foreign debt on gross foreign debt in V4 countries in %



Source: author's own calculations according to CNB 2018; NBS 2018; NBP 2018; MNB 2018

If this indicator shows values higher than 1 (thus higher than 100%) it means that the given country does not run the risk of a solvency crisis. Slovakia is the only country, which has this indicator below 100%. This special situation is given by the fact that Slovakia is a part of the euro zone. For Slovakia not only its central bank matters, but also its membership in the euro-system, including European Stability Mechanism etc. The exchange rate regime is very important for this indicator, e.g. floating enable to avoid the solvency crisis even by a less favourable ration of foreign exchange reserves to short-term debt. However, this indicator needs to be applied cautiously, as it presumes that foreign exchange reserves can be as such used to repay the external debts. It opens the issue of currency structure and liquidity of reserve assets.

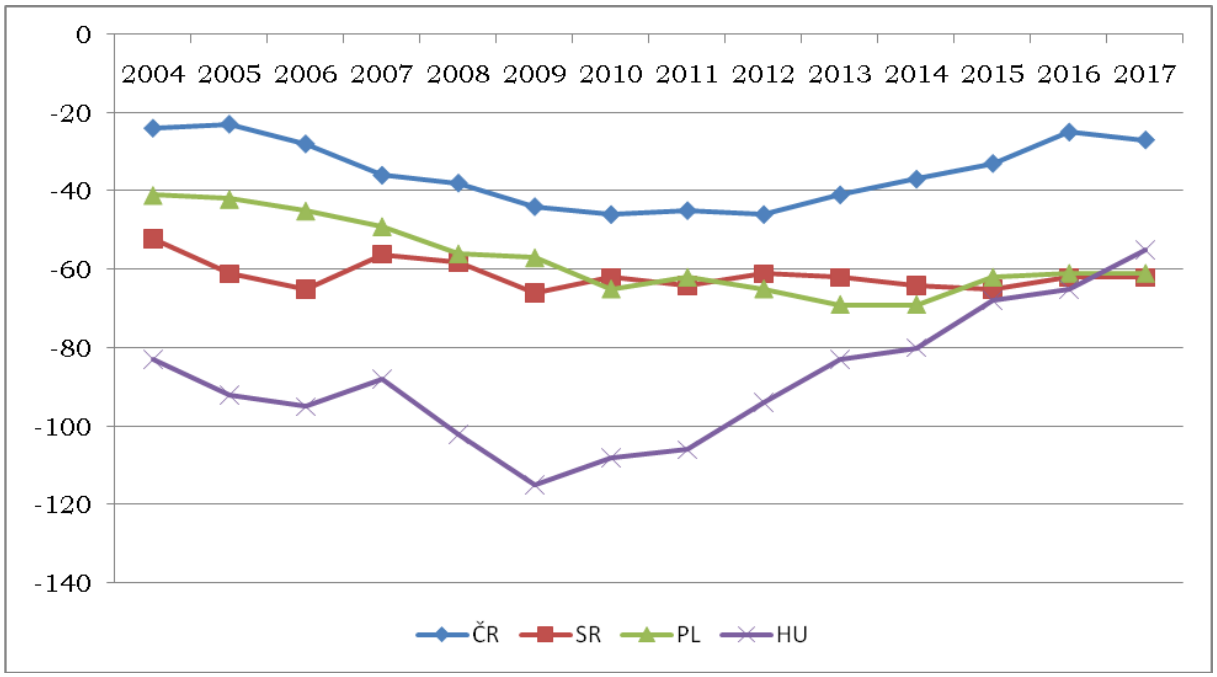
Graph 7: Development of foreign exchange reserves ratio to short-term debt in V4 countries in %



Source: author's own calculations according to CNB 2018; NBS 2018; NBP 2018; MNB 2018

There are further indicators of external balance, e.g. the ratio of debt service to GDP, with the limit value of 5%, or the import coverage by foreign exchange reserves (3-5 months). Indicators of external balance can also include the ratio of net investment position to GDP, with the limit value 35%.

Graph 8: Development of net international investment position to GDP in V4 countries in %



Sources: (Eurostat, 2018b)

http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=tipsii10&tableSelection=1

Net investment position reflects the final balance of the state of foreign assets and liabilities to a certain date. Foreign assets can be defined as a portfolio of foreign direct investment, portfolio investment, financial derivatives and other investments of domestic subjects towards non-residents, including the foreign exchange reserves of the given country. Foreign liabilities include financial claims of non-residents towards domestic subjects in foreign direct investment, portfolio investment, financial derivatives and other investment. The data are given on gross principle, e.g. the financial liabilities and assets are separated by each item.

Regarding the dynamics of net investment position to GDP, the Czech Republic has the best position. Because of the exchange rate intervention, the foreign exchange reserves of the central bank grew, which positively contributed to the change in 2013. Other countries see their values oscillate at around 60%.

Transitional economies like the V4 countries have a typical feature in the form of inflow of FDI on the liabilities of the investment position. FDI are more significant than debt sources. Therefore, it is not the foreign indebtedness that would weigh on the liabilities of the given country and thus negatively influence the net investment position. Another characteristic feature is the high share of foreign exchange reserves on the side of assets in the investment positions, which is connected with central bank exchange rate interventions (with the exception of Slovakia).

Sustainability of the external balance regarding the net investment position can be found in Brůna (2013). The author claims that transition economies like V4 countries have difficulties in achieving long-term sustainability and in lowering the ratio of net investment position to GDP, because these countries are net receivers of FDI and thus carry high dividend costs and costs in the form of reinvested earnings.

4. DISCUSSION

Globalization of world economy is inevitably connected with capital flows in all various forms. These capital flows have different causes, which could be divided into two groups. Firstly, they are factors connected with the economic level of given countries, so-called pull factors, which "lure" foreign capital because of their attractiveness. These factors may include the gap between domestic savings and investments, high economic growth, high interest rate differential in favour of the domestic currency, appreciation tendencies of the domestic currency and others, which can bring foreign investors higher yields of their free capital. Also, the liberalization of financial account or the abolishing of barriers to free movement of capital can be important. Inflow of capital can be also the reflection of external influences, which pushes capital to given country (push factors). These are the factors that offer the foreign investors higher yields than the domestic market.

One of the most important topics concerning indebtedness is the relationship between indebtedness and economic growth, thus the issue of foreign capital usage. If the capital is not used efficiently (wrong investments, unproductive consumption etc.), the yield from its usage will not cover the debt service, a country will have to take out another loan to repay the debt and so it gets to the debt spiral, which can at the end lead to unsustainable level of indebtedness and to default.

From the point of view of the foreign debt sustainability it is crucial that the exports of the given country grow faster and that this growth exceeds the costs of servicing debt. This topic is reflected in debt overhand theories, which are devoted to analysis of high foreign indebtedness negative impacts on the host economy. These arguments can be found in Serieux and Samy (2001), or Patillo, Poirson, Ricci (2004). These authors analyse through which channels the high debt influence the host economies. High indebtedness can, according to these researchers, be a source of insecurity about future repayment of debt, as it can cause default of given country and lead to tax hike, public expenditure cuts or debt monetization. Insecurity and instability puts off the investors, the lack of productive investment leads to decrease in real economic growth and the corresponding decrease in revenues of all economic subjects.

Similar approach can be found by Krugman (1988) and Sachs (1989). They assume that if there is a certain probability that the country won´t be able to repay its debt, it may discourage domestic and foreign investors, as they may fear that the more they produce, the more they will be taxed and thus they won´t have the incentive to invest. This argument is explained by the so-called Laffer debt curve. This curve assumes that the higher the debt burden the lower the probability of its repayment. Till certain level of debt, the probability of its repayment grows, but afterwards it goes down. However, there are different views on what the breaking point is. Patillo, Poirson, Ricci (2004) believe it is 160-170% debt ratio to export, or 35-40% debt ratio to GDP. Similar arguments can be found in Cordella, Ricci, Arranzi (2006).

Although there is a number of studies with quantified indebtedness impacts on economic growth, the results are ambiguous. The studies were conducted on different

countries with different economic standards. Studies on developed countries conclude that foreign indebtedness has positive impact on economic growth. See Schclarek (2004), which shows that the foreign indebtedness impact of developing countries is negative, whereas by the developed countries it is positive.
Patillo, Poirson, Ricci (2004) show that high debt burden can influence the growth by two channels – capital accumulation or productivity.
Theories also indicate that debt can have a non-linear impact on growth. However, there are not enough studies that empirically research non-linear impact of debt on growth. Cohen (1997) states that probability of debt restructuring, which is positively dependent on external indebtedness, can reduce growth substantially. Debt is becoming excessive, when it reaches 50% GDP or 200% exports.
Reinhart, Rogoff, Savastano (2003) state that even a relatively low level of debt can trigger a debt crisis. Although the connection between debt and growth is not analysed directly, the results show that in some cases even the debt level of around 15% GNI can be a trigger, if it is a case of a country with default record and with higher inflation.
There are also diverging views, e.g. Easterly (2001), who see the opposite causality. In this case the world economic slow down after 1975 helped to trigger the debt crisis in the 80´s. Lower growth leads to lower tax receipts, which can cause debt explosion.

CONCLUSION

The aim of this article was to identify risk factors in V4 countries regarding foreign indebtedness that could have the potential to destabilize the whole region. To reach this aim the method of comparative analysis was chosen, with the help of crucial indicators with so-called limit or critical levels it was possible to conduct the comparative analysis. These indicators are closely followed by investors and foreign financial institutions.
Gross foreign indebtedness showed possible risk in all V4 countries. However deeper analysis detected that the reason why the figures exceed the critical level of 40% GDP are inter-company loans. They reflect a common feature of V4 countries, the way they are engaged in the world division labour, where the mothers of transnational corporations play the key role.
Deposits of non-residents in domestic banks can reflect positive interest rate differentials (with the exception of Slovakia), but also attractivity of these countries´ securities. In both cases it is dubious, to what extent this represents “debt”, which would be a threat to these countries. More controversial is the situation in Hungary, which has indeed experience with debt crises. Problems of Hungarian subjects regarding their debt holdings in foreign currency could negatively influence the whole image of the region for investors and rating agencies.
Net foreign indebtedness underlines the role of financial claims of V4 countries. The trend indicator of foreign debt to exports can also be viewed positively. Visegrad countries evidence low value, incomparable to countries, which experienced a debt crisis.
Regarding debt sustainability the division between short-term and long-term debt is crucial. In this regard the Czech Republic stands out as it has recently witnessed increase in short-term banking debt. This increase was due to the interest of non-resident who demanded crown assets. The policy of exchange rate commitment,

which brought about this situation, was already abandoned. Therefore, this situation should not carry any substantial risk for the Czech Republic.
The ratio of foreign exchange reserves to short-term debt does not indicate risk of solvency crisis in V4 countries. The special position of Slovakia, a eurozone member, must be considered, when analysing its foreign exchange reserves.
The most worrying is the increase in government debt. The interest of foreign investors in debt securities of these countries can be a sign of their trust in these economies, it is however also connected to serious risks (exchange rate risk) and is and will be connected with the outflow of financial flows abroad. Thus, the issue of in/sufficient absorption of domestic market arises.
The discussions about the connections between foreign debt, economic growth and debt crises continue on the academic level. New issues which concern various debt impacts on various categories of countries are coming up, and there are doubts about the "critical" level of debt indicators based on empirical evidence.

REFERENCES

Boddewyn, J., (1965), The Comparative Approach to the Study of Business Administration. The Academy of Management Journal. Vol. 8, No. 4. 1965. Pp. 261-267 Available at: https://www.jstor.org/stable/255342?seq=1#page_scan_tab_contents [1.2. 2018].

Brůna, K., (2013), Koncept udržitelnosti negativní čisté investiční pozice a jeho aplikace na příkladu České republiky v letech 1999-2011, Politická ekonomie, 2013, 61, No 1., pp. 67-90. ISSN 0032-3233

Cohen, D., (1997), Growth and External Debt: A New Perspective on the African and Latin American Tragedies, Centre for Economic Policy Research Discussion Paper, No. 1753, pp. 1-17.

Cordella, T., Ricci, L., Arranzi, M.R. (2006), Debt Overhang or Debt Irrelevance?: Revisiting the Debt-Growth Link. IMF Working Paper No. 05/223. SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=888092 [1.2. 2018].

CNB (2018), Platební balance, ČNB, Available at:
https://www.cnb.cz/cs/statistika/platebni_bilance_stat/index.html. [1.2.2018].

Durčáková, J., Mandel. M (20047), Mezinárodní finance. Management Press. Praha. 2007. ISBN 978-80-7261-170-6

Easterly, W. R., (2001), Growth Implosions and Debt Explosions: Do Growth

Slowdowns Cause Public Debt Crises?, Contributions to Macroeconomics, Vol. 1, No. 1, Article 1, pp.1-24.

Eurostat (2018a), Net external debt - annual data, http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tipsii20&plugin=1

Eurostat (2018b), Net international investment position – annual data. http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=tipsii10&tableSelection=1 [1.8.2018].

IMF (2003), External Debt Statistics, Guide for Compilers and Users. MMF. Available at: http://www.imf.org/external/pubs/ft/eds/Eng/Guide/index.htm. [1.2.2018].

Krugman, P. (1988), Financing vs. Forgiving a Debt Overhang, Journal of Development Economics, Vol. 29, pp. 253-268.

MNB (2018), Data according to BPM6 Methodology, Magyar Nemzeti Bank. Available at: https://www.mnb.hu/en/statistics/statistical-data-and-information/statistical-time-series/viii-balance-of-payments-foreign-direct-investment-international-investment-position/balance-of-payments-international-investment-position/data-according-to-bpm6-methodology [1.2.2018].

NBP (2018), Statystyka bilansu płatniczego. Narodowy Bank Polski. Available at:

http://www.nbp.pl/home.aspx?f=/statystyka/aktywa_rezerwowe.html. [1.2.2018].

NBS (2009), Výroční zpráva NBS. Národná Banka Slovenska. Available at: https://www.nbs.sk/_img/Documents/_Publikacie/VyrocnaSprava/VSNBS09.pdf [1.2.2018].

NBS (2018), Platební bilance. Národná Banka Slovenska. Available at:

https://www.nbs.sk/sk/statisticke-udaje/statistika-platobnej-bilancie/medzinarodna-investicna-pozicia [1.2.2018].

Patillo, C ., Poirson, H., Ricci, R, (2004), What Are the Channels Through Which External Debt Affects Growth? IMF Working Paper, No. 04/15. January 2004. Available at: https://www.imf.org/en/Publications/WP/Issues/2016/12/30/What-Are-the-Channels-Through-Which-External-Debt-Affects-Growth-17021 [1.2.2018].

Reinhart, C.M., Rogoff, K.S., Savastano, M.A., (2003), Debt Intolerance,

The National Bureau of Economic Research, Working Paper 9908. (DOI): 10.3386/w9908. Available at: http://www.nber.org/papers/w9908 [1.2.2018].

Sachs, J., (1989), The Debt Overhang of Developing Countries, in Guillermo Calvo, Ronald Findlay, Pentti Kouri and Jorge Braga de Macedo (eds.), Debt, Stabilization and Development: Essays in Memory of Carlos Diaz-Alejandro, Blackwell. Oxford, pp. 80-102.

Schclarek, A. (2004), Debt and Economic Growth in Developing and Industrial Countries, Working Papers 2005:34, Lund University, Department of Economics. Available at: https://ideas.repec.org/p/hhs/lunewp/2005_034.html [1.2.2018].

Serieux, J., Samy, Y., (2001), The Debt Service Burden and Growth: Evidence from

Low Income Countries'. WIDER Conference on Debt Relief,

17-18 August. Helsinki: UNU/WIDER. Available at: https://www.researchgate.net/publication/254838017_The_debt_service_burden_and_growth_Evidence_from_low_income_countries [1.2.2018].

Task force on finance statistics (2014), External Debt Statistics: Guide for compilers and users. Available at: http://www.tffs.org/edsguide.htm [1.2.2018].

PESCO AS THE MODERN DEFENSE INITIATIVE OF THE EUROPEAN UNION: POSITIONS OF WESTERN EUROPEAN COUNTRIES VS POSITIONS OF EASTERN EUROPEAN COUNTRIES

Jarosław Nocoń

University of Gdansk,
Department of Political Science,
ul. Bażyńskiego 8, 80-309, Gdańsk, Poland
jaroslaw.nocon@ug.edu.pl

&

Lesia Dorosh

Lviv Polytechnic National University,
Department of Political Science and International Relations,
12 Bandera st., Lviv 79013, Ukraine
lesia.o.dorosh@lpnu.ua

&

Olha Ivasechko

Lviv Polytechnic National University,
Department of Political Science and International Relations,
12 Bandera st., Lviv 79013, Ukraine
ivasechko.2011@ukr.net

Abstract

The EU member states' modern security initiatives, realized by the defence alliance for Permanent Structured Cooperation (PESCO) have been found out. PESCO implementation process was initiated and headed by France and Germany. The countries proposed a step-by-step approach to strengthening defence capabilities and operational commitments to increase the overall defence efforts of United Europe. Allegedly, nowadays there are many practical problems and challenges on the way to the successful implementation of PESCO. Its successful overcoming will be facilitated

by the ability of initiator countries to deal with short-term operational issues. The differences in the strategic culture and models of European defence, the long-term priorities of some member states also will have significant importance for the long-term perspective of the successful functioning of PESCO.

Key words: *European Union, Permanent Structured Cooperation (PESCO), security*

THE RELEVANCE OF SCIENTIFIC RESEARCH

The establishment of cooperation and joint action by the EU countries to guarantee regional and global security are particularly relevant in the light of modern geopolitical, military and information threats and challenges to international and European security. Three key factors of the EU's security and defense policy initiatives revival are highlighted. Firstly, there is considerable destabilization of the EU's geopolitical and security environment. There should be mentioned Ukrainian conflict, tense relations with Russia, mainly of the Baltic States, and hidden energy insecurity on the eastern flanks of the Union. There are increased jihadist terrorism and mass migration from different regions of the Middle East and North Africa, and especially from Syria, on the southern flanks. Secondly, the United Kingdom as one of the security "heavyweights" of Europe exits from the EU. Thirdly, the victory of Donald Trump in the US presidential election raised the question of the future of transatlantic security partnership. Donald Trump became the first US president who expressed an unorthodox point of view on the US role in NATO, openly questioning its existence [Beckmann, Kempin 2017]. The theses of the German Chancellor Angela Merkel "we Europeans must take our fortune, we must fight for our future, for our destiny as Europeans" [Allen, Mulholland 2017] and the German Minister of Defence Ursula von der Leyen "Brexit and the US elections have opened our eyes. Europeans should take more responsibility for their security" sound reasonable considering these factors and considering generally the situation when hybrid threats and transnational terrorism are increasingly emerging in the global security field [Koenig, Walter-Franke 2017].

Taking into account the fact that the EU wants to be a more important player in the global political arena, its member states are eager for their share of participation. The EU has chosen a geostrategic approach to global affairs, adopting the EU Global Strategy in June 2016. It establishes four 'common interests': (i) promoting peace and security, both internal and external, as security outside Europe and within it are closely intertwined; (ii) prosperity, which requires an open and fair international economic system and continuous access to common global resources, taking into account Europe's economic dependence on trade and the need for the unimpeded delivery of natural resources; (iii) promoting the resilience of the Union democratic countries and respect for its norms and values; and (iv) promoting a rules-based global order with the multilateralism as a key principle [Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence 2016; Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy 2016]. Certainly, the EU needs to use all the tools it has at its disposal to promote itself and protect its interests. In this case, the researchers argue security is not just a matter of defence. It also concerns trade and energy policy, development assistance and other EU instruments used to

strengthen security. Neither the military potential should be neglected . Although the EU is strong in trade policy, development, economic and financial assistance or sanctions, it is predominantly weak in military strength [Camporini, Hartley, Maulny, Zandee 2017]. In this context, some EU member states intend to continue to rely on NATO for all defence capabilities, enhancing them, while others seek to use their sovereignty and enhance defence capabilities bilaterally and within the EU [DeMint 2018]. Their modern security initiatives have been embodied in the implementation of the defence union for Permanent Structured Cooperation (PESCO).

The European Council summit was held in Brussels on 22-23 June 2017. The summit decisions have direct implications for the Common Security and Defence Policy (CSDP). The key summit decision was the approval of the EU military integration. France, Germany and the European Commission leaders (first of all European Commission President Jean-Claude Juncker and the EU High Representative for Foreign Affairs and Security Policy Federica Mogherini) have successfully used the opportunity to make changes. The summit communiqué and EU leaders' statements made clear the intention to step up military integration [Moldovan 2017]. Integration should cover the institutional sphere, defence and industrial complex, the EU arms and military equipment market. PESCO should be the core of such integration [European Council meeting (22 and 23 June 2017) - Conclusions 2017], which was finally approved at the European Council meeting on 14 December 2017, bringing together 25 the EU member states (except the United Kingdom, Denmark and Malta) [European Council meeting (14 December 2017) – Conclusions 2017].

On top of that, the EU increases defence funding. The European Commission plans to spend € 500 million from the European Defence Fund on these goals in 2019 and 2020, and to bring the annual funding up to € 1 billion by 2020 [A European Defence Fund: €5.5 billion per year to boost Europe's defence capabilities 2017]. However, this amount seems symbolic and cannot fully ensure the effective functioning of PESCO, comparing to the United States, China or Russia, which spend several hundred billion dollars annually on defence. Specific recommendations are needed to coordinate the EU member states' armed forces and increase their defence capability to increase the Union's defence capability.

PESCO members have approved a list of 17 joint projects in December 2017. It is about the efforts to strengthen cooperation in narrowly defined areas, each with different groups of participants. These projects are divided into two categories. The first group is devoted to operational dimension; these projects are aimed to improve participation in the Common Security and Defence Policy missions and operations (for example, in Crisis Response Operations). The second group projects are aimed at developing capacity (for example, a marine project on (semi-) autonomous mines action systems). Some countries' contributions and the nature of PESCO projects indicate focusing on crisis response in southern Europe. Italy, Spain, Portugal and Greece are involved in the largest number of projects (9-16). Member states from Central Europe participate in 1 to 4 projects on the average; similarly to the Nordic countries (Sweden and Finland take part in three projects each). Only Lithuania and Slovakia are the leading countries in the two projects [Gotkowska 2018].

Therefore, current and future defence initiatives' implementation have been discussed since their initiation, especially between initiating countries representatives (France and Germany) and Eastern European countries and between those who support NATO and those who argue for the need to strengthen the EU's

defence capability. The intensification of such discussions actualises a comprehensive study of the modern defence initiatives within the European region and their prospects in the context of the security strategies of the countries of Western and Eastern Europe.

1. THE THEORETICAL BASIS OF THE STUDY

This study draws on research conducted on identifying contemporary security (which are mainly hybrid) threats facing the EU countries as well as on analyzing proposals and initiatives regarding the search for new cooperation instruments, mechanisms formation and new institutions construction aimed at overcoming modern geopolitical and security challenges. In this context, it is a question of rethinking the post-Westphalian identity, the identity formed after World War II and the Cold War, the identity emerging after the annexation of Crimea by the Russian Federation in 2014. There is a rapidly growing literature on the security efforts of combination/dismemberment in the European and Euro-Atlantic area between NATO and the EU [Apetroe, Gheorghe 2018; Drent 2018; DeMint 2018], and, consequently, discussions on the new defence initiatives prospects. Researchers develop the claim that PESCO is one of the unification instruments for states which have conflicting or incompatible security strategies [Blockmans 2018; Boháček 2018; France, Major, Sartori, 2017]. PESCO is interpreted as embodying the EU's strong desire to act as an important military player. But there are many sceptical visions of the future, and some researchers put forward the view that PESCO does not bring fundamental changes [Howorth 2018; Seitz 2018].

The studies analyzing and comparing the states' positions on PESCO should also be noted. We mean positions of Germany, France, the countries of Eastern Europe that are considering the development of military cooperation within the EU, including PESCO, taking into account their national interests and international positioning [Billon-Galland, Quencez 2017; Gotkowska 2017; Gotkowska 2018; Kempin, Kunz 2017; Keohane 2017; Koenig, Walter-Franke 2017]. In general, researchers make attempts to answer the EU defence initiatives future questions concerning modern security challenges in various dimensions and areas.

Separately, it is necessary to highlight the reviewed EU legal acts, the EU and states' leaders' statements, which indicate the ideas and peculiarities of implementation of defence initiatives [Allen, Mulholland 2017; Permanent Structured Cooperation (PESCO). FR/DE/ES/IT Proposals on the necessary commitments and elements for an inclusive and ambitious PESCO, supported by BE, CZ, FI and NL 2017; Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe 2017; Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy 2016; European Council meeting (22 and 23 June 2017) - Conclusions 2017; European Council meeting (14 December 2017) – Conclusions 2017; Letter of intent concerning the development of a European intervention initiative (EI2) 2018].

Therefore, these and other issues have become the subject of researchers' interest, including Western and Eastern European, other countries scholars. At the same time, the relatively few researches on comparing the positions of PESCO initiator states both among themselves and with the positions of the states with a restrained attitude towards such initiatives should be taken into account.

2. WESTERN EUROPEAN COUNTRIES' PESCO INITIATIVE DISCUSSIONS

Jean-Claude Juncker called PESCO 'the Lisbon Treaty sleeping beauty' [Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe 2017]. Indeed, the defence alliance idea, as outlined in the Lisbon Treaty acquis communautaire, was discussed many times, but member states were not able to agree on its implementation criteria and peculiarities [Gotkowska 2017]. France and Germany have been able to awaken this "beauty" and are leading PESCO implementation process these days. PESCO is a voluntary, inclusive, result-oriented, and legally binding framework for defence cooperation, with an ambitious commitment addressing the most important security and defence challenges.

PESCO members join this union, despite the different approaches to security policy and attitudes towards the development of military cooperation within the EU. For example, on the one hand, PESCO is joined by the Baltic States and Poland, which support NATO, on the other hand, by Austria and Finland, which are not members of the Alliance.

Originally, France pursued extremely ambitious military objectives in the development of the EU's security and defence policy by initiating PESCO. It is about strengthening the military capabilities of participating countries, so they can carry out crisis management operations in the southern regions (Africa and the Middle East), using the EU instruments, structures and financial resources. In the case of Germany, the political dimension of the approach to initiating PESCO was manifested in the desire of this state to support French initiatives for closer European integration at least in one of the spheres, as well as to demonstrate the French-German tandem functionality in the EU. Berlin's desire to show the new US administration the European willingness to take more responsibility for its security and that it can invest more in military cooperation was equally important. Of equal significance, there are also anti-American sentiments, widespread in German society, and ideas about the need to strengthen NATO are unpopular. The question of strengthening industrial cooperation in the EU defence sector also plays a crucial role for Germany, as it is considered beneficial for German defence companies [Gotkowska 2018].

Italy and Spain are also supporters of deepening European defence cooperation, mainly because of the deteriorating security situation at their southern borders, which affects their internal security. For example, Italy sees no real or potential contradiction between a clear NATO commitment and genuine support for deeper military co-operation within the EU [Keohane 2017]. It is also important that these countries seek to "share the burden" of solving the problems with other EU members. Sweden, Finland, the Baltic States and Romania also strongly support the new defence initiatives potential development but are more cautious about the issue of an autonomous EU military command and any other initiative which may call into question the NATO benefits in Europe. All of these countries prefer to avoid further fragmentation of the EU and at the same time to maintain a NATO leading role in European defence [Varga 2017].

The EU member states different points of view have led Germany and France to offer a step-by-step approach enhancing defence capabilities and operational commitments as a means of enhancing the United Europe common defence effort [Billon-Galland, Quencez 2017]. This step-by-step approach will allow the EU member states further cooperation in the defence sphere as intended by two initiating states. The EU countries will be able to develop new commonalities, without

highlighting the significant differences in the vision of the ultimate goals of such cooperation. Thus, such an initiative has fostered optimism sense among Brussels officials and officials from some European capitals in nowadays complex political and institutional environment of the EU. At the same time, there is a caution degree in their statements on the future of the initiative, given the numerous unsuccessful attempts to develop a serious EU defence cooperation project.

The French-German strategic partnership has taken on new dimensions after the victory of the ambitious Emmanuel Macron in the French presidential election. “I want to overcome the stereotype about France, responsible for international affairs, but mired in its internal problems, and about Germany - economically powerful but naive in the face of global threats” - stressed Emmanuel Macron to overcome the old stereotypes in Berlin on January 10, 2017 [Koenig, Walter-Franke 2017]. The defence issues led to the bilateral cooperation agenda. The plan to joint work on “a new generation of fighters” was announced following the French-German Defence and Security Council meeting on July 2017 [Hepher, Thomas 2017]. Both countries have also reaffirmed their support for the EU defence package and have indicated their desire to see the rapid results of such cooperation.

According to the aforementioned, PESCO cooperation programs must meet the highest excellence criteria. These are high-end missions and ‘first-entry’ capability in operations, either in a coalition with the United States, or within NATO, or in a special coalition. Reference is made to the joint production of European fighter jets by France and Germany, naval patrol aircraft for ocean surveillance missions, or European missile defence. PESCO programs can help to develop equipment, which are traditionally shipped from outside the EU, especially from the US. The 10% bonus provided by the European Defence Fund for PESCO programs is a good incentive for other countries to join this cooperation form with extended commitments [Camporini, Hartley, Maulny, Zandee 2017].

However, there were serious disputes between the two countries regarding PESCO until June 2017. Thus, official Paris and Berlin are promoting two different initiative visions. On the one hand, French is focusing on the project ambition and effectiveness potential and insist on high entry criteria and strong operational commitments. On the other hand, Germans view PESCO through the European integration lens, insist on the project inclusivity, warning that setting too high standards for participation in PESCO could strengthen existing disparities, and create new ones within the EU and between many member states. Therefore, Germany has proposed projects also aimed at strengthening cooperation and capacity in non-military areas (such as training, arms, medical supplies and logistics). After all, Germany itself has become a leading country in four projects and has been involved in seven more. On the other hand, France, despite passionate PESCO supporting, eventually became a leading country in only two projects and participated in four [Gotkowska 2018].

Security initiatives ambitions of France are reflected in the fact that President Emmanuel Macron in September 2017 put forward another idea – the creation of European Intervention Initiative, based on the common military force, strategic culture and military doctrine and budgetary instruments. The initiative aims to complement France's bilateral military cooperation with Germany and the United Kingdom. This is likely to mean enhanced cooperation between Paris and member states in Southern Europe (including Spain and Italy), linking the capabilities of these countries with French military potential [Gotkowska 2018].

The European Intervention Initiative implementation remains in doubt these days, with the ongoing negotiations between Paris and European partners. Nine European countries in June 2018 have signed a Letter of Intent [Letter of intent concerning the development of a European intervention initiative (EI2) 2018] setting out the goal of the initiative: developing a common strategic culture which enhance European states ability to carry out military missions and operations within the EU, NATO, UN and/or "ad hoc" coalitions [Drent 2018].

PESCO format discrepancies between initiators were overcome when a compromise was proposed to transform PESCO into a "pledging machine". Member states to join the Union no longer needed to have and provide a high level of potential or operational assets, but instead, they committed to achieving ambitious goals, thus maintaining an inclusive approach. States should be able to contribute to each of PESCO initiatives, as appropriate, and jointly develop specific defence capabilities [France, Major, Sartori 2017]. Thus, PESCO (like integration itself) has evolved into a state, process and ultimate goal - to encourage a group of European countries to increase their defence efforts and improve coordination of their defence policies [Billon-Galland, Quencez 2017]. Each member state was allowed to draw up its schedule to achieve the operational capability objectives. Such proposal has been welcomed by a considerable number of states, including removing concerns of member states from Central and Eastern Europe on NATO remaining the main European territorial security guarantor). Therefore, PESCO combines ambitious (France) and inclusive (Germany) goals to strengthen European strategic autonomy and a "step-by-step approach" to their implementation.

Another caveat concerns the differences in the strategic French and Germany culture, which may result in an inability to share responsibility for security fairly. The researchers, therefore, puts forward the view that Germany's history and its strategic culture do not allow the same types use of military intervention and involvement as France, and this may have consequences in determining the operations European defence should undertake. After all, despite Germany's desire and efforts to enhance its military capabilities, Germany's neighbours, and especially France, often prefer Berlin (due to its history) to remain a limited military force in Europe, thus not exacerbating the discomfort of other European nations.

Despite the considerable number of differences, researchers' views rest on the assumption that Emmanuel Macron and Angela Merkel have initiated the EU defence project, asserting that Europeans, without the British, are less disintegrated than they have often been in the past. However, today they still have a long way to go to be united in defence policy [Howorth 2018].

3. THE EASTERN EUROPEAN COUNTRIES' POSITIONS ON PESCO

We also consider it advisable to analyze the Eastern European countries' positions, notably Poland, which opposes any NATO duplication or disconnection structures at the EU level, and whose involvement in PESCO has been questioned. Countries in the EU's eastern flank, which are directly threatened by Russian aggression and are NATO members, are sceptical to PESCO. Thus, Poland, which is focused on strengthening collective defence and reforming NATO structures, in the face of Russian aggression is actively developing strategic relations and relying on the strong security guarantees provided by the US, which has the greatest military capabilities and will to use them. Poland most openly expressed its concern on the goals and the

initiative's development directions. Poland is not interested in joining PESCO for both strategic and political reasons. Warsaw does not support the European strategic autonomy concept and is a staunch NATO's role defender and the importance of the US in European security. However, political tension between Warsaw, Brussels and Paris also plays an important role [Billon-Galland, Quencez 2017]. Poland fears an autonomous European defence policy, led by France and Germany, can conceal threats from Russia, weaken NATO's transatlantic security, and separate the United States and Britain. Poland also fears that the European defence initiative will not only have privileged access to the EU funds but will also hold back the European project of "multi-speed Europe" by relegating the position of Poland on the periphery of European integration [Varga 2017].

However, Poland supports some initiatives, recognizing the need for greater European cooperation in defence and capacity-building. The country joined the program at the last minute (only participation in two of the initiative's projects was eventually declared). Poland is concerned about the formation of PESCO as an initiative which: (1) promoting the military capability development, mainly for crisis management operations, (2) is profitable for defence industry of the largest member states, (3) is concentrated on threats and challenges from Europe's southern neighbours [Gotkowska 2018]. Joint letter of 13 November 2017 from the Ministers of Foreign Affairs and National Defence of Poland set out three conditions for Poland's participation in PESCO. They are: the NATO's defence planning process priority; competitive, innovative and the European defence industry balanced development to the satisfaction of all member states´ needs; 360-degree approach to security threats with particular attention to the east flank [Blockmans 2018]. Former Polish Prime Minister Beata Szydło stated that 'we want the EU to act effectively in the EU neighbourhood crisis events. However, strategic autonomy should not mean weakening Europe's contribution to NATO's defence and deterrence capabilities' [Drent 2018]. Romania and the Baltic countries share similar doubts.

The Czech Republic, Slovakia and Hungary, which do not feel a direct military threat from Russia, view PESCO for their part as a tool which allows them not to conflict with Paris and Berlin, despite their opposition to French and German initiatives to the EU's migration policies. They also fear of the duplication with the NATO and the Western defence companies' dominance in the EU military-industrial complex [Gotkowska 2018].

In this day, Poland has become the centre of the US Army activity throughout the EU's and NATO's eastern flank. There are about 5,000 US soldiers in the country. The US military presence in Poland includes the Armored Brigade and the Combat Aviation Brigade rotary units, which is a part of the US-led European Deterrence Initiative and the US-led military group as a part of NATO's deterrence policy. Relations with the US have never been so intense, and are primarily viewed through the Eastern European countries' security and energy policy perspective (due to the liquefied gas supply from the US and Washington's opposition to North Stream 2). Thus, discussions on the EU's 'strategic autonomy' in the Western European countries, for this reason, are often incomprehensible to the Eastern European countries [Gotkowska 2018].

Moreover, the Eastern European countries' emphasis on collective defence does not mean that they do not recognize the need to participate in crisis management operations in the south. However, the formula issue of this involvement is often raised. Both Poland and the Baltic States are increasing their presence in the Middle

East within the global US-led coalition against ISIS and are supporting NATO's efforts in this area. For example, Poland has participated in the global coalition against ISIS since July 2016. Four Polish F-16 aircraft (about 150 soldiers) reconnaissance over Syria and Iraq from bases in Kuwait; Polish special forces (about 60 soldiers) trained military personnel in Iraq, and Polish logistics officers team (about 20 soldiers) trained Iraqi technical personnel to support their post-Soviet military equipment. This team (which is likely to be expanded) is to be part of a planned NATO training mission in Iraq [Gotkowska 2018]. It should be noted Poland continues to support NATO and the US. The Polish defence concept 2017 establishes, "All EU actions in the security domain should complement and enrich NATO operations in a non-competitive manner". This document states the NATO's key importance to Poland, "which is the key to our collective defence policy" [Keohane 2017].

Poland, despite ongoing discussions, will participate in the Dutch project to make troops' cross-border movement within the Union more effective along with other PESCO members (a cross-border military transport procedures simplification and standardization). The project will help to reduce the offensive forces deployment time at the active war theatre in the East after NATO's response forces initial use. Besides, Poland and Hungary also want to join the medical project and the French initiative on European security software [Boháček 2018].

Thus, PESCO should not be interpreted merely stereotyped as the EU's 'military might', or the 'EU army' opposing NATO. PESCO potential in the current circumstances is specifically focused on improving and adapting co-operation between the EU countries military systems. Also, the military capabilities developed and enhanced by PESCO (for example, cybersecurity and hybrid threats issues) can be used by the EU member states in other contexts and formats, such as NATO or the UN. For example, Germany can implement PESCO projects which are more in line with NATO's strategic goals. NATO is interested in projects enhancing interoperability, digitization and joint training of troops. This means participation in PESCO shortly will be a part of member states national effort to support NATO's defence projects [Apetroe, Gheorghe 2018]. According to Dick Zandee, the European military-strategic autonomy strengthening is a solution aimed at the equitable burdens sharing within NATO, which the United States has been demanded since Kennedy's presidency. It does not harm NATO, it is in NATO's interest [Camporini, Hartley, Maulny, Zandee 2017].

CONCLUSIONS: DISCUSSIONS ABOUT THE FUTURE

The increasing complexity of security threats and the emergence of the new ones in combination with existing ones (terrorism, hybrids and cyber threats, etc.) require a new approach to guaranteeing European and global security. Such security initiative as PESCO is often seen as a great success because it is about overcoming the EU defence stagnation, the most EU member states readiness to step up their efforts in political, economic, technical and financial aspects. The countries' readiness to join PESCO is truly impressive, and this is what gives hope for a common European vision in the defence field by converging the different countries views on international security issues [Permanent Structured Cooperation – PESCO. Deepening Defence Cooperation among EU Member States 2019].

Weighing up both sides of the argument, the researchers distinguish three key factors that will contribute to PESCO success: firstly, initiators should convey to everyone

the institutional structure and its future key ideas, given the fact that in the security and defence field, the institutions 'beauty' and integration as a goal are not the key value; secondly, PESCO should set a successful example, convincing sceptics that some member states can organize meaningful defence cooperation within, but not outside, the Union; and finally, PESCO should be open to third parties, principally for cooperation with NATO [France, Major, Sartori 2017]. Researchers also propound the view that it is important to ensure the high level of internal coherence and transparent governance, as well as effective links between EU countries and coordination with relevant existing initiatives and projects [France, Major, Sartori 2017]. Member States should understand that rival national interests should not adversely affect the EU's overall image as a regional and global leader. Therefore, PESCO can become a tool to ensure the EU member states' unified position on key issues, which will strengthen the EU's overall position in the international arena and the defence, economic and industrial sectors [Seitz 2018].

Due to geopolitical and institutional threats to the EU (Brexit and the actions of the Donald Trump administration), some researchers argue that PESCO is a security guarantee in the face of tough Brexit and the US refusal to support NATO. This situation certainly will have a negative impact on the EU's future and will also have other consequences, such as breaking the powers fine balance in the East (in particular, in the case of Ukraine), which will undoubtedly enable the Russian Federation to act more threateningly against the countries of Eastern Europe and the Baltic States. PESCO in the worst-case scenario is seen as a "contingency plan" to ensure not only security within the EU but also the neighbouring countries' security from even greater threats. Several projects are already underway in this dimension (EU Neighborhood Policy and Eastern Partnership), which are specifically aimed at achieving a bilateral objective:(1) guaranteeing border security and security in case of the Russian threat increase, terrorist threats arising from migration flows, and other hybrid and cyber threats; (2) becoming the EU's regional leader [Apetroe, Gheorghe 2018].

However, whether PESCO will be able to provide additional impetus to the European security and defence policy development depends on the participating member states willingness to further initiative developing and the European Commission determination to meet PESCO commitments. On the other hand, PESCO initiative may just as well end up as the "Union and Exchange" initiative (since 2011), which has supported military co-operation in narrow areas but has not led to a breakthrough in the EU military capabilities [Gotkowska 2018]. According to experts, Poland has jumped into Europe's "defensive train" instead of staying at the station, expecting someday it will be able to slow it down or even change its direction [Blockmans 2018].

Furthermore, one should not forget about expanding cooperation with NATO. Possible options for cooperation between the EU member states in the security and defence field are analyzed in 'Reflection paper on the future of European defence' (2017) [Reflection paper on the future of European defence 2017]. Despite the French President E. Macron and German Chancellor A. Merkel initiative, this paper specifies further continuing cooperation to rely on the EU member states cooperation with NATO as the main continent security organization. The new European Defence Fund herewith will help to develop several new joint initiatives, but the EU member states will still control defence capabilities development and the major part of procurement. Instead, it does not exclude the possibility of creating, on some member states

initiative, based on Article 42 of the EU Treaty, moving to defence cooperation of higher level, assuming greater commitments to each other's security. The EU in this scenario will be able to carry out special security and defence operations backed by a certain level of the member states defence forces integration. The European Union will also support joint defence programs with the European Defence Fund and set up a dedicated European Defence Research Agency to help in European defence market development capable of protecting its core strategic interests from external influence. NATO leaders directly welcomed the EDF and PESCO initiatives in the EU-NATO Joint Declaration signed on 10 July 2018, deeming them crucial for the European defence capabilities development, which is also extremely important to NATO [Joint Declaration on EU-NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization 2018].

To sum up, the cultural and strategic differences between the Western and Eastern European countries and their impact on the European defence system development should be considered extremely important in the long run. However, nowadays, the member states, according to PESCO initiators, should focus on addressing short-term technological and political issues and leave the "big debate" open. This pragmatic approach to PESCO is mainly focused on the rapid success of this project. Thus, the strategic rapprochement between Paris and Berlin makes it possible to move forward, focusing on specific ambitious projects whose successful implementation would be an impetus for the defence alliance development. The effective PESCO functioning will dramatically change some national security and defence policies towards common approach and, therefore, and towards more general defence and European future understanding. On the other hand, PESCO inability to deliver explicit results can slow the EU down for decades in defence integration, and significantly reduce the impact of other security initiatives within the EU.

The consensus view seems to be that there are many practical problems and challenges of PESCO successful implementation. It successful overcoming will be facilitated by the initiating states' (France and Germany) ability to promptly address short-term issues, such as identifying projects to be implemented and monitoring countries' commitments, as well as their ability to focus on the initiative's specific military effects. On the other hand, it should be understood that important differences in the strategic culture and models of European defence, the long-term priorities of some member states, which are often underestimated in the current security environment, will be important for PESCO successful operation in the long run.

REFERENCES

A European Defence Fund: €5.5 billion per year to boost Europe's defence capabilities (2017). European Commission. Press release data base. Available at: http://europa.eu/rapid/press-release_IP-17-1508_en.htm. [Access: 2019-05-13].

Allen, N., Mulholland, R., (2017), Angela Merkel Says Europe Can No Longer Rely on US or UK – and Must 'Fight for Its Own Destiny'. The Telegraph. [Online]. Available at: http://www.telegraph.co.uk/news/2017/05/28/angela-merkel-says-europe-can-no-longer-rely-us-uk-must-fight/ [Access: 2019-07-25].

Apetroe, A.C., Gheorghe, D., (2018), EU-NATO cooperation: Is PESCO the answer to the balance of EU'S regional priorities? UA: Ukraine Analytika. 3(13). Available at: http://ukraine-analytica.org/wp-content/uploads/Gheorghe.pdf. [Access: 2019-07-05].

Beckmann, R., Kempin R., (2017), EU Defence Policy Needs Strategy: Time for Political Examination of the CSDP's Reform Objectives. SWP Cpmments. Dutch Institute for International Politics. Vol. 1-3. Available at: https://www.swp-berlin.org/fileadmin/contents/products/comments/2017C34_ban_kmp.pdf. [Access: 2019-05-13].

Billon-Galland, A., Quencez, M., (2017), Can France and Germany make PESCO work as a process toward EU defence? The German Marshall Fund of the United States. Policy Brief. Available at: http://www.gmfus.org/publications/can-france-and-germany-make-pesco-work-process-toward-eu-defence [Access: 2019-04-20].

Blockmans, S., (2018), The EU's modular approach to defence integration: an inclusive, ambitious and legally binding PESCO? Common Market Law Review. 55: 1785–1826. Available at: https://www.ceps.eu/system/files/Publication-Journal-20181122-StevenBlockmans-PESCO.pdf [Access: 2019-03-05].

Boháček, P., (2018), PESCO: essential step for the resurrection of European defence. European Security Journal. Available at: https://www.esjnews.com/pesco-european-defence [Access: 2019-05-26].

Camporini, V., Hartley, K., Maulny, J.-P., Zandee, D., (2017), European preference, strategic autonomy and the European Defence Fund. Report. #22. The Armament Industry European Research Group (Ares Group). Available at: https://www.clingendael.org/sites/default/files/2017-11/Ares-22-Report-Nov-2017.pdf. [Access: 2019-07-25].

Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence (2016), European Council. Council of the European Union. Available at: https://www.consilium.europa.eu/en/press/press-releases/2016/11/14/conclusions-eu-global-strategy-security-defence/ [Access: 2019-05-13].

DeMint, H., (2018), EU-NATO Relations: A Future of Cooperation or Conflict? University of Washington. Available at: http://eucenter.scrippscollege.edu/wp-content/uploads/files/2018/03/EU-NATO-Relations-Hope-DeMint.pdf. [Access: 2019-05-13]

Drent, M., (2018), European strategic autonomy: Going it alone? Clingendael. Policy Brief. The Netherlands Institute of International Relations. Available at: https://www.clingendael.org/sites/default/files/2018-08/PB_European_Strategic_Autonomy.pdf [Access: 2019-04-10].

European Council meeting (14 December 2017) – Conclusions (2017). European Council. Council of the European Union. Available at: http://www.consilium.europa.eu /media/32204/14-final-conclusions-rev1-en.pdf]. [Access: 2019-05-13].

European Council meeting (22 and 23 June 2017) - Conclusions (2017). European Council. Council of the European Union. Available at: https://www.consilium.europa.eu /media/23985/22-23-euco-final-conclusions.pd. [Access: 2019-05-13].

France, De O., Major, C., Sartori, P., (2017), How to make PESCO a success. Policy Paper. #21. The Armament Industry European Research Group (Ares Group). Available at: https://www.iris-france.org/wp-content/uploads/2017/09/Ares-21-Policy-Paper-Sept-2017.pdf. [Access: 2019-07-25].

Gotkowska, J. (2017) The CSDP's Renaissance. Challenges and Opportunities for the Eastern Flank. OSW Commentary. [Online]. Available at: https://www.osw. waw.pl/en/publikacje/osw-commentary/2017-06-28/csdps-renaissance-challenges-and-opportunities-eastern-flank. [Access: 2019-07-25].

Gotkowska, J., (2018), The trouble with PESCO. The mirages of European Defence. Point of View 69. Centre for Eastern Studies. Available at: https://www.osw.waw.pl/sites/default/files/pw_69_pesco_ang_net.pdf [Access: 2019-05-15].

Hepher, T., Thomas, L., (2017), France and Germany to develop new European fighter jet. Reuters. [Online]. Available at: https://www.reuters.com/article/us-france-germany-defence/france-and-germany-to-develop-new-european-fighter-jet-idUSKBN19Y1FJ [Access: 2019-04-03].

Howorth, J., (2018), EU-NATO Cooperation and Strategic Autonomy: Logical Contradiction or Ariadne's Thread? KFG Working Paper Series. No. 90. Available at: https://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/wp/WP_90_Howorth/WP_90_Howorth_WEB.pdf. [Access: 2019-07-25].

Joint Declaration on EU-NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization (2018). North Atlantic Treaty Organization. Available at: https://www.nato.int/cps/en/natohq/official_texts_156626.htm. [Access: 2019-05-13].

Kempin, R., Kunz, B., (2017), France, Germany and the Quest for European Strategic Autonomy, Notes du Cerfa 141. Available at: https://www.ifri.org/sites/default/files/atoms/files/ndc_141_kempin_kunz_france_germany_european_strategic_autonomy_dec_2017.pdf. [Access: 2019-07-25].

Keohane, D., (2017), The Defence Policies of Italy and Poland: A Comparison. CSS Analyses in Security Policy. No. 219. Available at: http://www.css.ethz.ch/en/services/digital-library/articles/article.html/90633b69-d719-4ac6-bd0c-6fd73c0c8533 [Access: 2019-07-25].

Koenig, N., Walter-Franke, M., (2017), France and Germany: spearheading a European security and defence union? Jacques Delors Institut. Policy Paper 202. Available at: https://institutdelors.eu/wp-content/uploads/2018/01/franceandgermanyspearheadingaeuropeansecurityanddefenceunion-koenigwalter-jdib-july2017.pdf [Access: 2019-05-23].

Letter of intent concerning the development of a European intervention initiative (EI2) (2018). Available at: https://www.bmvg.de/resource/blob/25706/099f1956962441156817d7f35d08bc50/20180625-letter-of-intent-zu-der-europaeischen-interventionsinitiative-data.pdf. [Access: 2019-05-13].

Moldovan, O., (2017), "Istorychnyi samit" Yevropeiskoi rady: naslidky dlia Ukrainy. Mind.ua. Available at: https://mind.ua/openmind/20173535-istorichnij-samit-evropejskoyi-radi-naslidki-dlya-ukrayini [Access: 2019-05-13].

Muti, K., (2018), Poland: The Missing Link in European Defence. IAI Commentaries. 18|48. Istituto Affari Internazionali (IAI). Available at: https://www.iai.it/en/pubblicazioni/poland-missing-link-european-defence. [Access: 2019-07-25].

Permanent Structured Cooperation – PESCO. Deepening Defence Cooperation among EU Member States (2019). #EU Defence. [Online]. Available at: https://eeas.europa.eu/sites/eeas/files/pesco_factsheet_may_2019.pdf. [Access: 2019-07-25].

Permanent Structured Cooperation (PESCO). FR/DE/ES/IT Proposals on the necessary commitments and elements foran inclusive and ambitious PESCO, supported by BE, CZ, FI and NL. (2017). Letter by the Ministry of Defence of France, Germany, Italy and Spain to the HR, Available at: http://club.bruxelles2.eu/wp-content/uploads/2017/08/principescommuns-pesco-propfrallespita@ue170721.pdf. [Access: 2019-07-25].

Reflection paper on the future of European defence, (2017), European Commission. Available at: https://eeas.europa.eu/sites/eeas/files/reflection-paper-defence_en_1_0.pdf. [Access: 2019-05-13].

Seitz, S., (2018), PESCO's Prospects: Tracing the Path of EU Defence Reform and Considering the Future of Permanent Structured Cooperation. Politics in Theory and Practice. Available at: https://politicstheorypractice.com/2018/02/05/pescos-prospects-tracing-the-path-of-eu-defence-reform-and-considering-the-future-of-permanent-structured-cooperation/ [Access: 2019-05-13].

Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy, (2016), Brussels: European Union External Action Service. Available at: http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf. [Access: 2019-05-13].

Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe, (2017), European Commission – Speech. Available at: http://europa.eu/rapid/press-release_SPEECH-17-1581_en.htm [Access: 2019-05-26].

Varga, G., (2017), Towards European Strategic Autonomy? Evaluating the New CSDP Initiatives. KKI Studies. Series of the Institute for Foreign Affairs and Trade. Available at: https://kki.hu/assets/upload/07_KKI-Studies_CSDP_VargaG_20171003.pdf [Access: 2019-05-13].

JAPAN SELF-DEFENCE FORCES – ORIGIN AND DEVELOPMENT OF THE INSTITUTION

Joanna Marszałek-Kawa

Nicolaus Copernicus University,
Faculty of Political Science and International Studies,
Department of Political System of the Republic of Poland,
Ul. Stefana Batorego 39L, 87–100 Toruń, Poland
kawadj@box43.pl

&

Michał Dahl

Nicolaus Copernicus University,
Faculty of Political Science and International Studies,
Jean Monnet European Studies Centre,
Ul. Stefana Batorego 39L, 87–100 Toruń, Poland
dahl.michal@gmail.com

Abstract

The purpose of this paper is to discuss the origins and evolution of Self-Defence Forces as an institution within the Japanese constitutional system. The analysis also aims to provide answers to the question of the compatibility of Jietai with the Japanese Constitution and its formal status. In order to address the research problem, we have decided to dedicate the first part to issues related to the constitutional principles of pacifism and anti-militarism. It is followed by the description of the process that led to the formation of Japanese Self-Defence Forces. We decided that the turning point of the analysis is the appointment of Liberal Democratic Party's leader, Abe Shinzo, as the 96th Prime Minister of Japan (December 26, 2012). The reforms undertaken by the politician resulted in a rapid change in the character of Self-Defence Forces, putting an end to the hitherto functioning model of Jietai.

Key words: *Japan Self-Defence Forces, Jietai, security policy, Japanese constitution, pacifist clause, constitutional amendment*

INTRODUCTION

In today's globalized world, armed forces, despite their changing character, are still playing a significant role. Even those countries which are members of international organizations - bound by bilateral and multilateral agreements and having formal security guarantees - do not decide to abandon a national army. What is an interesting exception here, is Japan which, under article 9 of the constitution, cannot hold armed forces of any kind and renounces the right of belligerency. In contrast, however, the country still maintains 250,000-strong Self-Defence Forces (Jieitai) [Palowski 2014].

The purpose of the paper is to discuss the origins and evolution of Self-Defence Forces as an institution within the Japanese constitutional system. The analysis also aims to provide answers to the question of the compatibility of Jietai with the Japanese Constitution and its formal status. In order to address the research problem, we have decided to dedicate the first part to issues related to the constitutional principles of pacifism and anti-militarism. It is followed by the description of the process that led to the formation of Japanese Self-Defence Forces. We decided that the turning point of the analysis is the appointment of Liberal Democratic Party's leader, Abe Shinzo, as the 96th Prime Minister of Japan (December 26, 2012). The reforms undertaken by the politician resulted in a rapid change in the character of Self-Defence Forces, putting an end to the hitherto functioning model of Jietai as Due to the limited space we did not address the contemporary aspects of the functioning of Self-Defence Forces in the paper. There is no doubt, however, that it will help to understand the current trends in the evolution of Jietai model.[1]

1. THE CONSTITUTIONAL PRINCIPLES OF PACIFISM AND THEIR IMPLICATIONS

On 2 September 1945, the Japanese delegation signed the act of an unconditional surrender, putting an end to World War II 1945 [Wyszczelski 2008: 156]. This event marked the beginning of almost seven-year long U.S. occupation, resulting in the introduction of significant changes in, among others, the political, economic and legal order of the state (Gordon 2010: 314). Japanese people, who still remembered the power of their country in the inter-war period [Pepłoński, Kuromiya 2008; Wyszczelski 2008], found it extremely difficult to adapt to the new circumstances. The American strategy in Japan, theoretically supported by all allied superpowers, focused on two main areas: demilitarization and democratization [Gordon 2010: 314–315]. It required the logistically complex operation of the dissolution of the Imperial Japanese Army (Dai-Nippon Teikoku Rikugun), followed by the repatriation of almost seven million people to the islands [Gordon 2010: 315]. Soldiers and ship crews were demobilized and most of the military equipment was dismantled [Varley 2006: 298]. Japan was also deprived of the territories it had conquered by force. This also included overseas lands [Varley 2006: 298]. As a result, the borders from before the First Sino-Japanese War of 1894-1895 were restored [Henshall 2011: 170]. The reforms implemented in the years 1945–1946 were thoroughly described by A.

[1] The selected aspects of the functioning of Japanese Self-Defence Forces after Prime Minister Shinzō Abe took office have been the subject of the analyses conducted by a number of researchers of modern international relations. See: Hughes, 2017; Pajon, 2017; Liff, 2017; Cantir, Kaarbo, 2016; Dahl, 2018, pp. 28–32; Dahl, 2016, pp. 128–144; Liff, 2015; Młodawska-Bronowska, 2015.

Gordon in his monograph. According to this eminent japanologist, they were based on the assumption that militarism stemmed from the ejtslack of pluralism, tyranny and poverty, and the construction of new, peaceful Japan was possible only after the army was dissolved [Gordon 2010: 316]. As Gordon pointed out, "the country was in need of extensive reforms, which would lead to the dismantling of the authoritarian political power, the introduction of equal political rights and the rooting of completely new values" [Gordon 2010: 316[.

Constant references to the principles of democracy as understood in the West were reflected in the U.S. efforts to draw up a new constitution [Gordon 2010: 316]. The currently binding fundamental law was adopted on 3 November 1946 and entered into force on 3 May 1947. The occupation authority believed that the democratization of Japan should consist in changing the previous constitutional system, based on the sovereignty of the emperor [Konstytucja… 1990: 16]. This significant change, which was a manifestation of the excessive "Americanization" of constitutional arrangements (not necessarily suited to the Japanese conditions) was not the main factor distinguishing the new fundamental law, though [Karolczak 2008: 15; Varley 2006: 299]. The most important Japanese legal act of 1946 is well-known among constitutionalists thanks to its famous pacifist clause (art. 9) [Japonia 2001: 45]. It was imposed on the Japanese government by the Commander in Chief of the U.S. Armed Forces Pacific, General Douglas MacArthur, although there is no evidence that he was the author of this idea [Henshall 2011: 171]. A separate chapter of the constitution (chapter III) was also dedicated to the principle of pacifism, which stresses its particular role. The mentioned rule was laid out in the following words:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized. [Konstytucja Japonii 1990: 35].

Since it was placed at the beginning of the constitution, before any references to citizens' rights and the organization of the state apparatus, the principle of pacifism was recognized as one of the foundations of the Japanese constitutional system, along with, among others, the principles of: democracy, individualism, ensuring the rights and freedoms of an individual, welfare state and secular state [Konstytucja… 1990: 20–22]. What was the essence of the defence doctrine formulated after World War II was the prevention of remilitarization and resumption of expansionism by consecutive governments [Ho Thanh 2012: 185]. It is a matter for discussion whether some initiatives of Japanese decision-makers, such as "three principles of arms export", "three non-nuclear principles", or the principle of military spending not exceeding the limit of one per cent of GDP, are not in contradiction with Yoshida's doctrine.[2]

Despite Americans' initial satisfaction with the weakening military power of Japan, the Cold War period brought about new challenges in the sphere of international security. The U.S. stance on the total demilitarization of Japan changed following the outbreak of the Korean War. According to some researchers, just a few years after the Japanese army was dissolved, the process of its reconstruction began [Konstytucja…

[2] After the name of Shigeru Yoshida, the Prime Minister of Japan in the years 1948–1954, the author of the concept of close cooperation with the United States [Ho Thanh 2012: 185].

1990: 23]. In 1950, the Japanese government was obliged to establish the National Police Reserve [Trojnar 2008: 55]. The occupation authority ordered that the newly formed troops should consist of no more than 75,000 men [Trojnar 2009: 47]. At the same time, 8,000 men were deployed in the Coast Guard Forces [Niedbalska-Asano Asano, 2012: 158]. The decision was motivated by the need to fill in staff shortages caused by the transferring of American troops from the occupied areas to the Korean front [Niedbalska-Asano, Asano 2012: 158]. Since the US aimed to gain Japan's support as its ally in the war against Communism on the Korean front, it consented to the peace treaty proposed by Prime Minister Yoshida.[3] A few days negotiations were concluded with the signing of the document by the Japanese prime minister on 8 September 1951 in San Francisco (Dover 2014). As J. Tubielewicz indicated, the treaty brought Japan back to dignity, equality and equal opportunities in the family of nations. In the preamble, Japan stressed its intention to join the United Nations and declared that it would respect the provisions of the UN Charter and the ideals of human freedoms and rights. Japan's right to self-defence was recognized, but the moment the occupation troops withdrew (within 90 days since the treaty entered into force), Japan became defenceless. Thus, it was decided that foreign armed forces could be stationed on the territory of Japan under special international arrangements. On the same day, i.e. 8 September, Japan and the U.S. signed the security treaty (ampo-jo yaku), which sanctioned the U.S. military presence in Japan. The text of the treaty did not specify any deadline and did not impose any military obligations on Japan. The U.S. took the whole responsibility for "ensuring the security" of its ally and its occupation forces were to be transformed into garrison forces [Tubielewicz 1984: 428–429].

As the security treaty entered into force in 1952, the National Police Reserve was renamed as the land and maritime National Safety Force and became immediately subordinate to the prime minister. It was also expanded to 110,000 men [Trojnar 2008: 55; Tersa 2014: 60].

2. THE ESTABLISHMENT OF THE JAPANESE SELF-DEFENCE FORCES

In 1954, following the growing social support to the idea of the reconstruction of real armed forces (although in line with the constitutional constraints), a decision was made to establish the Japanese Self-Defence Forces [Tersa 2014: 61], Jieitai, which were meant to be defence forces deployed on the territory of the Japanese archipelago. They replaced the Japanese National Safety Force established two years earlier [Trojnar 2009: 48]. Bearing in mind the previously mentioned pacifist principles included in the Japanese constitution and the provisions of the Japanese-American alliance, one might ask a question about the real reasons behind the idea of the establishment of self-defence forces with limited operational capabilities, especially in the context of the U.S. interests in the Asia-Pacific region [Tersa 2014: 58]. According to M. Tersa, those were two separate issues and "limiting the operational capacity of SDF (Japan Self-Defence Forces, M.D.'s note) was the idea of the Japanese themselves" [Tersa 2014: 58]. It is actually true, however, that it was the social factor that played a significant, if not the key role in establishing the institution – the

[3] The signing of the peace treaty turned out to be a necessary measure to overcome procedural conflicts that were an obstacle to reaching an international agreement in the sphere of the U.S.-Japan cooperation [Tubielewicz 1984: 428–429].

Japanese society blamed the army for the defeat in World War II and that was why there was a fear of generals being granted too much power [Tersa 2014: 58].
As regards the status of the Self-Defence Forces and the directions of their further development, it became necessary to work out a consensus that would be accepted by the largest possible number of political parties and social groups. The government proposed that the famous pacifist clause be reinterpreted depending on the current challenges in foreign and security policy and, in practice, also reflecting the interests of the government camp. This solution has been applied until today. One of the first examples of this approach was the Japanese government's official statement of 1954, according to which "renouncing war" should not be equated with the right to deter other countries from using force against Japan, because such an interpretation of this regulation does not lie in the interest of the nation [Tersa 2014: 61]. The position of some political parties on self-defence forces was dependent on the actual social support to the idea of Jietai. For example, the Japanese Socialist Party (Nihon Shakai-tō, JSP) recognized the state's constitutional right to wage a war only when Japanese people's support to the concept of self-defence forces clearly increased.
Social support became a catalyst for expanding the size of the self-defence forces and for restructuring them. They became the subject of social supervision, exercised by the Japanese Defence Agency (JDA), which was later transformed into the Ministry of Defence [Tersa 2014: 62][4].
In 1971, the so-called three non-nuclear principles entered into force. They were established by Prime Minister Eisaku Satō and stated that Japan would neither posses nor manufacture nuclear weapons, nor would it permit their introduction into its territory [Trojnar 2008: 56; Tersa 2014: 28–32]. Almost ten years later (in 1976), a special act was passed according to which the amount of military expenditure could not exceed the limit of 1 per cent of GDP and which forbade the export of military weapons and technologies [Trojnar 2008: 56[. It is estimated that, in the early 1980s, Jieitai, which had the annual budget of almost nine billion dollars, consisted of 300,000 soldiers, more than 150 warships and almost 100 aircraft [Konstytucja... 1990: 23]. The limit on military spending was abolished in December 1985 [Trojnar 2008: 56]. The main advocate of Japan's greater independence in international and defence issues was the-then Prime Minister, Yasuhiro Nakasone, member of the Liberal-Democratic Party [LPD; Trojnar 2009: 48]. He managed to increase military expenses and contributed to the improvement in the quality of the Self-Defence Forces and to them being more clearly defined as defensive forces.[5]

3. THE TURBULENT 1990s – JIEITAI IN THE ERA OF CHANGES

The end of the Cold War and, thus, the diminishing threat of spreading the Communist ideology, created a favourable environment for demands concerning the revision of Japanese-U.S. relations. It was the American military presence on the territory of an independent state that raised particular controversy (Gordon 2010: 445). Both the ruling and opposition parties advocated the need for the intensification of Japan's activity in the international area [Ho Thanh 2012: 187[.

[4] Detailed information on the Japanese defence Agency (since 2007, the Ministry Defence) can be found on the official website of the institution (*About Ministry*).
[5] In 1987 and 1988, the share of military spending exceeded 6.5% of the government expenditure, amounting to, respectively. 25.5 and 28.8 billion dollars [Trojnar 2009: 48[.

In 1991, a decision was made to provide financial support to Operation Desert Storm and send the Self-Defence troops to aid the allied forces in clearing the waters of the Persian Gulf [Trojnar 2009: 48]. Although Japan's participation was not of a military character (the Japanese sent four minesweepers and two auxiliary ships to clear the way for supplies and transport of oil), it was severely criticized by the society.[6] Despite moderate strategic and military achievements, the operation turned out to be a PR success, which promoted the SDF's activity outside the country borders. [Tersa 2014: 73–74]. The society also changed its attitude regarding the participation of the Self-Defence Forces in overseas missions. In June 1991 (just two months after sending the ships), the "Asahi" daily conducted a survey the results of which showed that 65% of the respondents found participation in the mission to be a good idea, although problematic due to constitutional provisions, while only 24% considered it to be a mistake [Tersa 2014: 74]. Thanks to sending minesweepers to the Gulf War, the Japanese society began to believe that the Self-Defence Forces could take part in foreign operations, which, on the one hand, have a peaceful function and humanitarian dimension, and do not put Japanese soldiers at risk, but, on the other hand, require military expertise. It can be said that it was the first step towards reassuring the public opinion, who feared that foreign missions were inseparably linked with aggression, like in the times of World War II [Tersa 2014: 74].

At the same time, it should be pointed out that the international community's expectations concerning Japan's participation in the Persian Gulf War made Japanese decision-makers aware how important the state's direct involvement in global conflicts is for its foreign policy [Ho Thanh 2012: 187]. What followed the debate on this issue was the adoption by the Japanese parliament of the Law on Cooperation in International Peacekeeping on 15 June 1992 [Trojnar 2009: 48]. The SDF's participation in peacekeeping missions was limited to the cases in which:

- the agreement was reached regarding a suspension of military action in the area of a mission,
- the parties directly involved in the conflict agreed to the presence of peacekeeping forces, including the Japanese troops,
- the UN forces remain impartial [Trojnar 2009: 48].

The Japanese government reserved the right to withdraw the contingent in the event of the violation of the above conditions [Tersa 2014: 75]. The use of firearms was allowed only in self-defence and the number of Japanese soldiers was limited to 2,000 men. [Tersa 2014: 75–76]. The first mission with the participation of the Self-Defence Forces was organized in 1992 in Cambodia [Karolczak 2008: 16]. In the subsequent years, the forces took part in a few other peacekeeping operations of the United Nations, among others in Angola (1992), Mozambique (1993–1995), Salvador (1994) and in the Golan Heights [1996; Gordon 2010: 445; Szafraniec 2012].

The signing of the Japan-U.S. joint declaration on security and alliance for the 21st century [Ho Thanh 2012: 190] did not solve all problems in the bilateral relations. What remained a contentious issue was the scope of the SDF's tasks, which, according to Americans, was too narrow and focused on the protection of the Japanese islands [Gordon 2010: 445]. Under the pressure from Washington, the Japanese government proposed new guidelines regarding the activity of the Self-

[6] In order to express dissatisfaction with the participation of Japanese troops in the mission, a number of protest rallies were organized. Even cars were burned, which is a rare occurrence in the Japanese public life [Tersa 2014: 73].

Defence Forces, limiting their operations to providing "the logistics support to U.S. troops outside Japan in crisis situations in the region" [Gordon 2010: 445]. The powers of Jieitai were extended to carrying out "the inspection of vessels belonging to third countries and rescue operations concerning the staff of the U.S. forces and the Japanese abroad" [Gordon 2010: 445–446].

The events of 11 September of 2001 brought about more changes in Japan's security policy. Following the U.S. declaration on the war with terrorism, the parliament adopted a set of acts on special measures to combat it [Kosmala-Kozłowska 2012: 160]. P. Szafraniec drew attention to Prime Minister Jun'ichirō Koizumi's quick (as for Japanese standards) response to the ensuing situation, indicating that the agreement of the most important political parties[7] was possible in such a short time owing to the LDP's decision to abandon its custom of internal consultations because of extraordinary circumstances [Szafraniec 2012: 142]. Under the adopted Antiterrorism Special Measures Law, Japanese soldiers could take part in overseas logistics operations (for the period no longer than two years), and it was already in November 2001 that approximately 1,000-strong Japanese forces were sent to the Indian Ocean to provide aid to the U.S. campaign in Afghanistan [Kosmala-Kozłowska 2012: 140]. The technical backup for the dispatched contingent consisted of three destroyers: "Kirisame", "Kurama" and "Sawagiri", two auxiliary ships: "Hamana" and "Towada", and minesweeper "Uraga" [Trojnar 2009: 49]. In July 2003, Japan made a decision to help in the process of the reconstruction of Iraq. Consequently, from March 2004 to December 2006, the Japan Self-Defence Forces took part in the humanitarian operation in Al-Musanna province [Trojnar 2009: 49]. It should be noted that, despite Prime Minister Koizumi's assurances that Japanese soldiers would stay outside the war zone, it was the first time since World War II that the Japanese armed forces had been stationed outside the country borders in the direct vicinity of the area of military operations [Kosmala-Kozłowska 2012: 161]. On the other hand, it is a fact that, unlike other contingents, no Japanese soldier died while serving in Iraq.[8] During Prime Minister Koizumi's three terms of office (2001-2006), Japan was an advocate of the UN reforms, hand in hand with Germany, Brazil and the RSA, taking efforts towards becoming a member of the Security Council. None of these countries has managed to achieve it so far [Ho Thanh 2012: 192].

The history of the establishment and evolution of the Japan Self-Defence Forces reflects the uniqueness of the Japanese political system in comparison to other South-East Asian countries, marked by the army's significant influence on governance [Haliżak 1999: 349]. However, we can still observe that the prime minister's charisma has a considerable impact on the way in which decisions important for the interest of the state are made. Shinzō Abe, the Prime Minister of Japan in the years 2006–2007 and since 26 December 2012, is an example of such a politician. One of his priorities is to amend the pacifist constitutional provisions. He called for taking steps towards this goal on 3 May 2007, exactly 60 years after the adoption of the current fundamental law [Ho Thanh 2012: 193].

In March 2009, when Tarō Asō held the prime minister's office, the Japan Self-Defence Forces took part in the anti-piracy coalition off the coast of Somalia [Ho Thanh 2012:

[7] The agreement of 25 September 2001, concerning anti-terrorist legislation, was the outcome of a compromise between the Liberal-Democratic Party (LDP), the Conservative Party and the Political Federation for Clean Government (*Komeito*).

[8] Despite the fact that the total number of 5,500 soldiers took part in ten three-month mission cycles [Trojnar 2009: 61].

193]. On 5 February 2010, a decision was made to send the SDF to join the UN mission in Haiti. This step, which undoubtedly improved the image of Japan in the international arena, is considered to have been a great achievement of Prime Minister Yukio Hatoyama from the Democratic Party [Ho Thanh 2012: 194]. Hakoyama's initial declarations concerning the closure of the American military base in Okinawa, did not make him popular (Japanese PM 2010). The main threats to Japan's security have also changed, with tensions between two Koreas and Russian and Chinese expansionism (reflected especially in the PRC's activity in the Pacific area) growing in importance [Ho Thanh 2012: 194; Kosmala-Kozłowska 2012: 165–168].[9]

The above changes in the way of operation of the Japan Self-Defence Forces, despite the significant extension of their powers, have always been based on the reinterpretation of art. 9 of the constitution. When the leader of the Liberal-Democratic Party, Shinzō Abe became the head of government again on 26 December 2012, some saw it as an opportunity to amend the pacifist regulations. The prime minister's actions, coupled with the fact that his party obtained the constitutional majority (in the parliamentary election of 2017), allow us to expect that the status of Jietai will undergo unprecedented changes within a few years.

CONCLUSIONS

Despite the fact that the Japan Self-Defence Forces were formally established in 1954, their origin dates back to the end of World War II. Our analysis proves that Japan has never definitely abandoned armed forces, although it has never officially maintained them. Taking into consideration the geopolitical position of the state, this approach of Japanese decision-makers comes as no surprise. The functioning of the Self-Defence Forces, which are de facto the army of Japan, has become possible thanks to the appropriate interpretation of the so-called pacifist clause included in the Japanese constitution (art. 9).

The new order on the Japanese political scene, which began several years ago, is marked by, among others, a more flexible approach to the anti-military provisions in the constitution [Żakowski 2009: 61]. In this context, it must be remembered that the knowledge of the history of Jietai, its origin and evolution, is necessary to properly analyze the subsequent drafts of the Japanese fundamental law. Asian cultures, including the Japanese one, are characterized by continuity (also regarding institutions), which – as we hope – this paper helped to show with reference to the Self-Defence Forces.

REFERENCES

About Ministry. Ministry of Defence. Retrieved from http://www.mod.go.jp/e/about/history.html (Accessed February 2, 2018).

Cantir, C., Kaarbo, J., (2016), Domestic Role Contestation, Foreign Policy, and International Relations. London: Routledge.

[9] The debate in the media has a considerable influence on Japanese people's attitude to the reinterpretation of the pacifist clause. See: Tökölyová, Modrzejewski 2013.

Dahl, M., (2016), Japońskie Siły Samoobrony wobec wyzwań XXI wieku. [in:] J. Marszałek-Kawa, T. Bodio (ed.), Polityka bezpieczeństwa w regionie Azji i Pacyfiku. Toruń: Wydawnictwo Adam Marszałek, pp. 128–144.

Dahl, M., (2018), Japońskie siły samobrony. Uśpiona potęga. Wiadomości Historyczne z Wiedzą o Społeczeństwie, Vol. 3.

Dover, J.W., (2014), The San Francisco System: Past, Present, Future in U.S.-Japan-China Relations. The Asia-Pacific Journal. Retrieved from http://www.japanfocus.org/-John_W_-Dower/4079/article.html (Accessed February 2, 2018).

Gordon, A., (2010), Nowożytna historia Japonii. Warsaw: Państwowy Instytut Wydawniczy.

Haliżak, E., (1999), Stosunki międzynarodowe w regionie Azji i Pacyfiku. Warsaw: Scholar.

Henshall, K., (2011), Historia Japonii. Warsaw: Bellona.

Ho, Thanh Ł., (2012), Zmiany w japońskiej polityce bezpieczeństwa w pierwszej dekadzie XXI wieku. in: J. Marszałek-Kawa, R. Gawłowski (ed.), Ewolucja azjatyckiej polityki bezpieczeństwa. Toruń: Wydawnictwo Adam Marszałek, pp. 183–210.

Hughes, C.W., (2017), Japan's Strategic Trajectory and Collective Self-Defence: Essential Continuity or Radical Shift?. The Journal of Japanese Studies, Vol. 43, No. 1, pp. 93–126.

Japanese PM Yukio Hatoyama resigns amid Okinawa row. BBC News. Retrieved from http://www.bbc.com/news/10211314. (Accessed February 5, 2018).

Japonia (2001), in: Popularna Encyklopedia Powszechna, Vol. VIII, M. Szulc (ed.). Kraków: Pinnex.

Karolczak, K., (2008), System konstytucyjny Japonii. Warsaw: Wydawnictwo Sejmowe.

Konstytucja Japonii, (1990), Transl. T. Suzuki, P. Winczorek. Wrocław: Zakład Narodowy im. Ossolińskich.

Kosmala-Kozłowska, M., (2012), Japonia sięga po miecz? Renesans mocarstwowości – aspekt militarny. in: J. Marszałek-Kawa (ed.), Meandry japońskiej polityki. Toruń: Wydawnictwo Adam Marszałek, pp. 148–186.

Liff, A.P., (2015), Japan's Defence Policy: Abe the Evolutionary. The Washington Quarterly, Vol. 38, Issue 2, pp. 79–99.

Liff, A.P., (2017), Policy by Other Means: Collective Self-Defence and the Politics of Japan's Postwar Constitutional Reinterpretations. Asia Policy, No. 24, pp. 139–172.

Młodawska-Bronowska, J., (ed.) (2015), New Opportunities for Polish-Japanese Cooperation: Diagnosis and Prospects. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Niedbalska-Asano, P., Asano, M., (2012), Japonia. Leksykon. Warsaw: Książka i Wiedza.

Pajon, C., (2017), Japan's Coast Guard and Maritime Self-Defence Force in the East China Sea: Can a Black-and-White System Adapt to a Gray-Zone Reality? Asia Policy, Vol. 23, pp. 111–130.

Palowski, J., (2018), Nowe wytyczne dla rozwoju Japońskich Sił Samoobrony. Defence 24. Retrieved from http://www.defence24.pl/analiza_nowe-wytyczne-dla-rozwoju-japonskich-sil-samoobrony. (Accessed January 31, 2018).

Pepłoński, A., Kuromiya, H., (2008), Uwarunkowania polsko-japońskiej współpracy wywiadowczej w okresie międzywojennym. in: J. Marszałek-Kawa (ed.), Japonia. Historia i współczesność. Toruń: Wydawnictwo Adam Marszałek, pp. 157–194.

Szafraniec, P., (2012), Japonia a misje pokojowe ONZ w świetle postzimnowojennych wyzwań japońskiej polityki bezpieczeństwa. [in:] J. Marszałek-Kawa (ed.), Meandry japońskiej polityki. Toruń: Wydawnictwo Adam Marszałek, pp. 114–147.

Tersa, M., (2014), Japonia na zawsze wyrzeka się wojny. Współczesna sytuacja geopolityczna a japońska polityka bezpieczeństwa. Bydgoszcz: Kirin.

Tökölyová, T, Modrzejewski, A., (2013), Role of mass media in foreign policy decision-making. European Journal of Transformation Studies, Vol. 1, pp. 37–47.

Trojnar, E., (2009), Japonia z monarchie Zatoki Perskiej. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Trojnar, E., (2008), Konstytucja Japonii a wyzwania bezpieczeństwa międzynarodowego. [in:] J. Marszałek-Kawa (ed.), Japonia. Historia i współczesność. Toruń: Wydawnictwo Adam Marszałek, pp. 51–67.

Tubielewicz, J., (1984), Historia Japonii. Wrocław: Zakład Narodowy im. Ossolińskich.

Wyszczelski, L., (2008), Militarna rola Japonii w okresie międzywojennym w globalnej strategii panowania na świecie. in: J. Marszałek-Kawa, Japonia. Historia i współczesność. Toruń: Wydawnictwo Adam Marszałek, pp. 140–156.

Varley, P., (2006), Kultura japońska. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Żakowski, K., (2009), Problem rewizji konstytucji a japońska polityka bezpieczeństwa w XXI w. in: M. Pietrasiak, D. Mierzejewski (ed.), Chiny i Japonia. Dylematy mocarstw w Azji Wschodniej. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, pp. 61–73).

POLISH AMERICANS IN TOLEDO, OHIO, USA: ETHNICITY AND HOLIDAY TRADITIONS

David J. Jackson

Bowling Green State University,
Department of Political Science, BGSU,
Bowling Green, Ohio 43403-0001, USA
jacksod@bgsu.edu

Abstract

This paper presents a case study of Polish American Christmas events in Toledo, Ohio in 2013 through interviews and participant-observation ethnographic research.[1] It also briefly examines the history of the Polish American presence in Toledo, as well as the challenges the community faces now that its members no longer live in geographically concentrated neighborhoods. Despite the changing tastes of Toledoans both of Polish origin and other backgrounds, as well as controversies surrounding some Polish American events, a noticeable Polish American presence remains in the city and region, and is especially active around Christmas time.

Key words: *ethnicity, identity, Polish-American, holidays, Christmas*

INTRODUCTION

Near the end of the second decade of the 21st century, what, if anything, does ethnicity mean for white Americans? Does categorization by ethnicity actually demonstrate any forms of difference among the assimilated descendants of European immigrants from the great wave of immigration between the end of the 19th century and the beginning of the 20th century? Given intermarriage among white ethnics, how does one decide if one is Polish, German, or Irish American? The continuing presence of St. Patrick's Day celebrations, Oktoberfests, Polish festivals and Dyngus Days may signify real interest in ethnic expression, or they may be ways for bars, towns and ethnic organizations to make a quick dollar by exploiting people's need to feel connected to something larger than themselves.

Polish Americans of the third, fourth and fifth generations are many decades removed from their immigrant ancestors, and their ties to Polish traditions and heritage may be on the wane. This leads many scholars to argue that being descended from white

[1] Interviews were conducted mostly through email to afford participants the opportunity to express fully complicated thoughts about their ethnic identity and community.

European immigrants no longer plays a significant role in the day-to-day formation of personal and communal identity. Herbert Gans saw the renewed interest in ethnicity among fourth generation white ethnics in the 1960s and 1970s as not a true ethnic revival, but instead as a change from the lived ethnicity of the previous generations to what he termed "symbolic ethnicity." Symbolic ethnicity is, "a nostalgic allegiance to the culture of the immigrant generation, or that of the old country; a love for and a pride in a tradition that can be felt without having to be incorporated in everyday behavior" [Gans 1979: 9] Alba studied mostly European ethnic-Americans in Albany, New York, and found support for Gans' theory, as well evidence of the growth of a pan-European ethnic identity [Alba 1990]. Waters went much further and controversially claimed that the symbolic ethnicity of white Americans is "optional" and "contentless" [Waters 1991]. In Waters' analysis, for today's descendants of 19th and early 20th century European immigrants, ethnicity is something that can be switched on and off at will. In this sense, ethnicity becomes an individual choice, as opposed to being more nearly a fixed and immutable group characteristic.

On the other hand, many scholars note the persistence of ethnic identity among white Americans, or are less harshly critical of symbolic ethnicity. Erdmans (2000) claims, "Closed immigration doors, sealed borders, and a hostile assimilationist policy characterized the situation for Polish Americans for much of (the 20th) century" [Erdmans 2000: 23]. The opposite of each of these in the 1990s led her to predict the persistence of ethnic identity among Polish Americans. Her work also points out the complexity of the Polish American community when she writes, "The meaning of Polishness differs depending on whether one is foreign-born or native-born Polonian, it depends on whether one has been here five or fifty years, and it depends on what Poland looked like when they or their ancestors left" [Erdmans 2000: 23].

Bayor argues that ethnicity among whites, "continues to have some meaning and represents the basis for some differences in values and behavior among various ethnic groups" [Bayor 2009: 20]. Data shows that, "(d)ifferences exist between ethnic groups on matters that include child rearing, mental illness, attitudes toward disease, disease rates, and family values" [Bayor 2009: 21]. Interestingly, individuals need not adopt an ethnic identity or live in an ethnic culture for these differences to persist.

In a study of the old Italian neighborhood in Boston, Smajda and Gerteis point out that many Americans seek out ethnic experiences, and, "(t)his search for ethnic roots and identifications may take on real subjective importance in a multicultural world, even if whites' identification remains largely symbolic" [Smajda & Gerteis 2012: 620]. By this understanding, ethnic identity can be very important at the individual level, even if it does not occur on a daily basis in an ethnic neighborhood.

In his introductory and summary chapters to the collected works of Helena Stankiewicz Zand concerning Polish American folkways, Obidinski discusses the limitations of quantitative measures of ethnic persistence among Polish Americans, and argues in favor of instead examining folkways as ethnic expression. He examines which folkways that Zand identified persist and which have faded (as of 1987) and made the interesting claim that, "Among future generations of Polish Americans, the expression of Polonian ethnicity may emphasize public celebrations rather than the forms of private family ritual" [Obidinski & Stankiewicz Zand 1987: 131]. This transformation of ethnicity from private, family based activities to public behaviors and rituals seems unlikely given the millions of Polish American families and their adaptations of Polish folkways, but his prediction certainly accurately foreshadowed

the growth of Polish American festivals, public Wigilia celebrations, Dyngus Days, and so on.

Finally, scholars have recently demonstrated that, for some Polish Americans of the fourth or fifth generation, there remain negative consequences of others identifying them with their ethnic heritage. A recent survey of young Polish Americans enrolled at universities and a community college in Ohio showed that 17.1% have felt unfairly treated because of their Polish ethnic origin [Jackson & Liggett 2018]. Clearly for some Polish Americans, their ethnicity is not exclusively symbolic and contentless, but can still come with negative consequences.

This article examines through interviews and participant observation how a number of Polish American groups in Toledo, Ohio maintain and promote Polish American culture and identity. Specifically, it looks at how a small number of groups celebrated the pre-Christmas holiday season with special events in 2013[2]. These groups consist of and are led by third and fourth generation descendants of the massive wave of immigration that brought Polish people to Toledo more than 100 years ago. Toledo does not attract large numbers of Polish immigrants currently, as do cities such as Detroit, Chicago, Houston and so on, so Toledo's Polonia is not being linguistically and culturally refreshed as are the groups in other cities. Before the analysis of these Christmas events, a brief examination of the size and history of the Polish American community of Toledo is presented. The paper concludes with an examination of which events have continued or been added, which have folded, and what the future of Toledo Polonian events might look like given the activities of a secular Polish American umbrella organization.

1. POLISH AMERICANS IN TOLEDO

According to the 2000 U.S. Census, there were 31,802 Polish Americans in Toledo, which represented 10.1% of the city's population [American Fact Finder: https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml, retrieved 21 May, 2019]. The 2017American Community Survey produced by the Census Bureau put the number of Polish Americans at 23,074, or 8.3% of the total population (American Fact Finder: https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml, retrieved 21 May, 2019). While these numbers make it appear as if the Polish American population declined significantly, a fairer analysis of the full data would suggest that the region's Polish American population remained quite high.

Toledo is a city of about 279,455 people located in Lucas County, which according to the 2017 American Community Survey has a population of 433,404 (American Fact Finder: https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml, retrieved 21 May, 2019). Of those, 38,056, or 8.8%, identify as Polish American. There is, therefore, a significant Polish American population in both Toledo's city proper, as well as in the region. These numbers do not include the Polish American population

[2] In 2013 there were a number of groups in Toledo, Ohio that promoted Polish or Polish American culture. These included the Toledo Area Polka Society, The Toledo Polish Genealogical Society, The International Music Association (since disbanded), The Toledo-Poznań Sister City Alliance, the Polish American Concert Band, the Polish American Community of Toledo, The Alliance of Poles, The Polish Roman Catholic Union of America and the Commodore Club. This paper examines the activities of the Toledo Area Polka Society, the Polish American Concert Band, the Polish American Community of Toledo, The Polish Roman Catholic Union of America, and the Commodore Club.

of Toledo's southern suburbs, because these are located in a different county, Wood County. The 2017 American Community Survey reports that there are 10,121 Polish Americans in Wood County, and many of those reside in suburbs of the city of Toledo, such as Rossford and Perrysburg (American Fact Finder: https:// factfinder.census.gov/faces/nav/jsf/pages/index.xhtml, retrieved 21 May, 2019). Polish Americans appear to be leaving the city of Toledo in substantial numbers, but the Toledo region remains home to a significant Polish American population.

There were two predominantly Polish American neighborhoods in Toledo: Lagrange (sometimes called Lagrinka, but in this paper referred to as Lagrange) and Kuszwanc. Neither is predominantly Polish American anymore, with African-Americans primarily replacing the Polish population. Of the two neighborhoods, Lagrange appears to be in better shape economically, and benefited from a very active neighborhood-based economic development corporation first called Lagrange Development Corporation, but later changed to United North, that purchased and rehabilitated homes, promoted business growth, and engaged in significant community organizing around issues of crime and overall quality of life. They also organized a Polish festival in the neighborhood. The Catholic parish in Kuszwanc (St. Anthony of Padua) was closed by the diocese of Toledo in 2005, and one of two parishes in Lagrange (St. Hedwig) closed in 2012[3]. In 2013 there were still a few Polish American oriented businesses in each area, including The Alliance of Poles in Kushwanc, the Commodore Club in Lagrange, and a Polish American meat market in Lagrange called Stanley's Market, which has operated since 1932[4].

In a study of Chicago's Polonia, Erdmans distinguishes between "ethnic" Polish Americans and "immigrants" [Erdmans 1995: 175–95]. Ethnics are the descendants of the great wave of immigration, while immigrants are more newly arrived. Despite some apparent connections, the needs of the groups are so different that cooperation is nearly impossible. Ethnic Polish Americans maintain an emotional connection with their ancestors' homeland, defend themselves against stereotypes and promote "Polish Pride," and do not speak proper Polish. Immigrants need help finding a job, speak modern Polish, and remember a country far different from the one the ancestors of the ethnics fled at the turn of the last century. For both groups, however, "Polishness" is a meaningful, if very different, part of their lives. The overwhelming majority of the participants in the events described below are best classified as "ethnics."

Analysis of Polish-American ethnicity must account for economic class. Richard Alba presents multiple theories about ethnic identity. In the first of these, "Ethnicity (is) viewed as a working- and lower-class style" [Alba 1990: 27]. Underlying this is the notion that ethnics live and work together, which contributes to their life chances and strengthens their communal feelings. He claims if this theory were true, then, "Ethnic identities should be more common and more salient in lower socioeconomic groups than in higher ones" [Alba 1990: 27]. I do not know the economic background of all of the participants, but I do know the occupations of many of the musicians and organization leaders. Among the occupations of these ethnic leaders are real estate agent, banker, railroad engineer (a skilled position), professional musician,

[3] Technically, it was merged with the other Polish American Parish, St Adalbert, creating the merged St. Hedwig-St. Adalbert parish that utilizes the St. Adalbert buildings.

[4] A pictorial history of Polish Americans in Toledo appears in Richard Philiposki (2009), Toledo's Polonia, Charleston, SC: Arcadia Publishing.

pharmacist, mortgage loan officer, and so on. These are not low status or lower-class occupations.

2. TOLEDO AREA POLKA SOCIETY

The Toledo Area Polka Society, or TAPS as it is known, was founded in 1982 in an East Toledo garage. The central purpose of the organization had been to present one polka dance per month from September to May. Because of their creation of a wildly popular summer picnic/polka festival held in June in suburban Oregon, Ohio, the group now hosts fewer monthly dances. Originally, the organization held their dances at the LaPark nightclub in the Lagrange neighborhood, but moved them to an American Legion hall on the outskirts of the city when the club closed. The dances have now moved to the Polish Roman Catholic Union of America hall in Toledo. The organization reports that its membership peaked at about 750, but had dropped to fewer than 400 by 2013.

On December 15, 2013 TAPS held their annual Christmas dinner dance. Approximately 175 people attended, mostly the third and fourth generations of Polish Americans, but some young children were in attendance too and received gifts from a member dressed as Santa Claus. Music was provided by local musicians organized as The Czelusta Park All-Stars (styled after a park in the Lagrange neighborhood that was named for a former Polish American Mayor of Toledo). Evoking the Wigilia traditions of Poland, opłatek wafers were available on every table, and verbal explanations of what to do with them were given by organization leaders. Table decorations were minimal, including the obligatory poinsettias, but straw was also included, which reflects the Polish tradition of putting straw in Wigilia place settings to evoke the manger in which Jesus Christ was born. On each table were several photocopies of the lyrics to traditional Polish Christmas songs[5].

The music was performed by a four-piece polka band with accordion, drums, and two trumpets (sometimes one of the trumpet players would play clarinet instead). Songs played included traditional Polish American non-holiday polkas, waltzes, and obereks as well as traditional English-language Christmas songs. The event included performances of traditional Polish-language Christmas carols by a trio of Toledo vocalists: Ed Biegaj, Eric Hite and Rob McMahon. Usually the Polish Christmas music is segregated into just one portion of the performance, between sets of polka music. However, in 2013, due mostly to accidents of scheduling, there were two sets of kolędy, which were generally well received by the audience. One 70 year-old female said she was pleased there would be at least two sets of kolędy, because when there is only one she feels sad when it ends, because that is the last she will hear of Polish

[5] That the event occurred in Advent did not cause any negative comments from participants. This may be because this is when the event is traditionally held, and because in highly assimilated ethnic Catholic communities the liturgical calendar may prevail in church, but less so in people's daily lives. As Obidinski (1987) points out, "…'Wigilia' and 'Swieconka' traditions, once restricted to family members in private homes, have become public social events involving dinners and entertainment in public settings," (p. 125) and may therefore be perceived less as religious rituals as community activities. Finally, Fr. Thomas Extejt of the sole remaining parish in one of Toledo's formerly predominantly Polish American neighborhoods reports, "We also do the Christmas Eve supper earlier in December. We rent a hall that is accessible for people with disabilities (our parish hall isn't), and eat together as a parish. People from other parts of Toledo, from Michigan, and even from other parts of the Toledo Diocese will join us. The Bishop has come in the past, but he is often involved with celebrations of Our Lady of Guadalupe".

language music for the season. However, not everyone was pleased by the increased quantity of Christmas music. A 52 year-old who claimed to be speaking for others, asserted that there should be more polka dance music and less kolędy -- that the Polish Christmas music was a distraction from what this respondent believed to be the major purpose of the dinner dance.

Following Hobsbawm, Anders Silverman (1997) calls kolędy singalongs “invented traditions”. Invented traditions are, “a set of practices, of ritual or symbolic nature, which (seek) to establish continuity with a suitable historic past” [Silverman 1997: 25]. This does not mean the events are manufactured out of whole cloth or are inauthentic. They are modern variants of old customs, melded with new activities to celebrate ethnic heritage. Some of the traditions come from the old country, and some from the US. Polka music is a hybrid musical style that does not exist in Poland, but is traditionally associated with Polish-Americans due to their one-time strong embrace of it. The singing of Christmas songs is a tradition that made the trip from Poland to the U.S., and as Stankiewicz Zand reported in 1958, “Christmas was celebrated with scarcely any change from the old world pattern for the first two or three decades of the immigration and even today the principal features survive wherever there is even a small Polish community” [Stankiewicz Zand 1959: 81-90]. Referring to St. Hedwig parish in Trenton, NJ, she reports, “there was a communal Christmas Eve supper…and then followed carol singing by all…” [Stankiewicz Zand 1959: 83]. The polka version of the singalong at Christmas time thus has deep roots in the Polish and Polish American traditions.

How do musicians view their role in promoting and preserving Polish American culture? Ed Biegaj, who was born and raised in Toledo and spent much of his professional life in the area before moving to New Jersey, has been involved as a singer and musician in the polka field for more than 30 years. He said, "I will do anything I can to keep those traditions, songs, dance, et cetera alive and active. The concept of passing on these many great uniquely Polish entities is not only an honor, but my self-proclaimed duty." Clearly Biegaj views his role as something more significant than mere entertainer. More specifically, he views his role as a Polish American musician at Christmas time as partly spiritual: If I can bring someone a little closer to God through song, then I have achieved the greatest of all accomplishments. I feel I have done the greatest job possible when someone comes to me (especially a rough and tough looking man) and says, "I felt the Polish pride in you. It brought back great memories. It made me cry". Personally, at that point, without them saying it, I know I brought them a little closer to the Lord, and that is without equal. Clearly, Biegaj links Christianity and Polish-ness, and this link is expressed through his performance of Polish Christmas songs. He feels pride when he links Polish Americans to their Christianity through the Polish language many of the members of the older generations will remember from their youths.

In 2013, Mike Marek had served as President of TAPS for five years and been a member for 13 years, and also had been active in the Polish American community of Toledo for his entire adult life. He sees a significant decline in participation in, and maintenance of, Polish American traditions, and sees it as not just a generational decline, but can pinpoint fairly specifically when it began. When asked about what motivates him to maintain these traditions, he said, "A pride of being Polish. We were brought up to be proud of being Polish and Americans. Because some of my grandparents were 1st and or 2nd generation, we were exposed to many customs on an ongoing basis. Unfortunately my brothers—10-plus years younger--did not grow

in the same way." Marek was 65 in 2013, so his brothers would have been in their mid-50s then, and for those individuals Marek believes the love and respect for Polish traditions was not instilled to the same degree it was for his generation.
Echoing nearly every Polish American whom I have ever interviewed about this subject, Marek does not believe the future is bright for maintaining Polish traditions. His perspective includes a twist, however: Unfortunately I think that we have seen the better part of our traditions. As our neighborhoods become less Polish, our parish and churches do not carry on with tradition it is only a matter of time. I feel that the Mexican community in Toledo will be going through the same process as they move out of their original neighborhoods. Interestingly, Marek believes other immigrant communities, as they mature, will experience the same "melting" into the dominant American culture and loss of traditions that Polish Americans already have experienced.

3. POLISH AMERICAN CONCERT (PAC) BAND

The Polish American Concert Band has been part of Toledo's cultural scene since 1890. There are about 50 members of the band, including some third and fourth generation members. Every year for the past 33 years the band has performed a Christmas concert the Sunday after Thanksgiving. For many years the concert was performed at suburban Lourdes University's auditorium, but in 2013 the concert was moved back to the partially renovated Ohio Theatre, located near the center of the Lagrange Polish American neighborhood. Attendance dropped in 2013 compared with 2012, and many participants suggested this was because of the change in location. It should be pointed out that not everyone viewed the venue change as negative, or a reflection of Toledo Polish Americans' unwillingness to return to their old neighborhood. Jim Mackiewicz, Sr., who has been a member of the band for decades, and whose son is also a member of the band, said the decreased attendance was not necessarily caused by the community's opposition to returning to the old neighborhood, but believed instead that the numbers would build back up again as they stayed in the same location over time. He suggested that attendance at the suburban location did not start out high, but increased over time as well. Since 2013 the concert band has continued performing in the Lagrange neighborhood, now at the auditorium of the local public high school.
The 2013 concert program followed a pattern the band had been using for the past few years. Forty-eight musicians' names were listed on the program, which began with Jim Rutkowski singing the Polish National Anthem, then another member of the band singing the Star Spangled Banner. Other than that, little of the music performed by the PAC band was Polish in origin. For example, the entire set of tunes played before the intermission consisted of concert band music written by composers such as Cole Porter, Richard Rodgers and J.S. Bach. After the intermission there was a performance by the Honey Creek Preservation Jass Band. After their performance, the PAC Band returned and played one obviously Polish piece: Polska Powstaje (Poland Arises), arranged by Fr. Przybylski. During the "Armed Forces Salute" arranged by Bill Moffitt, veterans of the armed forces were asked to stand when the song attached to their branch of the service was played in the medley, and the crowd applauded their service.
Jim Mackiewicz, Jr. first played with the PAC Band around 1988 when he was just 15 years old, and had played with them regularly for 25 years as of 2013. As to why he works to preserve Polish American traditions, he cites the fact that he was raised

with the traditions: I have fond memories of my Christmases as a child, and part of this includes the Polish Traditions -- had the food, music, opłatek, etc. not been there, I may have still had the same fond memories, as I fortunately had a great family, however those traditions are what we did and part of what I remember. So, I want my kids to have the same great memories and I'm doing it similarly to the way I was taught/exposed to.

But Mackiewicz also cites other significant reasons for maintaining the Polish American traditions. First, he mentions the joy he experiences as a musician (clarinet and trumpet), when he says, "I simply love polka music – it makes happy, it's lively, it puts me in a good mood." Interestingly, like Marek, he also makes reference to other ethnic groups and their places in American society. "It seems like some ethnic groups--Spanish, Afro-American--are able to influence our society. Polish ways--the accent, the accordion, etc. were historically mocked-- but why is the Spanish language now included, when the Polish was shunned/hidden? Why can black Americans style, slang language, etc. now be incorporated into American culture? Even if in our own house, I'm not buying into everyone else's America – I'm proud of and keeping my ethnic background."

Mackiewicz's concerns echo those I have heard from a number of Polish Americans of the fourth generation or later. Their parents, raised in the assimilationist 1940s and 1950s, either never learned or never taught their kids the Polish language, or both. These kids in turn grew up feeling as if they had missed something, and may resent other ethnic groups that have been encouraged through multiculturalism and bilingualism to value their culture and protect their languages in ways that Polish and other immigrants from earlier times were not. They feel as if these ethnic Americans have been encouraged to share their ethnicity, while Polish Americans hid theirs and were mocked through one of the cruelest verbal manifestations of ethnic hatred: the Polish joke. There is also a sense in which they seem to feel as if it is too late now to get back what has been lost. As Jim Mackiewicz, Jr. puts it: I think there could be more of a Polish Community… looking forward to a Saturday wedding or a Sunday dance are things of the past. I think that people may be more willing to come out, but it might take someone to ask them. We have gotten busy and sometimes it's easier to stay home and watch your high-def TV. Another problem is that we've spread out, it was easier when there were predominantly "Polish neighborhoods" – the baby-boomers moved out and their kids –me- have even gone farther. I don't think this will ever change back.

While Mackiewicz, Jr. and others envy black and Latino Americans because the dominant culture absorbs aspects of their ethnic culture or has allowed them to preserve their language, these respondents also recognize that Polish Americans have contributed to their own culture's decline by moving out of the old ethnic neighborhoods, shunning the Polish aspects of their background, and instead assimilating into and consuming American mass culture.

4. POLISH ROMAN CATHOLIC UNION OF AMERICA (PRCUA) AND COMMODORE CLUB

The PRCUA claims to be the oldest Polish fraternal organization in the U.S., having been founded in 1873. According to their website, "…(the) PRCUA is committed to strengthening and preserving spiritual values, patriotic zeal, its ethnic culture, heritage, and fostering of cultural relations between the United States of America and Poland." They also sell life insurance and annuities.

In mid-December of 2013 the Toledo lodge sponsored a Christmas sing-along in the evening. Three musicians performed: accordionist and vocalist Randy Krajewski, concertina player, vocalist and drummer Ed Biegaj, and accordionist/keyboardist and vocalist Eric Hite. The reader may note the frequent recurrence of many of the names of the musicians at the various Polish American events. This is a problem long noted by proponents of the folk/polka music side of Polish American traditions, namely, the small and dwindling number of musicians. Ever since the electric guitar replaced the accordion as the go-to instrument for American kids in the 1950s, this problem has been evident. It gets worse every year, as musicians retire or die and few rise up to take their places.

The group played a mixture of Polish and English language Christmas songs, with the majority including English language vocals. Lyric sheets were provided for the Polish language songs, which were confined mainly in a group around the half-way point of the evening. Participants also provided a wide selection of foods served in a potluck setting, most of which were not Polish in their origins. However, there were two large crock pots of non-smoked Polish kiełbasa available, with strong horseradish sauce served as well.

Compared with the previous year, attendance was down at 2013's event. Fewer than 100 people attended, and there were various explanations for the decrease. Some people believed that the novelty of the event had worn off, so fewer people were interested in venturing out on a cold winter's night. Others speculated that the crowd was so large the previous year, when it was standing room only, that many people stayed home fearing they would not be able to get a seat.[6] Playing at both the PRCUA and Commodore Club events was multi-instrumentalist and vocalist Eric Hite. His primary reason for playing Polish American music is the pleasure of playing with other talented musicians: Camaraderie with the guys is a huge thing! The fact that you can get together with a group of musicians who know their arrangements and are worth their salt as musicians is always very rewarding. Even if we all don't play together on a regular basis, the fact that we can just get together, get on stage and play a good job is way cool!

His interest does not stop there, but also includes the desire to promote Polish American music among those who think either that it is not "cool," or it is just something that their parents and grandparents were interested in, but has no relevance for them today: Trying to preserve our Polish heritage/culture is another (reason for playing the music). Getting people to realize that yes, it actually can be cool! That's the labor of love part… I guess many people don't see a need for it but I believe it is something that is very important to hold onto/preserve. There is not much left around these parts when it comes to dances, neighborhoods, churches, and overall Polish culture in general. I think it's important to remind people that it still exists and there are some of us that are very proud of it and take it very seriously!

The sense of loss expressed by many of my informants, both those quoted in this paper and not, is almost overwhelming, yet completely appropriate. They are keenly aware of the closing of Polish American parishes, the decline of neighborhoods, the decreasing number of bands, venues and festivals. They observe it at the individual level, as well as the community level when they talk about families not passing down the traditions, and institutions of Polonia dying as well. These phenomena are not

[6] One is reminded of what baseball legend Yogi Berra allegedly once claimed: “That place, it's so crowded nobody goes there anymore.”

unique to Toledo, but are common in many big city Polonias. For each new polka band that starts up, there seem to be many more who retire. This became a problem from the business end of things when the National Academy of Recording Arts and Sciences dropped the Polka category in 2009. The category was created in 1986, and was won by big-band leader Jimmy Sturr 18 times. The Academy justified dropping the award by claiming doing so was necessary to "to ensure the awards process remains representative of the current musical landscape." Of course, polka musicians were deeply offended by the decision, taking it as a slap in the face against their style of music. But on message boards and in chat rooms, some musicians recognized that there had been a decline in the number of recordings submitted, and that Sturr's winning it so often decreased the credibility of the award anyway.

5. THE COMMODORE CLUB

The Commodore Club is the last club in the Lagrange neighborhood with large numbers of Polish American members.[7] It provides a clubhouse for members to drink in and socialize. In 2013 their Christmas dinner included a performance of area Polish American polka musicians headed by Randy Krajewski, and included many of the musicians mentioned above. The band played polkas, waltzes and obereks and a healthy helping of kolędy were sung as well. Club member response to the event was decidedly mixed. Some of the members did not appreciate the large crowd of non-members taking seating away from members, nor did they like the loudly amplified accordions, brass and vocals drowning out their conversation. Others marveled at the large number of highly talented polka musicians playing together on one stage, and expressed joy at hearing the Polish-language vocals of the Christmas and secular music.

DISCUSSION AND CONCLUSION

Toledo's Polonia, like many others in the US, is no longer defined by geographic borders of specific neighborhoods anchored by Catholic churches, and all of the businesses and services an ethnic or any other neighborhood could need. Instead, Toledo area Polish Americans live scattered across city and suburbs, and gather together only at Catholic mass, parish and secular festivals, and special events like the Christmas events described above. Since 2013, the landscape of Polish American events in Toledo has changed somewhat. The Commodore Club and PRCUA do not have Polish American Christmas events anymore, and the International Music Association has folded. After a more than 30-year run, the Lagrange Street Polish festival has not happened since 2016, although a return is being planned by its former organizers and others. On the plus side, the Holy Toledo Polka Days festival returned in the spring of 2019 after a long hiatus, and the Polish American Community of Toledo (PACT), an umbrella organization founded in 2009, has created a new festival, which was held in suburban Toledo for the first time in 2018.

PACT's Mission Statement describes four goals:

- To help promote, support, and patronize locally owned Polish American businesses and business owners.
- To promote, join and support local and national groups and organizations that sponsor or otherwise promote events that perpetuate Polish culture and/or tradition.

[7] Randy Krajewski reports the club currently has about 200 members.

- To further the image of our proud Polish heritage and our local Polonia.
- To hold and promote fundraisers and other programs that will help fund scholarships for local students.
- To build a Polish-American Community Center that will ultimately house a cultural center, library, youth recreation center, and provide a venue for local Polish American groups to hold their activities.

Besides organizing the new festival, the group has also sponsored golf scrambles, the showing of Polish films, and a kiełbasa cookoff described in more detail below.

The new festival did not occur without some controversy. Calling itself "A Real Polish American Festival," the advertising for the new event promised that, "the upcoming festival will be quite different from the more recent Polish festivals… It will be held in a beautiful 20-acre park-like setting and the major focus of the event will be to exhibit true Polish American culture through music, food, entertainment and the arts." These claims, as well as its name, drew skepticism and even some ire among Toledo-area Polish Americans who perceived it all as an attack on the authenticity of the original Lagrange Street festival, which had changed over time to include much non-Polish food. Stanley's Market, the venerably purveyor of kiełbasa and all other things Polish in the Lagrange neighborhood for 87 years, did not participate in the new festival in its first year, but agreed to participate in the second year, and advertising for the event in 2019 did not emphasize authenticity.

Approximately 1,300 people attended PACT's 8th Kiełbasa Cook-Off on Sunday, February 24th, 2019. Held at the hall of St. Clement Roman Catholic Church on Toledo's northwest side, the event featured kiełbasa provided by nine amateur producers. One could purchase 50 food tickets for $20.00. Each sample of kiełbasa cost just one ticket, so much sausage could be had for a fairly small price. Also, for two tickets, one could purchase sweet and sour cabbage or mizeria. A few tickets also purchased a slice of placek or a pączek.

The nine sausage makers were Busia's Old Fashion Kiełbasa, Z Best Kiełbasa, Ski's Sausage, Dziadzia & Busia's Old Fashion Recipe, Zbilski Kiełbasa, Oink K. Basa, Team Kazlo, Chet's Best Kiełbasa, and Lenny & Spud's Fresh Kiełbasa. The kiełbasa purveyors were arranged around the perimeter of the hall, and customers came to them with plates already partially filled with the other delicacies. Each piece of kiełbasa contained a toothpick with a number, so patrons could vote on their favorite. Importantly, professional sausage-makers were excluded from the event, because, "(w)e want to taste that secret family recipe for kiełbasa," according to Jack Sparagowski, the Chairman of PACT.

The sausages varied by casing style (some had the traditional snap of natural casing, others did not), fineness of the grind of the meat, fat content, and spice combinations. The sausages were served from large warmers, and had been boiled, and in some instances browned a little. I did not see any smoked kiełbasa on offer.

Other Polish foods in frozen form were available for purchase to take home. Busia's Pierogi Shack had frozen pierogi with various traditional and modern fillings available, as well as frozen soups such as chicken noodle and dill pickle.

Background music for the event was provided by the author (who is also the host of the Sunday Morning Polka Show of Northwest Ohio) and played over a speaker system. The music consisted of a sampling of polka music from Toledo bands from the past and present.

These events sponsored by PACT place that organization front and center of Toledo's Polonia in terms of sponsoring events designed to raise money and bring Toledo's

Polish American community together. In this sense they may be replacing other organizations both secular (United North) and religious, but not necessarily in a way that usurps the other organizations, as their capacity has significantly diminished.

According to Fr. Thomas Extejt, Pastor of Saints Adalbert and Hedwig Parish (the combined parish formed after the closure of St. Hedwig, and the sole remaining parish in either of Toledo's formerly predominantly Polish neighborhoods), the parish attempts to maintain some Polish Christmas traditions during the Advent and Christmas seasons. He said, "There is a strong desire to hang on to Polish Christmas customs. Plenty of people buy Christmas wafers (oplatki) from us, and I know that some of our customers are from parishes where not many Polish people live." In this case, the parish assists Polish Americans who are isolated from others to celebrate Wigilia.

Regarding Midnight Mass, Fr. Extejt reports, "in many of our neighborhoods it is not safe after dark, and 'midnight' Mass has been moved to an earlier hour. We've moved it back all the way to 4 p.m! I think we sing English carols before Mass starts, and Polish carols during Mass." Perhaps for some the changing of the time of Midnight Mass to an earlier hour is a step too far, however it does show the flexibility of the parish in accounting for the needs of its aging members and the realities of their location.

Is there a suburban/urban divide within the Toledo area's Polonia? While many of the area's Polish Americans reside within the city limits, many of these do not live in either formerly predominantly Polish American neighborhoods, but instead live in neighborhoods on the outskirts. As mentioned above, many live in the suburbs. The original formulation of the new festival raised the possibility of such a divide, but given that the organization changed its focus in 2019 sufficiently to bring in the old neighborhood's last Polish market, perhaps the divide is more illusory than real. Also, while PACT held its festival in the suburbs, it held its kiełbasa cookoff in the city, and plans to build its cultural center in Toledo.

Musician Ed Biegaj does not believe there is a suburban/urban divide. Referring to the creation of the new Polish festivals in the suburbs and the potential for reviving the festival in the city, he said, "Some people would say that the two groups oppose one another and are looking to destroy the other festival for the sake of their own festival winning favoritism. And although there may be some individuals who have that very thing happen, it is my belief that the majority of people involved on both sides would like to see both thrive."

Despite these controversies and changes, the Polish American community of Toledo continues to sponsor events throughout the year that allow Polish Americans to experience their culture and to share it with others. Organizers of these events adapt to new realities of population distribution and the preferences of attendees. But a Polish American presence remains. For most Toledo Polish Americans the ethnic experience may in fact be one that is symbolic and able to be turned on or off, but as the evidence above demonstrates, it is not therefore contentless or inauthentic.

REFERENCES

Alba, R. D., (1990), Ethnic Identity: The Transformation of White America. New Haven: Yale University Press.

Bayor, R. H., (2009), Another Look at 'Whiteness': The Persistence of Ethnicity in American Life, in Journal of American Ethnic History, 29(1), pp. 13-30.

Erdmans, M. P., (1995), Immigrants and Ethnics: Conflict and Identity in Polish Chicago, in Sociological Quarterly, 36(1), pp. 175–95.

Erdmans, M. P., (2000), Polonia in the New Century: We Will Not Fade Away, in Polish American Studies, 57(1), pp. 5-24.

Gans, G. J., (1979), Symbolic Ethnicity: the Future of Ethnic Groups and Cultures in America, in Ethnic and Racial Studies, 2, pp. 1-20.

Jackson, D., & Liggett, L., (2018), Political and Cultural Beliefs of Young Polish Americans, in Diaspora polska w Ameryce Polnocnej, ed. R. Raczyński & K. Morawska, Gdynia: Emigration Museum in Gdynia.

Obidinski, E. E., & Stankiewicz Zand, H., (1987), Polish Folkways in America, Lanham: MD.

Philiposki R., (2009), Toledo's Polonia. Charleston, SC: Arcadia Publishing.

Silverman, A. D., (1997), Dyngus Days and Kolędy Nights: Folk Celebrations in Polish-American Communities, in New York Folklore, 23(1-4), pp. 25-38.

Smajda, J. & Gerteis, J., (2012), Ethnic Community and Ethnic Boundaries in a 'Sauce-Scented Neighborhood', in Sociological Forum, 27(3), pp. 617-640.

Stankiewicz Zand, H., (1959), Polish American Holiday Customs, in Polish American Studies, 15(3-4).

Waters, M. C., (1991), Ethnic Options: Choosing Identities in America. Berkeley: University of California Press.

PERCEPTION OF MIGRATION FROM NON-EU COUNTRIES IN SLOVAKIA: THE CASE OF NITRA REGION

Ondřej Filipec

University of Ss. Cyril and Methodius in Trnava,
Department of Politics and European Studies,
Bučianská 4A/ 917 01 Trnava, Slovakia
ondrej.filipec@ucm.sk

&

Nina Vargová

University of Ss. Cyril and Methodius in Trnava,
Department of Politics and European Studies,
Bučianská 4A/ 917 01 Trnava, Slovakia
nina.vargova@ucm.sk

Abstract

The results of Eurobarometer surveys in last two years shows that Slovaks have very negative perception of immigration from the non-EU countries. As suggested by Eurobarometer the attitude is influenced by factors such as education level, wealth, occupation, age and other socio-economic factors. The main aim of this contribution is to analyze Slovak attitude towards migration in relation to other EU countries and to search for possible causes of the negative attitude toward Slovak citizens with special focus on Nitra Region. To what degree people attitudes from Nitra Region differ from that of the Slovakia and the EU? The contribution will present research results dedicated to false assumptions and misunderstandings of citizens about migration which will be put in relation to migration in its deeper context. In this sense presented study will reveal discrepancy between Eurobarometer survey data and data collected on a local level in Nitra region. The main claim of the contribution is in line with existing literature and leads to the conclusion that negative attitude of citizens is mostly caused by lower level of education and lack of general knowledge about migrants.

Key words: *Migration, perception, non-EU countries, Slovakia, Nitra Region*

INTRODUCTION

After the outbreak of the 2015 migration crisis the issue of migration started to play important role in Slovak politics and partially contributed to political earthquake after 2016 elections to the Slovak National Council. The issue of migration was communicated by all political actors including radical (neo)fascist party People's Party – Our Slovakia under the leadership of Marián Kotleba on one side and Slovak president Andrej Kiska with solidary attitude on the other [Mihálik 2017: 44]. The issue of migration polarized society and thus was used in the communication of political actors to mobilize popular support [Filipec, Mosneaga and Walter 2018: 199-200]. Public discourse about migration in Slovakia soon turned to be dominated by the issue of Muslims and Islam [Gigitashvili 2016: 8] and humanitarian reasons or solidarity become secondary issue to security.

The main aim of this article is to reveal the attitude of Slovaks towards migration and migrants from non-EU countries with special focus on Nitra region. While many researchers focus on EU or its member states level (including Eurobarometer), regional perspective is often missing and it might be expected that perception will vary due to great variability of regions across countries. From the methodological perspective this article presents exploratory case study aimed at exploring attitudes of Slovak citizens in Nitra region. The region has been selected as suitable for analysis due to its general characteristic: it is not region with Slovak capital nor periphery of the country, however the position is geographically central to the country with good connection to other regions and capital cities of Bratislava and Budapest. There are approx. 700 thousand people living in Nitra region, with population density very close to Slovak average 110 people per square kilometer.

There were several research questions behind the research which was divided into two parts. In the first part respondents were asked to rate migrants on the pictures presented on a scale from 0 to 10 according to sympathy. Second part deals with the task which required respondents to tell three words associated with „migration". This task was followed by another task to estimate the number of Muslims living in Slovakia, Sweden, UK and Germany. Division of the research was focusing on three research questions or premises.

First, due to medialized issue of migration with reference to Muslim background of migrants researchers expected, that there will be low level of sympathy towards migrants with Muslim appearance. Based on Eurobarometer survey Researchers also expected,, that education will play significant role in the number of sympathy points given by individuals. However, the question was not whether Slovaks from Nitra Region under-evaluate immigrants with Muslim appearance, but how much this evaluation differ in relation to other groups which might be visually identified (Asian, Black and White). Is there some sort of "sympathy hierarchy" regarding the perception of various ethnic groups among Slovaks in Nitra region?

Second, what words are Slovaks in Nitra region associating with migration from non-EU countries? It was expected, that due to medial communication there will be present words such as Islam, Terrorism, Fear or War – words with negative connotation within Slovak society.

Third, regarding estimation of the Muslim populations researchers expected that in line with existing research respondents will over-estimate populations of Muslims living in selected countries. Also, that respondents will be more precise about

estimation of the size of Muslim community in the own country and that education will show up as the most important factor.
The research was conducted in the centre of Nitra, the capital of Nitra region between 5th–18th February 2018. Out of 258 people 231 persons (89 %) agreed and replied on all questions asked by researchers. Despite relatively small sample all segments of the society were present in the research with respect to sex, age, socio-economic status and size of the place of residence.
From the methodological perspective there are some limits of the research, especially regarding its first part. First, it is hard to distinguish whether respondent is giving points of sympathy according to empathy with the person on the picture, or whether is influenced by the quality of the picture or by the presence of the researcher. Second, responses could have been influenced by the arbitrary selection of the pictures. Authors of the research tried to limit this shortcoming by selecting positive pictures on which persons are smiling. Third, the research did not worked with cultural bias which is very complex issue as perception is still developing and is strongly influenced by factors such as country history, personal experience, socio-cultural context etc. Also regarding second part of the research there are some controversial aspects as association of migration is influenced by media and topics communicated in the public sphere where negative topics are resonating more than positive news.
Despite above described limits of the research authors hope that the work will contribute to existing knowledge about perception of migration with adding regional perspective or at least with providing inspiration for further researchers. Finally, the results may serve as certain corrective despite the fact, that results of this case study and data are valid only for Nitra region and cannot be generalized on the whole Slovak public.

1. SYMPATHY AND NON-EU MIGRANTS

Migration is perceived differently among nations and ethnic groups. Countries all around the world have different experience in dealing with migration and migrating ethnic or religious groups. However, this perception does not vary in between nations, but also within the nations itself based on belonging to socio-economic group and is influenced by variables including sex, level of education, class etc. For example Tito Boeri and Herbert Brücner (2005) based on long-term analysis found that in the EU15 migration is perceived as a threat mainly for people with primary or lower education, people with low income and for the older employees [Boeri and Brücner 2005]. This trend continues. For example Eurobarometer survey (2015) provides us some general idea how migrants from non-EU countries are perceived. On the question (QA 10.2): "Please tell me whether each of the following statements evokes a positive or negative feeling for you: Immigration of people from outside EU" Slovak scored on the third worst place with just 17 % responding "positive", 77 % people "negative" and 6 % don't know. More negative attitude was only in Latvia and the Czech Republic. Slovak negative perception is far under EU28 average (34 % people "positive", 56 % "negative" and 10 % "don't know" [Eurobarometr 2015: 154]. Survey thus indicates overall negative attitude among Slovaks. However, for the purposes of this study comparison in between countries is not so relevant as the study deals with perception of migration in the specific region. For this reason Eurobarometer provides also data related to five variables including gender, age, education, socio-professional category and class. "Total negative" attitude was equally divided between 57 % of man and 56 % of

woman. Much more important variable influencing perception is according to survey age as the attitude differs significantly. While 61 % of older people with 55+ years have "total negative" feeling in relation to migration from non-EU countries, the youngest age group (15-24 years) has relatively small proportion 46 %., followed by 25-39 years old with 52 % and 40-54 years old with 58 %. What matters is also education which seems to be much more important determinant. While 64 % of people with less than 15 years of education has "total negative" attitude, among students it is just 41 % of people [Eurobarometer 2015: 155]. In other words, education seems to be more important determinant than age.

Also other variables plays important role. Students (with 41 % "total negative" attitude) are associating migrants from non-EU countries with less negative feelings than retired (63 %), house persons (59 %) or unemployed, manual workers or other white collars (58 % in each category). They share almost same level of negativity as self-employed (57 %). The closest attitude to that of students is that of managers with 47 %. The socio-professional category as a variable indicates that also income will have some influence on the perception. While the working class has 60 % of "total negative" associations with increasing income negativity decreases to 58 % with the lower middle class, 54 % of the middle class, 50 % of the upper middle class and 36 % of the upper class [Eurobarometer 2015: 155]. These date, however, are aggregated at the EU level and in the individual EU countries may differ significantly due to specific culture, historic experience etc. On the other side, they are useful as points of reference including the distances between least "total negative" and most "total negative" within individual variables.

For measuring attitude towards immigrants from non-EU countries people in our research were asked to award points of sympathy from 0 to 10 to the people present on the group of pictures 1 (families) including Asian, Black, Arab and white family and group of pictures 2 (individuals) including Asian woman, Black man, covered Muslim woman and white Slovak representative. As noted before pictures were selected with the aim to find difference between evaluating families and individuals and how much points of sympathy differs between individual visually ethnically different migrants. Slovak representative and white family with western outlook were put into the group for serving as point of reference.

As research showed Women were slightly more hesitant to give points of sympathy than man. On average woman gave 4,58 to 4,81 given by man. As expected families has got slightly more points of sympathy than individuals. As expected, most points of sympathy were given to white family (8,02 on average) with much less given to Asian family (4,16 points), black family (3,92 points) and least points of sympathy were given to family with Arab appearance (3,39 points). The gap between white family and remaining families seems to be significant as it is 4 points lower. The relative low score of Arab family is not surprising and most probably the score is affected by medial presentation of migration. On the other side point difference between Arab family and other "non-white" families is not so significant[1].

There were however considerable differences related to gender. Regarding families both men and woman gave on average same number points to Asian family and white family. The difference is most visible in the case of Arab family where men gave on average

[1] Due to license and copyright restriction images are available from authors upon formal request.

3,72 points and women just 3,06 points. Similarly with lover significance there was difference in the case of black family: men gave on average 4,16 and women 3,69. Similar attitude is present in the case of individuals where woman gave on average just 2,62 points to Arab woman while men 3,11 and similarly to families black man got also higher rating among men. It is important to note that Arab women with covered face got on average lowest number of points. From certain perspective her evaluation is touching possible minimum as most people do not want to "look bad" or "with lack of empathy" and thus gave some "symbolic points" to Arab women and on the other side they do not want to look "preferable" towards own race and thus "under evaluated" the white man and white family. In this sense if we change the scale from 0 to 10 and deduce 2 points from each site, then Arab woman and white men are touching both far positions. Data are summarized in the following table 1.

Table 1: Awarded points of sympathy according to gender

	Asian Family	Black Family	Arab Family	White Family	Asian Wom.	Black Man	Arab woman	White Men	Total
Average	4,16	3,92	3,39	8,02	3,51	3,81	2,87	7,89	4,7
Av men	4,11	4,16	3,72	8,04	3,41	4,02	3,11	7,91	4,81
Av women	4,22	3,69	3,06	8	3,61	3,61	2,62	7,86	4,58

Source: Authors, own research.

The research showed that education matters, however with considerable differences in relation to individual groups. In order to show contrast only two groups were selected from data file: people with basic education and people with university education. Both groups gave on average similar number of points of sympathy: people with basic education gave 4,71 points, with university degree 4,75 points. What differs is preference of different groups.

While people university degree give in general more points to "non-white" families than people with basic education. For example to the Asian family people with university degree gave on average 4,54 points while people with basic education just 3,91 points and similar difference is in relation to Arab family: While university educated gave on average 3,63 points, people with basic education just 3,09. On the other side, white family is slightly more awarded by sympathy points by people with basic education 8,09 compared to 7,88 awarded by university educated. In relation to individuals basic educated people are giving more points to the black man (4,21 points compared to 3,77 points with university degree). However, data looks much more interesting if we consider type of the university education as the differences between technical and humanities are much more significant than between university and basic cleavage. People with technical university education had tendency to under evaluate Arab family (2,77 points to 3,88 points awarded by people with education in humanities). Compared to the people with education in humanities technically educated people under evaluated black man, Arab woman and have slightly better evaluation to Asian woman and more points of sympathy for the white man. In other words, there is tendency among technically educated people to give less points of sympathy to people with Arabic appearance and giving more points to white family and white man. Awarded points according to education are visible in the table 2.

Table 2: Awarded points of sympathy according to education

	Asian Family	Black Family	Arab Family	White Family	Asian Wom.	Black Man	Arab wom.	White Men	Total
Av. basic	3,91	4,09	3,09	8,09	3,22	4,21	3,09	8	4,71
Av. university	4,54	3,95	3,63	7,88	3,71	3,77	2,78	7,75	4,75
Av. uni. (hum.)	4,51	4,07	3,88	7,67	3,56	3,86	2,88	7,62	4,75
Av. uni. (tech.)	4,62	3,54	2,77	8,54	4,23	3,46	2,46	8,15	4,72

Source: Authors, own research.

Regarding age groups there are also noticeable differences. For better contrast there will be three age groups analyzed including seniors with 65+ years, youth between 15 and 19 years old and young people between 20 and 26 years. It is interesting that youth is much closer to seniors than to the young people. This is possibly influenced by the level of education. Contrary to seniors young people gave on average more points of sympathy to the black family, Arab family, white family, black man and Arab woman. On the other side they awarded on average fewer points, than seniors to Asian family and Asian woman. In this sense this attitude reflects also level of education which is possibly main factor influencing difference to seniors and also to the youth. Points are visible in the table 3.

Table 3: Awarded points of sympathy according to age group

	Asian. Family	Black Family	Arab Family	White Family	Asian. Wom.	Black Man	Arab wom.	White Men
Average	4,16	3,92	3,39	8,02	3,51	3,81	2,87	7,89
Av. group 65+	4,27	3,8	2,86	7,52	4,22	3,8	2,72	7,91
Av. goup 15-19	4,73	3,56	2,76	7,68	3,08	3,72	2,56	7,64
Av. group 20-26	3,3	4,5	4,25	8,5	2,8	4	3,65	7,6

Source: Authors, own research.

Above presented data are in line with existing Eurobarometer survey that Slovaks are rather negative in the attitude towards migrants from non-EU countries. All three families and individuals with non-white appearance are significantly under the white ethnic group. This finding is in line with existing research which claims that migration is perceived mainly in the context of cultural diversity which is less welcome among men, older people, less educated or unemployed. In this sense well overview is provided by Tüzin Baycan and Peter Nijkamp (2012: 189-190). In line with Eurobarometer education plays important role in perception. However, it shall be stressed that also type of education is significant as distinction between technical education and education in humanities may be much more significant than between university degree and basic education. However, this may be caused by the fact that among people with basic education are many high school students with attitudes similar to university students.

2. ASSOCIATION OF MIGRATION AND ESTIMATIONS

From the research it is evident that family with Arab appearance and Muslim woman scored worst in the terms of average points of sympathy given. Thus we can claim that perception of migration in Nitra region is influenced by medial communication and fear from Muslim immigration. For this reason it is worth to explore also other related factors as association produced in relation to immigration from non-EU countries or estimation.

During the research the respondents were asked to tell three words they associate with migration from non-EU countries and researchers recorded first words mentioned. It is important to note that this task come after giving points of sympathy and thus respondents might have been influenced by previous task. However from the answers summed up in the Table 4 it is evident that respondents had mainly negative associations. Among three words the highest frequency had the word "Islam" mentioned by 94 people or 40,7 % of respondents, then it was followed by "terrorism" with 73, "war" with 51, "fear" with 50 or "economic migration" with 45 mentions. First positive word "Help" is mentioned on the ninth place. It is also interesting that among first five words is "war" together with "economic migration" which reflects different and contradicting understanding of migrant motives. Nevertheless, some words would certainly need further explanation and context. For example it is hard to put "terrorism" into the context. Do the respondents mean terrorism as a cause of migration due to fight against so called Islamic state or do they have fear from migration as a potential driver for terrorism in Europe?

The men and women perceive immigration slightly differently regarding associations. From the results it seems to be evident that women are more perceptive to war (15) than men who mentioned war at the first place only in four cases. Among men, there is slightly higher association with "fear" in 13 cases or "rape": 4 primary associations among men and missing association among woman. To sum up, perception of migration from non-EU countries is associated mainly with Islam, Terrorism, War and Fear certainly due to medial presentation of the topic. From certain perspective it is paradox as migration from non-EU countries to Slovakia has its roots mainly in post-Soviet states and most migrants to Slovakia came from Ukraine.

Table 4: Words associated with migration from non-EU countries

Total (3 words)	Men (fist word)	Women (first word)
Islam (94) Terrorism (73) War (51) Fear (50) Economic migration (45) Different culture (31) Diseases (29) Non-adaptability (22) Help (22) Different mentality (22) … Burqa (1)	Terrorism (14) Different culture (14) Economic migration (13) Fear (13) Islam (11) Different race (5) … War (4) Rape (4) Chance (4) Diseases (2)	War (15) Terrorism (14) Islam (12) Economic migration (11) Problem (10) Different culture (9) Danger (6) Job loss (5) Poverty (5) … Rape (1) Diseases (0) Chance (0)

Source: Authors, own research.

In the third task people were asked to estimate Muslim population in Slovakia, Sweden, Germany and the UK. It was expected that Slovaks will estimate correctly Muslim population in Slovakia and will over estimate Muslim population in the remaining countries. While first part of the hypothesis proven to be correct, second part turned to be incorrect and Slovaks under evaluated Muslim population in the mentioned countries. There is empiric evidence in the research; however two important aspects shall be mentioned. First of all, several people on the question reacted spontaneously and tried to build estimation on estimating total population of the state first. However, already in this initial estimation people often made mistakes and under estimated total population. For example one respondent noted: "Well, in Germany there are approx. 40 million people, so Muslim population will be around 500 thousand". Second, some people tried to estimate total population in the mentioned countries by estimating Slovak population first: "We are like 5,5 million people [Slovaks], so there are some 50 million Germans. There are many Muslims in Germany, so let say 1 million". These spontaneous comments are providing certain rationale why Slovaks under estimated Muslim population in the referred countries.
According to Pew Research Center there was in 2016 in total 4,95 million Muslims in Germany, 4,13 million Muslims in the UK, 810 thosand Muslims in Sweden and less than 10 thousand in Slovakia[2] [Pew Research Center 2017: 29]. The response on the question: "How many Muslims do you think lives in..." are summarized in the table 5.

Table 5: Estimation of Muslim Populations by Respondents

	Slovakia	Germany	Sweden	UK
Reality	Cca 5.000	Cca 5 mil.	Cca 810.000	Cca 4.1 mil.
Response min.	1.000	10.000	10.000	10.000
Response max.	8.000	2 mil.	2 mil.	2 mil.
Mod. (x)	6.000	60.000	70.000	80.000
Average (total)	3017	441.000	381.000	439.000

Source: Authors, own research.

From the table 5 it is evident that respondents were good in estimating Muslim population in the own country as the size between three and five thousand is appropriate. On the other side in all three remaining countries Muslim population was heavily under estimated and in the case of Germany almost 12 times. There are several interesting results. First, nobody was close enough to estimate population in Germany and the UK as maximal estimation was two million. Second, average estimations in all three states were very close despite relatively high differences in total populations (e. g. 10 million people living in Sweden and 81 million living in Germany).
There were no significant differences between estimations made by women and men. While women were closer to real numbers in the case of Germany (average estimation

[2] Variable resources claim that there are between 3 and 5 thousand Muslims living in Slovakia. For example while Foreign Policy pointed out, last census counted approx. 2 thousand Muslims in Slovakia, The New Arab reported that there are approx. 5 thousand Muslims living in Slovakia [Foreign Policy 2016; The New Arab 2018]. However, it seems that 5 thousand is the highest estimation with very inclusive approach.

at 444.428 vs. 405.247 that of man) and Sweden 409.250 vs. 341.256 that of men), men were closer in the case of the UK (466.110 vs. 416.250 that of women) and Slovakia (3.091 vs. 2922 that of women), but still far from the real numbers. Even education did not prove to be factor influencing quality of estimation. Contrary to expected results people with basic education had better sense for the real numbers. In the case of Germany there was average estimation of 491.500 Muslims (compared to estimation of 465.142 by people with university degree). In Sweden people with basic education estimated 374.909 compared to estimation of 266.535 by people with university degree and there was big difference in the case of the UK. While people with university degree estimated on average 345.178, people with basic education estimated higher number of 500.227. On the other side people with basic education under estimated Slovak Muslim population at 2.272 compared to people with university degree who guessed 3.071 people. In the various resources it was presented that there are approx. between 3 to 5 thousand Muslims living in Slovakia. Thus Slovaks in Nitra region does not overestimate domestic population which is not fully in line with existing research (see Sides and Citrin 2007).

As previously shown type of university degree plays important role in perceiving migration. This is also valid for estimation. People with education in humanities had closer estimation in the case of Slovakia (3.139 compared to 2.846 estimation by people holding degree in technical area) and in the case of Germany they estimated population at 535.930 compared to 274.076 estimated by technically educated. On the other side people with technical university education better estimated Muslim populations in Sweden and the UK. In other words, there is no visible pattern regarding variables but just certain tendency of people with basic education and technical university education to under estimate of domestic Muslim population and estimate higher numbers of foreign populations than people with university education in humanities.

Low estimation of Muslim population abroad is from certain perspective paradox as Slovak society was mobilized in the terms of migration policy during 2016 elections and perception of migration is associated with Islam. Above results shows that Slovaks in Nitra region have little idea about real numbers and trends in migration policy which may well explain potential for mobilization on the grounds of migration. Then the question is how people would react if they were confronted with the fact that in those countries is living 3 (in the case of Sweden) to 12 times more Muslims (in the case of Germany) that they on average estimate. Providing education in the field of migration policy and communicate facts may be the way how to improve the situation and undermine potential on radical parties, who build up their political capital on fear and lack of knowledge among people.

CONCLUSION

The main aim of this article was to explore perception of migration from non-EU countries in Nitra region. The research was based on 231 interviews conducted between 5th –18th February 2018 in the city of Nitra. The research focused on three areas.

First, people were asked to give points of sympathy to families and individuals on the pictures. In general on average women were more hesitant and gave more points of sympathy than man. Obviously, family with Arab appearance and lady with covered face got least points. However research showed that there are not big differences in

perception of various groups as Arab, Asian and black family scored relatively close. The perceptions vary according to age and education as older people have greater tendency to give points of sympathy to family or woman with Asian appearance. Nevertheless, it is important what type of university education respondents have. Those with technical education were giving less points of sympathy to migrants with Arab appearance and made more preference to white male or family with western appearance.

Second focus was on words associated with migration from non-EU countries. Despite the fact that majority of migrants form non-EU countries come from the Ukraine, respondents associate migration with Islam, Terrorism, War, Fear, Economic migration, Different culture or disease. Positive words are almost missing. Migration is perceived slightly differently between men and women. While men focus primarily on terrorism, economic migration and different culture, women focused on war, terrorism and Islam. In this sense responses are dominated by negative associations.

Third, Slovaks were able to estimate own Muslim population but heavily under estimated Muslim populations in Sweden (almost 3 times), the UK (almost 10 times) and Germany (almost 12 times). There is no strong influence of variables such as sex or education. Moreover, people with basic education had better estimation closer to real numbers. Nevertheless, if we compare this segment with university educated (humanities) segment, we can claim that people with basic education have tendency to give higher numbers and in same characteristic is similar to the segment with university education in technical area. The general underestimation might be related to relative small size of Slovak population which might have served as reference value for estimations or incorrect initial estimation of overall population living in stressed countries.

Above research provided some view into regional perception of migration in Slovakia and discovered that public discourse is strongly influenced by medial reflection of immigration crises which was mainly visible on the words associated with migration from non-EU countries. Heavy under estimation of foreign Muslim population is on one hand surprising but on the other hand reveals information gap which might be exploited by radical parties for building political capital on the anti-immigration and anti-Muslim rhetoric. For this reason fact based communication and education in migration trends might help to fill out the gap and limit potential for radicalism and extremism not only in Nitra region.

REFERENCES

Boeri, T. and Brücner, H., (2005), Why are Europeans so tough on migrants? Economic Policy, Vol. 20, No. 44, p. 629-703.

European Commission, (2016), Standard Eurobarometer 85, May 2016. [online] Available at: goo.gl/US7Kk8 [Accessed December 21, 2018].

Filipec, O., Mosneaga V. and Walter, A. T., (2018), Europe and the Migration Crisis: The Reponse of the EU Member States. Gdańsk: Stowarzyszenie Naukowe Instytut Badań nad Polityką Europejską.

Foreign Policy, (2016), Once Again, Slovakia Makes Life Harder for Muslims. Foreign Policy, December 2, 2016. [online] Available at: https://foreignpolicy.com/2016/12/02/once-again-slovakia-makes-life-harder-for-muslims/ [Accessed December 21, 2018].

Gigitashvili, G., (2016), Discursive and non-discursive practices of securitizing migraiton in the EU. Tartu: Centre of European Union-Russia studies, University of Tartu, European College.

Mihálik, J., (2017), The migrants and refugees in Europe: perspectives from Central European states. Polish Migration Review, Vol. 1, No. 1, p. 39-49.

Pew Research Foundation, (2017), Europe's Growing Muslim Population. 29. November 2017. Pew Research Center.

Sides, J. and Citrin, J., (2007), European Opinion About Immigration: The Role of Identities, Interests and Immigration. British Journal of Political Science, Vol. 37, No. 2, p. 477-504. The New Arab (2018) Slovakia's deplorable move to criminalise Islam. The New Arab, September 18, 2018. [online] Available at: goo.gl/38XXG8 [Accessed December 21, 2018].

Tüzin, B. and Nijkamp, P., (2012), A socio-economic impact analysis of urban cultural diversity: pathways and horizont. In: Peter Nijkamp, Jacques Poot and Mediha Sahin (eds.): Migration Impact Assessment: New Horizons. Cheltenham: Edward Elgar Publishing, p. 175-202.

Ondřej Filipec, Ph.D. is assistant professor at the Faculty of Social Sciences, University of Ss. Cyril and Methodius in Trnava, Slovakia. His research interests cover EU security policies, terrorism and theories of European integration. In the recent years he also focuses on migration.

Nina Vargová, M. A. finished her master degree in politics and European studies at the Faculty of Social Sciences, University of Ss. Cyril and Methodius in Trnava, Slovakia. His research interest covered EU and various issues related to migration.

SPECIAL TOPIC

"RULE OF LAW"

RULE OF LAW IN POLAND – INTEGRATION OR FRAGMENTATION OF COMMON VALUES?

Lucia Mokrá

Comenius University in Bratislava,
Faculty of Social and Economic Sciences,
Institute of European Studies and International Relations
Mlynské luhy 4, 821 05 Bratislava, Slovakia
lucia.mokra@fses.uniba

&

Piotr Juchniewicz

Comenius University in Bratislava,
Faculty of Social and Economic Sciences,
Institute of European Studies and International Relations,
Mlynské luhy 4, 821 05 Bratislava, Slovakia
juchniewicz@interia.pl

&

Arkadiusz Modrzejewski

University of Gdansk,
Faculty of Social Sciences,
Department of Political Science,
ul. Bażyńskiego 4, 80-952 Gdansk, Poland
arkadiusz.modrzejewski@ug.edu.pl

Abstract

The European Union treats the principle of the rule of law as one of the fundamental values of the European axiological system. The EU as a community of values treats the rule of law as a categorical imperative, which is an obligation for member states, which should respect it in an absolute way. The Treaty as well as the interpretation by EU institutions, particularly the Court of Justice of the EU, refers to this value and the obligation to implement it correctly. The recent Polish experience shows that the principle of the rule of law can be vitiated by governing powers. But this attitude

has caused a reaction of European institutions protecting the principle of the rule of law, which is treated by them as a base for mutual trust.

Keywords: *rule of law, democracy, EU values, infringement procedure, Court of Justice of the EU*

INTRODUCTION

The situation in Poland in period of 2015 to 2019, when the government of United Right with Prawo i Sprawiedliwość (Law and Justice) as the leading party represented by Jarosław Kaczyński, was investigating by the Commission due the breach of the rule of law principle. It was underlined from beginning by independent observers, lawyers and political scientists, that the decision would be crucial for understanding the rule of law as the essence of the European Union, which is not only a political entity but also an axiological international community.

In the Polish political debate, the right-wing sees the EU from the perspective of the so-called theory of intergovernmental cooperation, which reduces the EU to its initial form, i.e. economic cooperation, in order to achieve economic interests of nation states. Only the fraction of Jarosław Gowin, who is Vice Prime Minster in the right-wing government, is an exception in the right-wing coalition. It treats the EU or at least declares that it treats the EU in its proper dimension as a political community. The EU in its current form cannot be reduced to the common economic area. In fact the EU is a political power that has evolved into an axiological community for decades. The canon of values of Europe or, being more specific, EU values become more and more recognized element of actions of EU institutions, member states and people [Kołodziej 2017: 63]. Thanks to this the EU can be found as a real normative power changing international reality. John Richardson outlined the fundamental European values at the beginning of the 21st century. He indicated the following features:

1) the rule of law being the basis for social relations;
2) the interaction between the democratic process and human rights deep rooted in political decision-making;
3) the competitive market economy as the source of increasing prosperity;
4) the principle of solidarity among all members of society and the liberty of the individual;
5) the principle of sustainable development as well as
6) the respect for separate identities and the maintenance of cultural diversity within society (2002: 14).

We can find references to the European system of values in diverse speeches of European politicians as well as in programme documents of European political factions. European People's Party is probably the most significant political power that sees the EU in the axiological context. It defines the EU as a community or union of values, reflected in one legal system. EU law is an independent legal system which significantly affects the understanding and countours of law, legal system and legal norms in all member states [Hamuľák, 2014: 120]. However, the texts of treaties, which express the EU system of values and their legal interpretations, are the most important for our consideration. We do not have enough space for a detailed analysis of the evolution of the European Community – from the community of common interests to the axiological community [Florczak & Pacześniak 2014: 346]. At this

point, we have to recall Article 2 of the Treaty on European Union (TEU), which clearly defines the EU axiological catalogue. In this article we read:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

In this paper we would like to present the principle of the rule of law as a pivotal value, considering its meaning for the EU institutions and in general for the European Union itself in the context of the Republic of Poland being accused of breaking that principle. Our analysis is of normative character, however reflecting the structuralism perspective in research of the rule of law [Mentel 2015]. That is why we do not avoid evaluation, referring especially to verdicts and opinions of the Court of Justice of the EU.

1. THE CONCEPT OF THE RULE OF LAW

The normative concept of the rule of law is a result of the lawyers' imagination, which is strictly conducted by the legal system. According to the concept of Brian Tamanaha, the rule of law means that government and citizens are bound by law and limited by law [Tamanaha 2012: 233]. Being asked why people obey the rules, we could say that norms start to be a part of a legal system, then and only then, when they meet strict formal requirements (formal legislation process). According to a strongly normative concept, the law is the source of its normativity. So the relationship between law and action is seen as a relationship of duty. If we regard the norms as the law, it is our duty to follow and obey them [Winczorek, J. 2019].

Due to the concept of Niklas Luhmann, the legal system is a special type of social subsystem responsible for communication between other social systems – a cognitively open but operationally closed system [Winczorek, J. 2019]. Contrarily, Max Webber developed a concept of formal rationality of law, which means the law as a subsystem diverse and abstract. For Webber, rationality is predictability and predictability in the legal sense is clarity and certainty of law [Drozdowicz, Z. 2009: 115-132]. Both great thinkers pointed out the specific role of the rule of law principle in the legal system. However, we may ask whether legal clarity and certainty exhaust the features of the rule of law.

According to the opinions of the great social thinker Émile Durkheim, there is also a social role of law, assuming that the legal system defends socially recognized values. Durkheim, being a liberal in the sense of recognizing the autonomy of the individual, at the same time recognized society as a specific social fact, not reduced to institutions and procedures but based on commonly shared values. Therefore, when we consider the issue of the rule of law, we cannot view this concept only as legal positivists do, reducing the importance of the law only to the legal text itself [Oniszczuk 2012: 810-827].

Undoubtedly, the issue of the rule of law and European legal culture is interesting, but at the same time it is very complex. It should be emphasized that the rule of law has become one of the central concepts of modern legal discourse. The essence of the rule of law is based on two principles: holding power by law and limiting power by law. The authorities carry out their activities by applying laws, and at the same time,

they are bound by these laws. It can be concluded that, in the broadest sense the rule of law means that people are obliged to obey the legal system and should remain under its rule.

There are many definitions of the rule of law principle in jurisprudence, but each of them contains the idea of limiting political power by legal norms. Nevertheless, the most valuable effect of this principle is that it enables the autonomy of the individual (every single person). Ipso facto, we can describe it as a mechanism, process, institution, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally, prevents the arbitrariness of power.

The idea of the rule of law is the main principle and method of managing the state, which emphasizes the crucial role of the legal system and obeying the law. This major role of law, which reflects common desires and fundamental aspirations should be visualized and effectively enforced by the whole community. It is a kind of advanced method of governance which requires the nation to be governed by institutions of law, not by individuals, who have obtained the mandate of social support in elections. Moreover, the law is not influenced by the will of the individual – it is a universal, stable and precise instrument for representing public authority. To sum up, the rule of law principle is the guardian of democracy and liberalism in the contemporary philosophy of law policy [Sandel 1998: 33-48].

Moreover, the rule of law principle included requirements on how law should be implemented into society but also implies certain qualities of the characteristics and the content of the rules themselves. In particular, legal regulations should be precise and clear, have a general form, be universally applicable and be accessible to everyone. Legal requirements must be also certain enough for people to follow them; they cannot impose excessive cognitive or behavioral requirements on people who should follow them. Law should be relatively stable and include requirements that people may become familiar with before taking action – so legal obligations should not be established retroactively. Furthermore, law should remain internally consistent, i.e. it should provide legal methods of resolving the contradictions that may arise [Morigiwa 2011: 125-138].

2. RULE OF LAW AND DEMOCRACY

The concept of the rule of law is one of the most common ideas in contemporary public debate. It is usually mentioned as one of the basic and inseparable elements of democracy [Walker 1988]. Referring to the Anglo-Saxon tradition in supremacy of law, the rule of law principle is a negation of the arbitrariness and prevents discretionary of the rule of man [Tamanaha 2012: 24]. This should be understood as a replacement of fully arbitrary governments based on the will of the executive power by those in which power is limited by clearly formulated and unchanging legal provisions [Pietrzykowski 2014: 24].

The rule of law principle and democracy are desirable attributes of the contemporary political systems. It may be understood as a concept meeting three conditions: subordinating political power to the legal system, holding political power by the legal system, citizens possessing certain subjective rights. Understanding the concept this way emphasizes equality before the law and the predictability of political and legal systems in democratic countries. Undoubtedly, there is a strict relationship between democracy and the rule of law, based on a certain balanced connection between the

legislative, executive and judicial authorities. Judiciary and governments can lead ideological disputes, but even if they are not divided by ideology, politicians and judges want to expand their institutional power [Marawall, Przeworski 2010: 22-23]. Democracy is essentially based on electoral institutions, governments, and legislatures. The law works through courts, judges and specialized state institutions. Concrete institutions responsible for democracy and the legal system are representing concrete values, which may intersect at some point. When legal institutions claim the right to regulate and organise social interactions, democratic governance may be considered as limited. On the other hand, when parliament claims the sovereign power to legislate any law, the status of judicial institutions become secondary – judges become sole executors of concrete orders or may be considered as political actors [Ferejon, Pasquino 2010: 235-236]. It is clear that the efficient functioning of a legal system requires independent courts and autonomous judges.
Relations between democratic and judicial power lead to tensions due its character. That is why constitutional courts were introduced into European legal systems, which contributed to the extension of judicial influence into the sphere of political decisions. In some countries, active constitutional courts have had greater involvement in controlling and disciplining the legislative process. In others, however, changes were required in internal legislative debates. The legislative aspect of constitutional judication requires an abstract and a priori revision of the content of legal statutes and the constitution act. It may give rise to associations of quasi-political control. Essentially the constitutional court must consider and choose from various normative rules governing social behaviour.
In a democracy, when the opposition is weak and the credibility of the legal system and courts is low, the ones in power decide to confront independent courts, when they enjoy broad public support. Then the probability of success is high, and the risk of retaliation is limited. In such circumstances, the institutions of the rule of law are portrayed as something contrary to democracy. This kind of situation took place in Argentina during the presidency of Carlos Saùl Menem, who due to high social support, changed the composition of the Supreme Court, appointing politically loyal judges [Marwall, Przeworski 2010: 262]. Such a situation can also currently be observed in Poland, where the ruling party, Law and Justice, implements a policy of subordinating the judiciary to the executive branch, under the guise of reforming the judiciary.

3. RULE OF LAW AS A EU VALUE AND THE CASE OF POLAND

According to fundamental principles of the EU, the rule of law is one of the values, which are pre-conditions of membership, but may also be reviewed by the Commission anytime there is doubt about the failure of a Member State. As stated in Article 2 TEU, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Under the rule of law, all public powers always act within the confines set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.
The evaluation and review process is reflecting the system of EU shared values (EU, 2019a), which had been developed in safeguarding in the last years, and is based on:

1) The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council and the Commission in Nice in 2000 [Fridrich 2008].
2) The fundamental values of the European Union are enshrined in the EU treaties and in the Charter of Fundamental Rights of the EU. The Charter has been legally binding since 2009.
3) On 17 July 2019, the European Commission adopted a Communication on the measures it intends to adopt in order to reinforce the implementation of the rule of law within the Union. The most important new procedure is an annual monitoring cycle to review rule of law developments in the member states, resulting in an annual rule of law report.

As stated in these documents, EU values are common to EU countries in a society in which inclusion, tolerance, justice, solidarity and non-discrimination prevail. These values are an integral part of the European way of life. This means, that the member states are obliged to continuously enshrine these values. The problem lays in the missing unified characteristics, benchmarks or the system of evaluation in its implementation.

As FRAME analysis states, the concepts of democracy, the rule of law and fundamental rights may be said to be dynamic if not 'famously elusive' concepts, whose boundaries may remain relatively unclear (FRAME 2014: 3). In the European Treaties, these concepts are usually mentioned together, which at the very least shows their interconnection and interdependence in the context of the EU legal framework. Accordingly, any debate on how to strengthen Member States' compliance with Article 2 TEU should start from the premise that democracy, the rule of law and fundamental rights are mutually reinforcing principles, whose relationship may be described as triangular [EP 2013: 59]. There is, however, some disagreement among stakeholders concerning which of these three values may be considered the most fundamental one. For the European Union Agency for Fundamental Rights, human rights should be considered the overarching concept. For the Commission's DG Justice, the overarching concept would appear to be the rule of law, while other stakeholders may feel that democracy is the glue that binds the three elements together [FRA 2014]. The new Rule of Law Framework established by the European Commission, however, considers the values of Article 2 TEU from the perspective of the rule of law [EC 2014: 3-4].

Different mechanisms and processes exist at EU level to promote, protect and safeguard EU values laid down in Article 2 TEU, in particular, democracy, the rule of law and fundamental rights. These include legally binding mechanisms stated in Article 7 TEU, which allows EU institutions to act in situations where there is 'a clear risk of a serious breach' of EU values by a Member State or where there is a serious and persistent breach of EU values laid down in Article 2 TEU. The legally binding mechanisms for enforcement of the EU values includes also the traditional infringement procedure set out in Articles 258 to 260 TFEU. There are also non-binding or soft law tools, in the form of annual reports prepared by EU institutions covering matters related to Article 2 TEU. In 2014, both the European Commission and Council introduced two new additional mechanisms: the Commission adopted a new Rule of Law Framework (EC 2014) and the Council committed itself to organising a new annual rule of law dialogue between Member States (CoEU 2014), according to which the rule of law should be evaluated as the foundation for proper implementation and it should enshrine EU values.

Developments in some Member States have led to criticism regarding the ability of the EU to act upon serious threats or breaches of EU values by Member States. Relevant examples include the situation of Roma minority rights in France in the summer of 2010, the measures adopted by Viktor Orbán's government in Hungary concerning, for example, the independence of the judiciary, as well as the non-respect for constitutional court judgments in Romania in 2012 [Reding 2013].
Despite the body of EU instruments and processes to uphold values described in Article 2 TEU, serious concerns remain with respect to their effectiveness. The Commission's Rule of Law Framework was activated for the first time in response to the constitutional crisis in Poland [Brunsden 201].

4. POLAND "RULE OF LAW" CRISIS

Poland is the first country against which the European Commission has started proceedings under its Rule of Law Framework. Poland is the first member state of the EU ever to become subject to the measures described in Article 7 of the Treaty on European Union (TEU) and subject to the decisions of the Court of Justice of the EU. The case against the Polish government has started in 2016. The European Commission initiated its Rule of Law Framework proceedings on 13 January 2016. [Niklewicz 2017]. This was done in response to both the assault on Poland's Constitutional Tribunal by the ruling Law and Justice party (Prawo i Sprawiedliwość, PiS) and the new legislation on public service broadcasters, which gave the government political control over the public media (European Commission 2016c). While both areas are equally important, it is the Constitutional Tribunal issue that, understandably, raised the most concerns. In December 2015, the PiS majority in parliament, acting under the pretext of seeking political pluralism in the composition of the Tribunal, passed a new law concerning its functioning and the nomination of its judges (European Commission 2016a). Before being effectively crippled, the Tribunal managed to rule on 9 March 2016 that the law of 22 December 2015 had been unconstitutional (Poland, Constitutional Court 2016). The Polish government under the majority of PiS simply refused to publish that ruling, claiming that it had no legal standing. In the following months, the president and the vice-president of the Tribunal were replaced by lawyers close to PiS, and additional judges were nominated, despite the fact that the previous (unpublished) ruling of the Tribunal had deemed such actions unconstitutional (Poland, Constitutional Court 2016).
The European Commission's initial assessment was that there was the possibility of a threat to the rule of law in Poland (European Commission 2016a). This was validated by the official opinion of the European Commission for Democracy through Law, known as the Venice Commission. In its March 2016 opinion, the Venice Commission stated that PiS's actions endangered not only the rule of law, but also the functioning of Poland's democratic system. It warned that PiS undermined all three basic principles of the CoE: democracy, human rights and the rule of law [European Commission for Democracy Through Law 2016: 24]. The Polish government waved the Venice Commission's opinion aside, as it did the European Commission's initial findings.
As the situation in Poland deteriorated, the European Commission's Rule of Law Framework proceedings continued, albeit at a relatively slow pace. On 1 June 2016, almost half a year after the dialogue with the Polish government started, the Commission adopted its formal opinion, effectively concluding the first stage of the

procedure [European Commission 2016a]. The next stages took place in July and December 2016, and then in July 2017 the Commission issued formal recommendations to the Polish government [European Commission 2016b, 2017]. The third and most recent recommendation covers a relatively new, additional issue: legislative proposals in the area of court organisation that would limit the judicial independence of ordinary courts. In the European Commission's view, this further increases the systemic threat to the rule of law in Poland [European Commission 2017].

While adopting the third Rule of Law recommendation, the European Commission explicitly warned that it was finally ready to launch the sanctions procedure under the framework of Article 7 of the TEU [European Commission 2017].

The Commission has finally brought infringement proceedings against the Republic of Poland under Article 258 TFEU for failing to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union, on the grounds that, first, national measures lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) appointed to that court before 3 April 2018 infringe the principle of irremovability of judges, and second, national measures granting the President of the Republic discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age infringe the principle of judicial independence [EC, 2019].

Fundamentally, this case presents the Court with the opportunity to rule, for the first time within the context of a direct action for infringement under Article 258 TFEU, on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system with the standards set down in the second subparagraph of Article 19(1) TEU, combined with Article 47 of the Charter, for ensuring respect for the rule of law in the Union legal order. (2) It also raises some important questions concerning the material scope of the second subparagraph of Article 19(1) TEU in relation to that of Article 47 of the Charter and the relationship between the procedures of Article 258 TFEU and Article 7 TEU [Tanchev 2019].

The European Commission in its press release stated, that the activation of Article 7 TEU is focused on protection of the rule of law in Europe. With reference to Poland it was pointed out, that judicial reforms in this country led to the political control over the judicial power. "In case of missing courts' independence there arise serious doubts on EU law implementation, from the protection of investments to the mutual recognition of judgements in various areas, as from the disputes on children's care to European Arrest warrant." [EC 2019]

The European Commission had issued the additional (fourth) recommendation related to the rule of law, identifying steps, which Polish authorities may take towards the settlement of the current situation. Once Polish authorities implement recommendations properly, the European Commission after consulting the European Parliament and the Council may reconsider its submission to the Court. The European Commission confirmed that it has the intention to leads a constructive dialogue with Polish authorities to consensually settle the situation.

However, in the Commission's statement, it was expressed, that Polish authorities had adopted more than 13 laws, which influence the whole structure of judicial power in Poland and have serious influence on the Constitutional Court, the Supreme Court, courts of general jurisdiction, the National Judicial Council, the prosecutor's office and the National Judicial School. Its common characteristics is, that legislative

and executive power may systematically interfere with the content, competences, administration and work of justice. "The new disciplinary regime undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control, as required by the Court of Justice of the European Union" [EC 2019].

The Court of Justice of the EU ruled, that, first, by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) is to apply to judges in post who were appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU [CJ EU 2019: C619/18].

After this decision, all member states and EU institutions should learn the lesson from the judgement and start preparing modifications both to Article 7 TEU, which includes a sanction mechanism, and to the European Commission's Rule of Law Framework, so that the EU's internal defences are strengthened for future needs. It has to be clearly interpreted, that activating Article 7 TEU is called as "nuclear option" due its consequences and as such it should prevent different approach between Member States in this sensitive matter.

The different treatment of Poland and Hungary by the EU was presented by offering a purely legalistic explanation: While "concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play", the situation of Poland would allegedly be different to the extent that the main issue is "the fact that binding rulings of the Constitutional Tribunal are currently not respected", which "is a serious matter in any rule of law-dominated state" [EC 2016]. To prove the equal evaluation of situations in different members states, the Court of Justice should use some applicable quantitative statistic methods [Mentel 2002] to prove beyond doubt the transparency in the procedure and the same treatment with all member states, which threaten the fundamental principle.

CONCLUSION

Strengthening the rule of law in the European Union, has already been on the European Union agenda for several years and it is still a top priority, which was strongly worded in the content of communication from the European Commission to the European Parliament, The European Council and the Council, dated on 3 April of 2019 [EU 2019]. The document says in its first sentence, that the rule of law is one of the founding values of the European Union [TEU 2009: article 2], as well as a reflection of our common identity and common constitutional traditions. We can further read, that under the rule of law, all public powers always act within the constraints set out, by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent accountable democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts and effective judicial review [TEU 2009: article 19; CJ EU, 2017] including respect for fundamental rights; separation of powers; and equality before the law. [Commission 2014]

In the judgement of 24 June 2019 on the infringement procedure launched against Poland in October 2018, the Court of Justice of the European Union ruled that Poland has failed to fulfil its obligations under Article 2 of the Treaty of European Union. [CJEU 2019: C-619/18] This judgment confirmed the jurisdiction of the Court of Justice of the EU to check compliance with judicial independence by national courts under Article 19 (1) Treaty of European Union. In the judgment, the court underlines the significance of respecting the common values upon which the European Union is founded – to respect the rule of law principle in order to maintain mutual trust [Bachmaier 2019: 120-126].

ACKNOWLEDGMENT

This work was supported by the Slovak Research and Development Agency under the contract No. APVV-16-0540.

REFERENCES

Bachmaier, L., (2019), Compliance with the Rule of Law in the EU and the Protection of the Union's Budget, in EUCRIM, 2, 120-125.

Brunsden, J., (2016), Leaked: Timmermans letter to Warsaw, in Financial Times. 13 January 2016.

CJ EU, 2017. Case C-72/15 Rosneft. Online: http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-72/15. ECLI:EU:C:2017:236 [last accessed on 27 October 2019]

CJ EU, 2019: C-619/18. Commission vs Poland, Judgment of the Court (Grand Chamber) of 24 June 2019 — European Commission v Republic of Poland, ECLI:EU:C:2019:531

CJ EU, 2019. Poland v. Commission, case C-619/18, source: http://curia.europa.eu/juris/document/document.jsf?text=&docid=216461&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=8211212, ECLI:EU:C:2019:615 [last accessed on 27 October 2019]

CoEU, 2014. Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law of 16 December 2014.

Commission, 2014. Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law of 11.3.2014, COM(2014) 158 final.

Drozdowicz, Z., (2009), Weberowski "model" badań historycznych, in Nauka, 3, 115-132.

EC, 2016. European Commission Press Release Database, Readout by First Vice- President Timmermans of the College Meeting of 13 January 2016, SPEECH/16/71.

EC, 2014. European Commission, Communication 'A new EU Framework to strengthen the Rule of Law' of 19 March 2014, COM(2014) 158 final/2.

EC, 2019. Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control. Brussels, European Commission, 2019, source: https://europa.eu/rapid/press-release_IP-19-1957_en.htm [last access on 29 September 2019]

EU, 2019. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Further strengthening the Rule of Law within the Union State of play and possible next steps, COM/2019/163 final. Source: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0163&from=EN

European Commission, 2016a. Commission opinion on the rule of law in Poland and the Rule of Law Framework: Questions & answers. Press Release, MEMO/16/2017, 1 June.

European Commission, 2016b. Rule of law, Commission issues recommendation to Poland. Press Release, IP/16/2643, 27 July.

European Commission, 2016c. Rule of law in Poland: Commission starts dialogue. Press Release, WM/16/2030, 13 January.

European Commission, 2017. European Commission acts to preserve the rule of law in Poland. Press Release, IP/17/2161, 26 July.

European Commission for Democracy Through Law. (2016). Opinion on amendments to the act of 25 June 2015 on the Constitutional Tribunal of Poland. Opinion, CDL-AD (2016)001, 11 March.

EP, 2013. 'The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism'. Brussels, European Parliament, 2013. http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf [last access on 29 September 2019]

EU, 2019. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL. Further strengthening the Rule of Law within the Union State of play and possible next steps. Source: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN, [last access on 26 October 2019]

EU, 2019a. Common values and the rule of law: cornerstones of EU action. Finland, 2019. https://eu2019.fi/en/priorities/values-and-the-rule-of-law [last access on 29 September 2019]

Ferejohn, J. & Pasquino, P., (2010), Demokracja i rządy prawa, in: Maravall, J.M. & Przeworsk, A. (eds.), Demokracja i rządy prawa, Warszawa: Wydawnictwo Naukowe SCHOLAR.

FRA, 2014. Democracy Reporting International, 'From commitment to action: Fundamental values in EU Member States', Report on an expert roundtable on legal mechanisms and reforms of EU law, Berlin, 30 January, 2014.

FRAME, 2014. Frameproject output, WP3, deliverable 2. 'Critical analysis of the EU's conceptualization and operationalization of the concepts of human rights, democracy and rule of law'. Brussels, European Commission, 2014.

Fridrich, B., (2008), EU Charter of Fundamental Rights. In: Fridrich, B. et all.: Human rights protection in the EU. Bratislava : Univerzita Komenského, 2008. - 245 p.

Florczak, A. & Pacześniak, A., (2014), Unia Europejska – strażniczka wartości czy (własnych) interesów?, in: Pacześniak, A. & Klimowicz, M. Procesy integracyjne i dezintegracyjne w Europie, Wrocław: OTO.

Hamuľák, O., (2014), The Unbearable Lightness of Being Guardian of the Constitution (Revolt and Revolution Dilemma in the Approach of the Czech Constitutional Court Vis-á-vis EU and Supranational Legal Order. European Studies vol. 1, 119-129.

https://bim.lbg.ac.at/sites/files/bim/attachments/deliverable-3.2.pdf [last access on 29 September 2019]

Kołodziej, J. H., (2017), Enclaving of European Community and the Aftermath o f Pereat Mundus. The Dynamics of European Values in Polish Society, in Politicke Vedy 20 (4), 63-89.

Luhmann, N., (1995), Social Systems, Stanford: Stanford University Press.

Marvall, J.M., (2010), Rządy prawa jako broń polityczna, in Maravall, J.M. & Przeworski, A. (eds.), Demokracja i rządy prawa, Warszawa: Wydawnictwo Naukowe SCHOLAR

Maravall, J.M. & Przeworski, A., (2010), Wprowadzenie, in Maravall, J.M. & Przeworski, A. (eds.), Demokracja i rządy prawa, Warszawa: Wydawnictwo Naukowe SCHOLAR.

Mentel, A., (2015), Introduction to structuralism and post-structuralism: Trnava: Typi Universitas Tyrnaviensis, 2015.

Mentel, A., (2002), Application of statistical methods in ethnography, in Slovenský národopis, 50 (1), 5-24.

Morigiwa, Y., (2011), Interpretation by Another Name, in: Morigiwa, Y., Stolleis, M. & Halpérin J. (eds.), Interpretation of Law in the Age of Enlightenment, Heidelberg: Springer Netherlands.

Niklewicz, K., (2017), Safeguarding the rule of law within the EU: lessons from the Polish experience, in European View, 16, 281-292.

Oniszczuk, J., (2012), Filozofia i teoria prawa, Warszawa: C.H. BECK.

Pietrzykowski, T., (2014), Ujarzmienie Lewiatana. Szkice o idei rządów prawa, Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Poland, Constitutional Court, (2016), Wyrok, Sygn. Akt K 47/15. [Judgment, case no. K 47/15]. Warsaw, 9 March. http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/02/wyrok-TK_K_47_15.pdf [last access on 29 September 2019]

Reding, V., (2013), The EU and the Rule of Law – What next?, Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677.

Richardson, J., (2002), The European Union in the World – A Community of Values, in Fordham International Law Journal, 26 (1), 12-35.

Sandel, M., (1998), Liberalism and the limits of justice, Cambridge: Cambrigde University Press.

Tanchev (2019), Opinion of advocate general Tanchev delivered on 11 April 2019(1) Case C619/18, source: http://curia.europa.eu/juris/document/document.jsf?text=&docid=212921&pageIndex=0&doclang=en [last access on 29 September 2019].

Tamanaha, B., (2012), The History and Elements of the Rule of Law, in Singapore Journal of Legal Studies, 2, 232-247.

TEU. (2009), Article 2 of the Treaty of European Union.

TEU. (2009), Article 19 of the Treaty on European Union.

Walker, G., (1988), The Rule of Law Foundation of the Constitutional Democracy, Melbourne: Melbourne University Press.

HOW MUCH IS THE RULE OF LAW RELEVANT FOR HUMAN RIGHTS PROTECTION?

Branislav Fridrich

Matej Bel University,
Faculty of Law,
Komenského 20, 974 00 Banská Bystrica, Slovakia
fridrich@fridrichpalko.sk

Abstract

Rule of law and human rights are connected categories. Rule of law would be empty definition without human rights and human rights protection cannot be enforced without the rule of law framework. The strong rule of law is key for human rights protection. Some of human rights are directly overlapping with the rule of law, as right for fair trial or freedom of speech. The paper is focused on the implementation of the rule of law framework adopted on international level into European level and it is followed by country analysis as the case study to verify the connection of rule of law and human rights.

Keywords: *rule of law, human rights, democracy, rule of law index, justice scoreboard*

INTRODUCTION

The Rule of Law concept is present in international environment for a long period of time, in some formalised version in las 15 years. In the European context, the Rule of Law was formed as the founding principle of the European Union, by setting the framework for its proper implementation [Modrzejewski 2016]. This is well understood and visible in the European territory also within the work of another body – Venice Commission of the Council of Europe. We also want to underline the important role of the rule of law in ensuring government accountability in implementation of human rights. We argue, that if national Courts fulfil criteria set as the rule of law standards, those Courts are better prepared to interpret human rights in the modern world and contribute to its effective protection.

1. THE RULE OF LAW AND HUMAN RIGHTS IN INTERNATIONAL LAW

1.1. Rule of law framework within the UN system

As written in the report of UN Secretary-General [UN 2005]:

> "while freedom from want and fear are essential, they are not enough. All human beings have the right to be treated with dignity and respect" (para. 27). Such dignity and respect are afforded to people through the enjoyment of all human rights and are protected through the rule of law. The backbone of the freedom to live in dignity is the international human rights framework, together with international humanitarian law, international criminal law and international refugee law. Those foundational parts of the normative framework are complementary bodies of law that share a common goal: the protection of the lives, health and dignity of persons. The rule of law is the vehicle for the promotion and protection of the common normative framework. It provides a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of all human rights."

The rule of law concept requires that legal processes, institutions and substantive norms are consistent with human rights. It means, that the principles connected to rule of law as equality under the law, accountability before the law and fairness in the protection of human rights have to be observed. As presented also by UN SG, "the rule of law is the implementation mechanism for human rights, turning them from a principle into a reality".

According to this we can consider the rule of law and human rights as the two sides of the same coin, it has indivisible relation. The root of this relation can be found in the key international human rights document, the Universal Declaration of Human rights, in which it is stated that it is essential, "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" [UN 1948].

The following international documents confirmed this interlink between rule of law and human rights, i.e. in the Millennium Declaration [UN 2000], Member States agreed to spare no efforts to strengthen the rule of law and respect for all internationally recognized human rights and fundamental freedoms. In the following Resolution adopted by the General Assembly on 16 September 2005 [UN 2005a] Member States recognized the rule of law and human rights as belonging to the universal and indivisible core values and principles of the United Nations. And finally, in the Resolution A/RES/67/1 - Declaration of the High-level Meeting on the Rule of Law [UN 2012] Member States emphasized that human rights and the rule of law were interlinked and mutually reinforcing.

As from the procedural point of view, the competences to review the proper implementation of the rule of law was assigned to the Human Rights Council. Within the Council work, there had been adopted several resolutions, that directly relate to both human rights and the rule of law, including on the administration of justice; on the integrity of the judicial system; and on human rights, democracy and the rule of law.

The Human Rights Council has established several special procedure mechanisms directly related to the rule of law, such as the Special Rapporteur on the independence of judges and lawyers [UN 1994], the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence [UN 2011],

the Independent Expert on the promotion of a democratic and equitable international order [UN 2011a] and the Special Rapporteur on the promotion and protection of human rights while countering terrorism [UN 2005b].

1.2. Rule of Law Index

While universally agreed human rights, norms and standards provide its normative foundation, the rule of law must be anchored in a national context, including its culture, history and politics. States therefore do have different national experiences in the development of their systems of the rule of law. Nevertheless, as affirmed by the General Assembly in resolution A/RES/67/1 [UN, 2012], there are common features founded on international norms and standards.

One of the most valuable evaluation of the rule of law according to the requirement of the legal processes, institutions and substantive norms, is the Rule of Law Index. This is focused on evaluation whether the rule of law is performed conform to internationally set standards, but still respecting national legal and material surrounding. [WJP 2019]

Rule of Law Index measures countries' rule of law performance across eight factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice [WJP 2019]. Due its importance and the mechanism elaborated; the Rule of Law Index is applied in 126 countries all over the world. However, there are almost 70 countries not covered, which means, that the UN is not aware of approximately one third of UN members' rule of law state. As to the implementation value, the focus is primarily on countries, where the Rule of Law index refer to potential violations and fragility due other powers intervention to judicial power. As such, the Rule of Law Index is not providing sufficient data to European countries Rule of Law evaluation.

2. WHY AND HOW TO MEASURE RULE OF LAW IN PRACTICE?

2.1. EU Justice Scoreboard and reflection of international standards on European level

As concluded from above, it is very hard to measure the level of the rule of law. While it is pre-condition for human rights implementation, we focus on the way how to combine existing mechanism on the international level (the UN level) with the regional mechanism in the Europe (elaborated within the Council of Europe and European Union) to properly evaluate the rule of law in the country. As for the methodological point of view, we choose case study of the Slovak Republic, because it is not involved in the universal system of the rule of law evaluation (not a part of the WJP Rule of Law Index) and it is by territory close to the countries, which were recently subject of the European Commission investigation on the rule of law status. This fragility provides us the basis for the analysis, why and how to measure rule of law, to prevent consequences in relation to breach of this obligation internationally and under the European law.

The universal system of the rule of law is based on the acknowledgement of the legal processes, institutions and substantive norms in relation to human rights. According to the principle of supremacy of international law as well as the obligation of the EU stated in the article 6 TEU [Mokrá 2011: 398], the EU recognises the principle of human

rights protection as developed within the UN system. By analogy we can use the general approach of evaluation the legal processes, institutions and substantive norms in the country, to conclude on relation between the rule of law and human rights.

According to this, there are two mechanism of the Rule of Law evaluation in Europe:

1) Within the European Union - the system of Justice Scoreboard in the European Union, which had been adopted in 2013 by the European Commission. This is focused particularly on judicial institutions, its system of creation, independency and impartiality (mainly through the process of creation of courts and budget independence). The system evaluate the level of the Rule of Law by set criteria of quality and independence. The another criteria of efficiency was adopted in the way to evaluate processes, with special focus on protection of rights in judicial proceeding by legal authorities without unreasonable delay.
2) The system of monitoring Rule of Law and Human Rights by Council of Europe. This competence is exercised by the European Commission for Democracy through Law (the Venice Commission), a Council of Europe independent consultative body on issues of constitutional law, including the functioning of democratic institutions and fundamental rights, electoral law and constitutional justice. According to its Report on the Rule of Law [Venice 2011], the Venice Commission is able to issue opinion as the alert in relation to any situation or adopted legislation with potential to breach the rule of law principle in the member state.

Both of the systems are complementary, as for the preparation of the EU Justice Scoreboard, the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) was asked by the European Commission to collect data and conduct an analysis. The European Commission has used the most relevant and significant data for elaborating this Scoreboard. The Scoreboard also uses data from other sources, such as from the World Bank, World Economic Forum and World Justice Project. [Commission 2013] The European Commission also rely on the individual opinions of Venice Commission in relation to rule of law in the EU member states.

The combination of the both systems provides us framework to evaluate stated universal criteria for rule of law – institutions, legal processes and substantive norms in relation to human rights.

a) judicial institutions

Courts have an important responsibility in ensuring the observance of human rights. In a sense, the challenge for the national court of first instance is the same as for one of Europe's highest courts: to ensure that human rights do not only exist on paper but that they are ‘practical and effective’.

However, the pyramidal structure of the judicial system gives these different courts different roles. The higher courts have a greater responsibility for the interpretation of human rights that are laid down in the ECHR, the EU Charter of Fundamental Rights and national legislation. Via their binding interpretation of such legal provisions these courts can influence the practical significance of human rights. In the lower courts, the emphasis is on ensuring respect for human rights in the many individual cases that these courts handle. [EUI 2014: 14].

The annual evaluation of the work of national courts is incorporated in the EU Justice Scoreboard [Commission 2019]. It focuses on the three main elements of an effective justice system:

1) Efficiency: indicators on the length of proceedings, clearance rate and number of pending cases.
2) Quality: indicators on accessibility, such as legal aid and court fees, training, monitoring of court activities, budget, human resources and standards on the quality of judgments.
3) Independence: indicators on the perceived judicial independence among the general public and companies, on safeguards relating to judges and on safeguards relating to the functioning of national prosecution services.

While evaluating institutions (judicial institutions), we will focus on all criteria of quality and independence, which are conform to the evaluation of legal institutions.

Table No. 1 – Slovak Judicial Institutions and Independency

Year / number	2013	2014	2015	2016	2017
Number of courts of general jurisdiction	54	54	54	54	54
Number of specialised courts	9	9	9	9	9
Total number of judges	1342	1322	1292	1311	1376
Total number of non-judge staff at courts	4497	4468	4390	4482	4616
Annual public budget allocation	1687629	1719516	1582960	1714751	1728422

Source: [CEPEJ, 2017]

b) legal processes

The above-mentioned EU Justice Scoreboard use also element of efficiency to evaluate the quality of legal processes, mainly through the length of proceedings, clearance rate and number of pending cases.

From the point of efficiency, the number of received and pending cases has been developed as follow:

Table No. 2 – Efficiency of the Slovak courts

Year / number of cases	2013	2014	2015	2016	2017
1st instance courts pending cases (civil)	339930	407396	396248	320952	254068
1st instance courts incoming cases (civil)	690648	614273	535414	922805	855880
2nd instance courts pending cases (civil)	21467	26041	36764	31216	21695
2nd instance courts incoming cases (civil)	69217	87676	87688	68142	46920
High instance courts	-	9240	11948	12799	7992

Source: [CEPEJ, 2017]

As two out of three criteria of the rule of law e judicial institutions and legal processes are interconnecting, we can summarise from the above-mentioned short data presentation following: The number of cases increased especially in 2016 and 2017, however, the number of pending cases decreased. This is connected with the electronisation of the judicial proceeding and judicial registration desk at courts, as well as the increased number of judges at courts (see table No.1). What is however significant is, that in the 2nd instance courts there are still approximately one third of cases pending, which use to lead to prolongation of the judicial proceeding and then is even transferred into the increased number of applications to ECtHR due unreasonable delay in the proceeding.
As to the independency of judicial institutions, we may use the only presented criteria – the allocated money from state budget. The annual budget increased in 2016 due mentioned electronisation and increase of the number of judges, however since that time the increase of the budget in 2017 is under lower than the inflation rate. It does not allocate finances in relation to increased number of cases as well as to development and improvement of the judicial system in the country. The development in judiciary is not reflecting recommendations of the overall country analysis done in 2011 [Analysis 2011].

c) substantive norms

Unfortunately, the EU Justice Scoreboard does not evaluate the quality of the substantive norms. However, once we want to evaluate substantive norms and the relation of the rule of law and human rights, we may focus on those human rights directly overlapping with rule of law - right for fair trial or freedom of speech, as notified by the UN Secretary-General Report [UN 2005]. In t
This is in relation to Slovakia quite an issue, as these rights are not explicitly evaluated by the Human Rights Council (UN) or by the European Union. But due the fact, the principle of human rights protection is the key element and the common value of EU member states, upon which the European Union is founded [Mokrá 2011: 400], we can use the case law of the European Court for Human Rights to quantify

the level of the substantive norms in these indicated areas, referring to the Article 6, para 2 TEU, as the inspiration and source of the human rights system in the European Union confirmed by the case law of the Court of Justice of the European Union [Mokrá 2013: 231].
Based on the annual statistics of the applications and decisions of the European Court for Human Rights (hereinafter as ECtHR), there are following data for Slovakia available. We focus only on data which overlap with the period stated in tables No. 1 and 2.

Table No. 3 – Applications to the ECtHR against Slovakia

Year / number of applications	2017	2018
Applications allocated to a judicial formation	425	390
Communicated to the Government	47	32
Application decided:	395	439
Of which declared inadmissible or struct out (single judge)	354	391
Of which declared inadmissible or struct out (committee)	22	27
Of which declared inadmissible or struct out (chamber)	1	2
Decided by the judgement	18	19

Source: [ECtHR, 2019]

Right for fair trial and Slovakia
The number of applications is quite high, as visible from the last two years development, there are approximately four hundred applications submitted each year. To draw the overall picture, there had been by 30 November 2019 submitted 2817 applications at all against Slovakia, from which those argued violation of the right for fair trial presented 941 applications (both in civil and criminal matters, of which 422 were only civil matters). However approximately 80% of the applications are found inadmissible (see table No. 3 as well), it is the most frequently used reason for submission of the application to the European Court for Human Rights, like every third application is arguing by the violation of the right for fair trial. Using the argument presented in the table No.3, there is constant feed of applications to ECtHR. In this sense we can conclude, that at least perception of the guarantee of the right for fair trial is low, due highest number of applications.

Freedom of speech and Slovakia
Freedom of speech is defined in the Convention on protection of Human Rights and Fundamental Freedoms [Convention 1950] as the freedom of expression. When analysing the quality of this freedom granted on the national level through the optic of how many applications had been submitted to the ECtHR, we can find out 101 applications by 30 November 2019. It means only 3 per cent of the overall applications.

CONCLUSION

„Nowadays, any government of a member state of the Council of Europe has to explain itself if it fails to take sufficient account of human rights.“ [EUI 2014: 1]. This concluding observation is not only of the political declaration of the government's political liability, but also of the substantive legal character. As the mechanism of the rule of law evaluation provides us the framework of the effective human rights protection, we have to consider different available mechanism not to omit some of the criteria. The effective human rights protection may be provided only in the effective national systems based on the rule of law. The rule of law can be evaluated on the basis of the existence of working and independent judicial institutions, effective legal processes and substantive norms, granting every individual protection of his/her rights according to national constitution and internationally recognised human rights standards.

None of the presented systems of evaluation of the rule of law is perfect. Each is using different perspective and different indicators to evaluate it. The UN system is focused mainly on the rule of law alerts and the system in the countries, where the human rights system is fragile and there are several or systematic violations of human rights due ambiguity of the legal and political system. The Council of Europe system is more precise; however, the general evaluation is fragmented in relation to individual rights and freedoms as granted by the Convention on Human Rights and Fundamental Freedoms. The foundation of the Venice Commission as the independent expert body help to communicate awareness of the rule of law in particular cases, when Council of Europe member states intervene into the independency of the judicial power as the conditio sine qua non for the rule of law application. And finally, the European Union due recent development in its member states, adopted its own Rule of Law Framework. The rule of law as fundamental value is granted by the Article 2 TEU, however there was missing interpretation or the implementing legislation. Investigation of Poland, Hungary, Romania and Malta, even initiating the investigation and the judicial proceeding against the member states based on Article 7 TEU due the violation of the rule of law principle, led us to the new development phase. The rule of law needs precise definition of the content and as the principle has to be observed. Once it was considered as the key element common to all member states, there cannot exist exception in the implementation practice.

When evaluating the situation in Slovakia, we have to conclude, that there are not filled all required characteristics of the effective rule of law system: legal institutions are not effectively working, because of the length of procedure connected with the low budget of the judicial power. The public perception of the independency of the judicial power is also very low. The quality of the judgement has to be seen in the light of the number of cases reviewed or appealed at the court of higher instances – almost one third of first instance courts cases are reviewed by second instance courts and from that approximately one third is reviewed by the highest courts. As to substantive norms, valued upon two main rights implementation – the right for fair trial is one of the most frequently violated right granted by international human rights treaty – Convention on the human rights and fundamental freedoms. The positive impact has the freedom of expression (freedom of speech), which is one of the lowest argued freedom before the ECtHR. Due the latest development in this area and protection of journalists, the final percentage should be viewed in wider perspective. Unfortunately, there we are missing quantitative data to analyse it.

The quality of the particular data influences the level of the overall system. If some instruments and measures are not working, the whole system is failing. We do not need another evaluation mechanism of the rule of law, once recognising it is necessary framework for effective human rights implementation. The government of the concrete country once fulfilling criteria as set in relation to rule of law on international and European level, cannot fail in protecting its citizens and inhabitants.

ACKNOWLEDGMENT

This work was supported by the Slovak Research and Development Agency under the contract No. APVV-16-0540.

REFERENCES

Analysis (2011), Analysis of judiciary in the Slovakia and its efficiency by 2010. Ministry of Justice of the Slovak Republic, 2011, Online: www.justice.gov.sk/Stranky/Sudy/Statistika%20sudy%20a%20sudcovia/analyza_sudnictva2011.pdf

CEPEJ (2017), Study on the functioning of judicial systems in the EU Member States. European Commission. Online: https://ec.europa.eu/info/sites/info/files/20180405_-_eu_scoreboard_-_indicators.pdf

Convention (1950), European Convention on Human Rights and Fundamental Freedoms, Council of Europe. Online: https://www.echr.coe.int/Documents/Convention_ENG.pdf

Commission (2013), EU Justice Scoreboard 2013. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2013_en.pdf

Commission (2019), EU Justice Scoreboard. Online: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2232

ECtHR (2019), Proceeding before the ECtHR. Online: [https://www.echr.coe.int/Documents/CP_Slovak_Republic_ENG.pdf]:

EUI (2014), Corstens, G. Human Rights and the Rule of Law. Florence, EUI. CJC DL 2014/03

EU JS (2019), EU Justice Scoreboard 2019. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

EU JS (2018), EU Justice Scoreboard 2018: Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf

EU JS (2017), EU Justice Scoreboard 2017. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf

EU JS (2016), EU Justice Scoreboard 2016. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2016_en.pdf

EU JS (2015), EU Justice Scoreboard 2015. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2015_en.pdf

EU JS (2014), EU Justice Scoreboard 2014. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2014_en.pdf

EU JS (2013), EU Justice Scoreboard 2013. Online: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2013_en.pdf

Modrzejewski, A., (2016), The European Union and Crisis and Values, in Governing for the Future: Interdisciplinary Perspectives for a Sustainable World, A. Taranu (ed.), Bologna: Medimond, 167-172.

Mokrá, L., (2011), Evropská unie a základní lidská práva In: Evropské právo. Plzeň, Aleš Čeněk, 2011, p. 394-405.

Mokrá, L., (2013), Koncepcia Európskeho unijného práva ľudských práv. In: Ústavné garancie ľudských práv. Bratislava, Univerzita Komenského, Právnická fakulta, 2013. p. 226-239.

UN (2012), Resolution A/RES/67/1 - Declaration of the High-level Meeting on the Rule of Law. Online: https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf

UN (2011), UN resolution No. 18/7 on Independent Expert on the promotion of a democratic and equitable international order. Online: https://www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx

UN (2011a), UN resolution No. 18/6on the promotion of a democratic and equitable international order and the Special Rapporteur on the promotion and protection of human rights while countering terrorism. Online: https://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx

UN (2005b), Human Rights Resolution 2005/80. Online: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20Commision%20on%20Human%20Rights%20RES-2005-80.pdf

UN (2005a), Resolution adopted by the General Assembly on 16 September 2005. Online: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf

UN (2005), Report of the Secretary General No. A/59/2005: In larger freedom: towards development, security and human rights for all. Online: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CPR%20A%2059%202005.pdf

UN (2000), The Millennium Declaration. Online: https://www.ohchr.org/EN/ProfessionalInterest/Pages/Millennium.aspx

UN (1994), UN resolution No. 1994/41 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. Online: https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx

UN (1948), Universal Declaration of Human Rights. (General Assembly resolution 217 A). Online: https://www.un.org/en/universal-declaration-human-rights/

Venice (2011), Report on the Rule of Law. Online: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e,

WJP (2019), Rule of Law Index. Online: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019

RULE OF LAW ON THE CROSSROADS (CURRENT LEVEL OF PROTECTION OF THE PRINCIPLE IN THE EU)

Peter Lysina

Comenius University in Bratislava, Faculty of Law,
Department of International Law and International Relations,
Šafárikovo námestie 6, 810 00 Bratislava, the Slovak Republic
peter.lysina@flaw.uniba.sk

Abstract

The article focused on protection of the Rule of Law in the EU is divided into three parts. The attention is paid to the concept of the Rule of Law, legal basis for possible EU activities and compliance of existing EU instruments with the Treaties. The goal of the first part is to confirm the hypothesis that the Rule of Law at EU level is an autonomous concept. The aim of the second part is to confirm that the Rule of Law as a value has its expression in substantive article(s) of the Treaties. The objective of the third part is to confirm legality of existing EU instruments.

***Key words**: EU, Framework to strengthen the Rule of Law, Annual Political Dialogue, Commission, Council of the EU*

INTRODUCTION

In the last years, the EU has faced several challenges somehow connected with the Rule of Law principle. Such a principle is being highlighted in various situations – with respect to EU activities towards third countries but also with respect to those aimed at Member States of the EU. The Rule of Law principle is mentioned on every occasion. Respecting the principle is mentioned by politicians in their speeches but also by academics and other experts.

Since huge attention has been paid to this principle recently (in comparison to the attention paid to it in previous years of the EC/EU existence), it could lead us to the conclusion that such a principle in the EU is something new. However, such a conclusion would have been far-fetched. From the EU perspective, the Rule of Law principle is nothing new. This principle found its place in the EU (or better-said EC) Law many years ago. For the first time, it was the Court of Justice, which in its Les Verts judgment, confirmed that the European Economic Community was a Community based on the Rule of Law. [Judgment of 23 April 1986, Les Verts v. Parliament (294/83, ECR 1986 p. 1339) (SVVIII/00529 FIVIII/00551)

ECLI:EU:C:1986:166, para 23] However, it should be noted that despite Les Verts judgment, at that time the primary law of the European Communities, contained no explicit reference to the Rule of Law principle.

The situation changed five years later, when in 1992 the Treaty on EU (the Maastricht Treaty entered into force in 1993) incorporated the Rule of Law principle into the primary law. In its preamble, the Maastricht Treaty confirmed the attachment of the Member States of the EU to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the Rule of Law. It should be empasized that the respective paragraph of the Preamble of the Treaty on EU was the first ever provision of the primary law of the EU, which expressly mentioned the Rule of Law principle. Notwithstanding, it was still "only" part of the preamble, not a substantive Article of the Treaty. The incorporation of the principle into the respective Article of the Treaty came only with the Treaty of Amsterdam in 1997 (entered into force in 1999). The treaty of Amsterdam incorporated the new Article 6 into the Treaty on EU. The respective part of the preamble remained unaltered. On the basis of the new Article 6 of the Treaty on EU, the Rule of Law principle was included among principles which are common to the Member States. With this article, the Rule of Law principle became an integral part of the primary law of the EU as one of the common values of the Member States.

A similar perception of the Rule of Law principle was also retained in the Lisbon Treaty in 2007 (entered into force in 2009). Pursuant to the new Article 2 of the Treaty on EU, the Rule of Law principle has still its firm place among the values common to the Member States. In addition to this Article, the Rule of Law principle is also mentioned in the preamble of the Treaty on EU and in its Article 21, which refers to the external dimension of the Rule of Law principle. According to Article 21 of the Treaty on EU, the Rule of Law principle is also one of the guiding principles for the EU's action on the international scene. Finally, the Rule of Law is also expressly mentioned in the Charter of Fundamental Rights of the EU, namely in its preamble as one of the founding principles of the EU. [Mokrá 2008: 24]

Taking into account all facts mentioned above, it is possible to say that the Rule of Law principle has its irreplaceable role in the EU as one of its common values and its founding principle as well. That is why we can say that the EU, as a community of values, was also built on this principle and respect for this principle shall be obvious. However, as we can see that it is not so easy in practice. We are facing various situations that can be marked as challenges to the Rule of Law principle. At this point, we can mention the situation in Poland and Hungary.

For such situations, in which the Rule of Law principle is at stake, the EU has various instruments focused on control and prevention of the Rule of Law deficiencies. Some of them stem directly from the Treaty on EU and from the Treaty on the Functioning of the EU (hereinafter together as "the Treaties"), while others have been established on a basis of legally non-binding instruments (e.g. conclusions of the Council of the EU or communication of the Commission). Perhaps this is also the reason why legality of latter two has been questioned at several occasions.

In this situation, the objective of this article is to focus on the legal aspects of the current instruments on the Rule of Law protection in the EU. The article focuses on several aspects of the Rule of Law protection in the EU. The Aim of the first part is to confirm the hypothesis that the Rule of Law at EU level is an autonomous concept. In this part, the stress is laid on a brief comparison of the major approaches to the Rule of Law in the Member States. On the basis of such a comparison, it is our

ambition to confirm that from a national perspective, the Rule of Law cannot be perceived as something common to all Member States. Therefore, the Rule of Law as a common value (as envisaged in Article 2 of the Treaty on EU) must be perceived as an autonomous EU concept. After the confirmation of this hypothesis, we would like to focus on the analysis of existing EU Law provisions as well as on jurisprudence of the Court of Justice with the aim to find content for the autonomous concept of the Rule of Law at EU level. Since the Rule of Law as a value cannot serve as a legal basis for EU activities, our ambition in the second part of this article is to examine whether there is any adequate legal basis for possible EU activities regarding the Rule of Law. The third part of this article is focused on existing instruments of the EU on Rule of Law protection and on their compliance with the EU Law. This part is divided into two chapters dealing with instruments stemming directly from the Treaties and with instruments created by the Institutions. It is obvious that a thorough analysis is not necessary with regard to legality of the first group of instruments. Since they are an integral part of the primary law, they must be compatible with the Treaties (by their very nature). With respect to the legality of the second group of instruments, some objections from the Member States resonated. That is why the objective of this part is to analyse these instruments and to examine their compliance with the Treaties.
On the basis of the outcomes of these three parts, we would like to come to assess whether the current instruments of the EU on the Rule of Law protection are legally sound and sufficient or whether there is special need for replacement of existing mechanisms by new ones (e. g. by Periodic Peer Review or others).

1. RULE OF LAW (IN THE EU) – CONCEPT

1.1 Unity or diversity at national level?

As it was indicated above, the Rule of Law principle at EU level is perceived as a value that is common to all Member States. Considering such a perception, it is clear that the concept of the Rule of Law should be common to all Member States.
With the aim to confirm the existence of a common concept of the Rule of Law, we should focus on how the Rule of Law is perceived in the Member States. It should be noted that, our intention is not to bring an exhaustive analysis of the approach to the Rule of Law principle in the Member States. We would only like to check whether there is unity among the Member States in interpretation of this principle.
Just a brief look at the situation in selected Member States leads us to the possible conclusion that, at least three different concepts of the Rule of Law exist within the Member States. These are the following - Rule of Law, Etat de droit and Rechtsstaat. Each of them has its own particularities.
In general, it is possible to say that the Rule of Law (originating in the UK) includes procedural obligations (such as a fair hearing before an impartial and independent tribunal) as well as substantive obligations (access to justice; legal certainty; equal application of the law; respect for human rights). [Venice Committee study No. 512/2009]
On the other hand, another concept – Rechtsstaat focuses much more on the nature of the state. Rechsstaat was defined in opposition to the absolutist state, which implies unlimited powers of the executive. Protection against absolutism had to be provided by the legislative power, rather than by the judiciary [Wennerström 2007: 50].
As far as the third approach is concerned, the French concept Etat de droit puts less emphasis on the nature of the state, which it considers the guarantor of fundamental

rights enshrined in the Constitution against the legislator. As such, Etat de droit actually implies (judicial) constitutional review of ordinary legislation. [Heuschling 2002: 380]

As it stems from the particularities of those three concepts, we can say that the Rule of Law, Rechtsstaat and Etat de droit are indeed different concepts. The different nature of those three concepts is not relativized even by some common features they have (the role of the Parliament and the role of review made by judges). [Wennerström 2007: 73]

Taking into account the above-mentioned situation in the EU, with at least three various approaches to the Rule of Law (other combinations and approaches are also possible), it seems very difficult to agree that, at national level, a Rule of Law principle common to all Member States can exist.

1.2 Autonomous concept at EU level?

Based on the comparison of the perception of the Rule of Law within the EU, we concluded that, at national level, there can hardly exist a Rule of Law principle common to all Member States. On the other hand, wording of respective provisions of the Treaties could have justified another conclusion - that besides all existing national approaches to the concept of the Rule of Law, there is another approach that is based on the existence of an autonomous EU concept of the Rule of Law, which is considered to be common to all Member States. With the aim to either confirm or deny such a hypothesis, it is necessary to turn our attention to the way of interpretation of the Rule of Law at EU level.

If there is an autonomous concept of the Rule of Law at EU level, the question is – where can we find its definition (or its characteristics, at least)? In other words, for the existence of an autonomous EU concept of the Rule of Law, it is necessary to confirm, whether there is a definition of the Rule of Law at EU level.

In the introductory part of this article, it was pointed out that there is no express definition of the Rule of Law principle in the primary law of the EU. In addition to that, we can say the same about existing secondary law. Apart from some attempts to define the Rule of Law that were made in currently discussed proposals for legal acts,[1] there is no generally accepted definition of such a principle in the secondary law.

With the absence of an explicit definition in the primary law and in the secondary law, it is necessary to seek a possible definition in the jurisprudence of the Court of Justice. As concerns the jurisprudence of the Court of Justice, it is necessary to say that no judgment contains a comprehensive definition of the Rule of Law principle. On the other hand, various judgments contain elements that can be considered characteristics of the Rule of Law principle. They are the following:

- legality,[2]
- legal certainty,[3]

[1] In particular, it is possible to mention currently (in 2019) discussed proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in the event of generalised deficiencies as regards the Rule of Law in a Member State. See COM/2018/324 final - 2018/0136 (COD).

[2] According to the Court of Justice, "in a community governed by the Rule of Law, adherence to legality must be properly ensured". See Judgment of 29 April 2004, Commission v. CAS Succhi di Frutta (C-496/99 P, ECR 2004 p. I-3801) ECLI:EU:C:2004:236, para 63.

[3] According to the Court of Justice, "the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication and that it may be

- prohibition of arbitrary or disproportionate intervention by the public authorities,[4]
- right to submit acts for a review by the courts,[5]
- separation of legislative, administrative and judicial powers,[6]
- equal treatment[7] and others.

Of course, it is necessary to underline that the list of characteristics of the Rule of Law at EU level is not exhaustive. It may be changed and completed with new judgments and opinions of the Court of Justice.

Anyway, as it seems to be clear from the above mentioned characteristics, the perception of the Rule of Law principle at EU level is similar to the perception of the Rule of Law presented by the Venice Committee in its study on the Rule of Law. The Venice Committee pointed out the following aspects of the Rule of Law principle forming a definition of such a principle - prohibition of arbitrariness, legality, legal certainty, separation of powers, independence and impartiality of the judiciary, respect for (judicial) human rights, hierarchy of norms, non-discrimination and equality before the law. [Venice Committee study No. 512 / 2009: 4 and following] It should be noted that the above-mentioned report of the Venice Committee is widely accepted and the EU is not an exception.

That is why we can conclude that the existence of an autonomous concept of the Rule of Law at EU level was confirmed. On the other hand, we confirmed the existence of the Rule of Law as a value. Therefore, at a latter stage we shall focus on whether there is any legal basis of the EU activities focused on the Rule of Law and its protection.

otherwise only exceptionally, where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected". See Judgment of 12 November 1981, Meridionale Industria Salumi and others (212 to 217/80, ECR 1981 p. 2735) ECLI:EU:C:1981:270, para 10.

[4] According to the Court of Justice, "in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law." See Judgment of 21 September 1989, Hoechst v. Commission (46/87 and 227/88, ECR 1989 p. 2859) (SVX/00133 FIX/00145) ECLI:EU:C:1989:337, para 19.

[5] According to the Court of Justice, "the EU is a union based on the Rule of Law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights ... Treaty has established, ..., a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts, and has entrusted such review to the Courts of the EU". See Judgment of 3 October 2013, Inuit Tapiriit Kanatami and others v. Parliament and Council (C-583/11 P) ECLI:EU:C:2013:625, paras 91 and 92.

[6] According to the Court of Justice, "it should be pointed out, however, that EU law does not preclude a Member State from simultaneously exercising legislative, administrative and judicial functions, provided that those functions are exercised in compliance with the principle of the separation of powers, which characterises the operation of the Rule of Law. It has not been alleged that that is not the position in the Member State concerned in the main proceedings." See Judgment of 22 December 2010, DEB (C-279/09, ECR 2010 p. I-13849) ECLI:EU:C:2010:811, para 58.

[7] According to the Court of Justice, "It must be recalled that the principle of equal treatment is a general principle of EU law." See Judgment of 14 September 2010, Akzo Nobel Chemicals and Akcros Chemicals v. Commission (C-550/07 P, ECR 2010 p. I-8301) ECLI:EU:C:2010:512, para 54.

2. RULE OF LAW (IN THE EU) – LEGAL BASIS

As it was clearly stated above, the Rule of Law (at EU level) is one of the values (common to all Member States) of the EU expressly mentioned in several provisions that found their place in the primary law of the EU. However, as a value only, it cannot serve as a legal basis of EU proceedings aimed at the Rule of Law protection or enforcement.

It should be remembered that in line with Article 5 of the Treaty on EU, the limits of EU competences are governed by the principle of conferral. Under the principle of conferral, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Therefore, any competence (including the competence to start the proceedings on the Rule of Law protection) of the EU has to be conferred upon it by the Member States in the Treaties. [Koutrakos 2008: 172] We can only agree with Craig and De Búrca that clear evidence of existing competence of the EU is the legal basis – adequate provision of the Treaties.[8] [Craig, De Búrca 2011: 307] That is why, immediately after we confirmed the existence of an autonomous concept of the Rule of Law in the EU, it is necessary to examine, whether there is an adequate legal basis for the EU to start proceedings against the Member States causing deficiencies to the Rule of Law principle.

As concerns the legal basis for the EU activities aimed at the Rule of Law protection, attention has to be paid to the following approaches:

a) EU activities based on various provisions giving legal basis;
b) EU activities based on special legal basis for the Rule of Law related issues.

Ad a) The first approach is linked with the past. Before the Court of Justice confirmed the existence of a special legal basis, the EU could have based its activities focused on the Rule of Law only on legal basis primarily linked with other issues. For example, the EU focused on alleged infringement of the EU law that caused also Rule of Law related deficiencies. In this case, the legal basis for that EU action (aimed at the Rule of Law protection) is the same as for the respective infringement proceedings.

Ad b) The existence of a special legal basis for the Rule of Law related activities of the EU is relatively new. The Court of Justice confirmed it in its several recent judgments. At this point, we can focus on one of them – case C-192/18 relating Polish judiciary. In this judgment, the Court confirmed that Article 19 of the Treaty on EU is the provision, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU. [Judgment of 5 November 2019, Commission v. Poland (Indépendance des juridictions de droit commun) (C-192/18) ECLI:EU:C:2019:924, para 98]. In the light of this judgment, there is no doubt that the EU has the competence over the Rule of Law related issues (even those of the Member States). The Court of Justice further explains that as regards the material scope of the second subparagraph of Article 19 para 1 of the Treaty on EU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51 para 1 of the Charter.

[8] A similar wording found its place in various judgments of the Court of Justice. For example see judgment of 20 September 1988, Spain v. Council, 203/86, EU:C:1988:420, paras 36 – 38

[Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, para 29]
Taking into account the above mentioned we could conclude that the competence of the EU is based on Article 19 para 1 of the Treaty on EU. On the basis of that Article, the EU can take action aimed at the Rule of Law protection in situations in which deficiencies to the Rule of Law occur and provided those deficiencies occur in areas covered by the EU law, irrespective of whether the Member States are implementing the EU law within the meaning of Article 51 para 1 of the Charter.

3. EXISTING INSTRUMENTS OF THE EU – LEGALITY

Once we confirmed the existence of an autonomous concept of the Rule of Law in the EU (that is common to all Member States), as well as the existence of a legal basis, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU, it is necessary to draw our attention to the existing instruments of the EU regarding the Rule of Law protection. With respect to these instruments, we will focus on their compliance with the Treaties. In other words, our goal will be to examine whether the existing instruments have adequate legal basis in the Treaties. We will pay special attention to instruments stemming from the Treaties (we suppose there is no problem with their compliance with the Treaties) and to instruments/mechanisms established by institutions (we will focus on their legality).

3.1. The Rule of Law Protection via Instruments established by the primary law of the EU

Primary law of the EU offers various instruments that can be used for purposes of the protection of the Rule of Law. At this point, we could mention proceedings envisaged by Article 7 of the Treaty on EU, and Articles 258, 259, 260, 267 of the Treaty on the Functioning of the EU [Hillion 2016: 66]. These instruments could be divided into various groups based on several criteria. For the purposes of this article, it seems sufficient to divide them based on their primary purpose. On the basis of this criterion, we can distinguish instruments aimed at the Rule of Law protection only (Article 7 of the Treaty on EU proceedings) and those focused primarily on other proceedings but also applicable for the Rule of Law protection (proceedings based on Articles 258, 259, 260, 267 of the Treaty on the Functioning of the EU).
With respect to any of the proceedings mentioned above it is not necessary to examine their compliance with the EU law. The reason is quite simple – all of the proceedings are directly regulated by provisions of the primary law of the EU. That is why these proceedings (by their very nature) must be compatible with the EU Law.

3.2. The Rule of Law protection via mechanisms adopted by the Institutions of the EU

In addition to various instruments contained in the primary law, the Institutions came with their own mechanisms focused on the Rule of Law, too. At this point, we would like to draw the attention to mechanisms created by the Commission and by the Council of the EU.

New EU Framework to strengthen the Rule of Law

New EU Framework to strengthen the Rule of Law was created by the Commission on 11 March 2014 as its contribution to ensure protection of the Rule of Law in all Member States. The framework was established by the Communication from the Commission to the European Parliament and the Council No. COM (2014) 0158 called A new EU Framework to strengthen the Rule of Law.

The aim of the framework (as declared by the Commission) was to help to find a solution in order to prevent the emerging of a systemic threat to the rule of law in a Member State in which a "clear risk of a serious breach" could develop. [Claes, Bonelli 2016: 283] Based on the Framework, the Commission enters into a bilateral communication with the Member State concerned. The communication with the Member State is divided into three stages – a Commission assessment, a Commission recommendation and a follow-up to the recommendation.

In the first stage (assessment), the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the Rule of Law.

In the second stage (recommendation), the Commission issues a "rule of law recommendation" addressed to the Member State concerned. Such a step comes after the Commission finds that there is objective evidence of a systemic threat and that the authorities of the given Member State are not taking appropriate action to redress it. A very important thing is that the Commission makes both – the sending of its recommendation as well as its main content public.

The last stage (follow up) is linked with monitoring. The Commission monitors the follow-up given by the Member State concerned to the recommendation addressed to it. If there is no satisfactory follow-up by the Member State within the set time limit , the Commission submits a reasoned proposal for activating Article 7 of the Treaty on EU proceedings.

In practice, the Framework was (so far) used only once – relating Poland. It should be noted that proceedings against Poland triggered many objections against the compatibility of the Framework with the EU Law. Objections were heard in particular from Poland, but also from the Legal Service of the Council (as it was presented in the document of 27 May 2014). [Claes, Bonelli 2016: 285] was The argument that there was no legal basis for such a mechanism and therefore it was incompatible with the principle of conferral, which governs the competences of the institutions of the EU, is common for all objections against the Framework. With regard to these objections, we would like to examine whether the Commission has adequate competences for such a framework.

As concerns the compliance with the Treaties, we need to draw our attention to the basis of the framework first. It should be noted that the communication of the Commission could not be considered as a legal act. That is why the Commission was not obliged to identify legal basis for the framework. On the other hand, we can recall the principle of conferral. Under this principle, the Commission can only act in areas in which the EU has adequate competences. Pursuant to Article 5 para 2 of the Treaty on EU, under the principle of conferral, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the EU in the Treaties remain with the Member States.

The question is, whether the Rule of Law protection belongs to such areas (in which the competences were conferred upon the EU in the Treaties). The answer is clear - as mentioned above, the Court of Justice confirmed Article 19 of the Treaty on EU as the provision, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU. [Judgment of 5 November 2019, Commission v. Poland (Indépendance des juridictions de droit commun) (C-192/18) ECLI:EU:C:2019:924, para 98] In addition, the framework respects the existing mechanism on the Rule of Law protection created by Article 7 of the Treaty on EU. That is why we can conclude that the EU (and the Commission) has the competence to establish an adequate mechanism aimed at the Rule of Law protection.

Annual Political Dialogue among all Member States within the Council to Promote and Safeguard the Rule of Law in the Framework of the Treaties

On 16 December 2014, the Council of the EU and the Member States meeting within the Council adopted conclusions on ensuring respect for the Rule of Law establishing an annual political dialogue among all Member States within the Council to promote and safeguard the Rule of Law in the framework of the Treaties. The Member States agreed that the dialogue would be based on the principles of objectivity, non-discrimination and equal treatment of all Member States and would be conducted on a non-partisan and evidence-based approach. [Toggenburg, Grimheden 2016: 233]
The dialogue takes place once a year in the Council, in its General Affairs configuration.
The first round was organised by the Luxembourg Presidency of the Council of the EU on 17 November 2015. In the introductory part of the dialogue, the Commission presented the outcome of its annual colloquium on fundamental rights "Tolerance and respect: preventing and combating anti-Semitic and anti-Muslim hatred in Europe". Then, within tour de table, the Member States shared examples of their best practices as well as challenges encountered at national level in relation to the respect for the Rule of Law. Finally, the Member States also had an opportunity to comment the Presidency non-paper on the Rule of Law in the age of digitalization.
The second round of the dialogue took place on 24 May 2016 under the Netherlands Presidency of the Council of the EU and it was thematically focused on integration of migrants. The Member States presented their best practices in the field of integration of migrants.
The third round of the dialogue was organised by the Estonian Presidency of the Council of the EU on 17 October 2017. Thematic debate was focused on the topic "Media Pluralism and the Rule of Law in the Digital Age".
The fourth round of the dialogue (and so far the last one) took place during the Austrian Presidency of the Council of the EU on 12 November 2018. The topic for the discussion was “Trust in public institutions and the Rule of Law”.
Now (in the second half of 2019), there is no substantive discussion envisaged. Instead of that, the Finnish Presidency of the Council organises an evaluation of the previous four rounds of the dialogue carried out so far. It should be noted that it is the second evaluation since 2014. The first mid-term evaluation took place during the Slovak Presidency in the second half of 2016.
After brief information on several rounds of the annual dialogue, with reference to the goal of this article, it is necessary to examine the legal basis for the annual dialogue of the Council. Particular attention will be paid to the compliance of the annual

dialogue with the Treaties. It is a very important fact that the dialogue was established on the basis of the Conclusions of the Council and the Member States of 16 December 2014. We should bear in mind that conclusions in general are the Council's ordinary means of expression when it is not exercising the powers conferred upon it by the Treaties. In principle, they have the status of purely political commitments or positions with no legal effect. As an exception to this principle, the Council sometimes adopts, in the form of conclusions, certain acts having or designed to have a legal effect, such as positions of the EU in the field of Common Foreign and Security Policy. However, this is not the case of "Rule of Law Conclusions".

Based on what was mentioned above, we can say that the Council Conclusions of December 2014 establishing annual dialogue within the Council are not a legally binding act. Consequently, the dialogue itself was established as a political dialogue.[8] There was no intention to treat it as a legally binding instrument. Therefore we can conclude that the scope of the dialogue as such (or its parts at least) does not belong to the competences of the EU and there is no legal basis for its organisation. On the other hand, the existence of the dialogue on the basis of the Council Conclusions is not contra legem. However, for a definite conclusion on the legality of the dialogue it is necessary to examine also the outcomes of the dialogue (and their compatibility with the Treaties) or follow-ups adopted on the basis of the dialogue (if any).

As far as the outcomes are concerned – each round of the annual dialogue was concluded with the Presidency Conclusions (which are also documents outside the scope of the EU) and no other document, even a legally non-binding one, was adopted. That is why we can conclude that annual political dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties established by the Council Conclusions is not incompatible with the Treaties. It is so because none of the aspects of the dialogue establishes effect non-compatible with the EU Law. In addition, the dialogue does not impose any obligations to the Member States. It is only a platform for the discussion on the Rule of Law related topics.

3.3. Legality of existing instruments

After analysing all the above-mentioned instruments and mechanisms of the EU focused on the Rule of Law protection, we can say that no problem with compliance of these instruments with the EU Law was identified.

Firstly, we confirmed that all instruments directly regulated by provisions of the Treaties (namely Article 7 of the Treaty on EU proceedings, as well as proceedings based on Articles 258, 259, 260, 267 of the Treaty on the Functioning of the EU) are compatible with the EU Law. The reason is that these instruments themselves are part of the primary law.

Secondly, with respect to instruments established by the Institutions, we also confirmed their compliance with the Treaties. Although both analysed mechanisms (of the Council as well as of the Commission) were established based on legally non-binding acts, the analysis confirmed that those mechanisms are fully in line with the Treaties. As concerns the mechanism of the Council – annual dialogue – it imposes no obligations, and as such, is a rather political than legal instrument. Its aim is to

[8] Such an idea clearly stems from the founding Council Conclusions. See paragraph 4 of the Council Conclusions on ensuring respect for the Rule of Law – the Council document No. 16134/14

only discuss. That is why no contradiction with the Treaties was identified. With respect to the Commission´s Framework to strengthen the Rule of Law, it should be noted that some voices concerning its incompatibility with the EU law were heard (e.g. Poland during proceedings against the country). Common for all of those voices was the argument of no legal basis for such proceedings by the Commission. It is possible that a short time after the Commission had adopted its framework in 2014 those voices were right to some extent. However, the situation changed after a series of the Court of Justice judgments. This was because the Court of Justice confirmed Article 19 of the Treaty on EU as the provision, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU. [Judgment of 5 November 2019, Commission v. Poland (Indépendance des juridictions de droit commun) (C-192/18) ECLI:EU:C:2019:924, para 98] As a consequence, it is necessary to reject all the objections against an absent legal basis for the Rule of Law related proceedings. Therefore, we can also conclude that the Framework (despite being established by the Commission's communication) has its legal basis in the Treaties and it is full in line with the EU Law.

CONCLUSION

Taking into account the outcomes of the analysis contained in all parts of this article, we can conclude that:

- The EU Law (and in particular Article 2 of the Treaty on EU) perceives the Rule of Law as a value that is common to all Member States.
- There is no unity in the perception of the Rule of Law at national level. At least three different approaches to the Rule of Law exist (Rule of Law, Etat de droit and Rechtsstaat). In addition, other approaches to the concept at national level cannot be excluded. That is why only an autonomous concept of the Rule of Law principle (existing at EU level) can be common for all the Member States.
- However, at EU level, there is no explicit definition of the Rule of Law in the written EU Law (neither primary, nor secondary). That is why special attention shall be paid to existing jurisprudence of the Court of Justice of the EU.
- The concept of the Rule of Law, common to all Member States is based on several judgments. The Court highlighted in particular the following elements of the principle: legality, legal certainty, prohibition of arbitrary or disproportionate intervention by the public authorities, right to submit acts for a review by the courts, separation of legislative, administrative and judicial powers, equal treatment.
- There is no doubt that the Rule of Law is a value of the EU. However, thanks to jurisprudence of the Court of Justice, this value affirmed in Article 2 of the Treaty on EU found concrete expression in Article 19 para 1 of the Treaty on EU. Based on this Article, the EU can take action aimed at the Rule of Law protection in situations in which deficiencies to the Rule of Law occur and provided those deficiencies occur in areas covered by the EU law, irrespective of whether the Member States are implementing the EU law within the meaning of Article 51 para 1 of the Charter.
- EU Law offers various instruments for the protection of the Rule of Law. Some of them are directly regulated in the Treaties. Therefore, their legality (in general) cannot be questioned.

- In addition to instruments offered by the Treaties, there are also instruments created by the Institutions. The most important are the following two - Commission´s Framework to strengthen the Rule of Law and the Council´s annual dialogue on the Rule of Law. As it was proven, despite some objections against their legality, both of them are fully in line with the Treaties.
- Since there are various instruments aimed at (or at least useable) the Rule of Law protection, there is no need to establish new additional mechanisms. From our perspective, the EU should rather focus on better implementation of existing instruments.
- However, we are aware of ongoing discussions at intergovernmental level (discussion on new Periodic Peer Review) as well as on the plan for a new mechanism at EU Level (ideas presented by the Commission with regard to the Rule of Law Review Cycle). We are also aware of some activities of the European Parliament (and its initiative addressed to the Commission in 2016). That is why we cannot completely reject the attempts for a new mechanism. But, it should be stressed that any discussion on a new mechanism could only be legitimate if the outcome is one strong mechanism, a replacement of the existing ones, with added value for the Rule of Law protection in the EU, and with full respect of such a mechanism from all Member States.

REFERENCES

Claes, M., Bonelli, M., (2016), The Rule of Law and the Constitutionalisation of the European Union, In. Schroeder, W., Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation, Hart Publishing, Oxford.

Craig, P., De Búrca, G., (2015), EU Law: Text, Cases, and Materials. Fifth Edition, Oxford University Press, Oxford.

Heuschling, L., (2002), État de droit, Rechtsstaat, Rule of Law, Dalloz, Paris.

Hillion, C., (2016), Overseeing the Rule of Law in the EU, In Closa, C., Kochenov, D. Reinforcing Rule of Law Oversight in the European Union. Cambridge, Cambridge University Press.

Koutrakos, P., (2008), Legal Basis and Delimitation of Competence, In Cremona, M., De Witte, B. EU Foreign Relations Law: Constitutional Fundamentals. Hart Publishing, Oxford.

Mokrá, L., (2008), Ochrana ľudských práv a slobôd v európskom priestore, In. Bulletin slovenskej advokácie, 14 (5).

Toggenburg, G., N., Grimheden, J., (2016), The Rule of Law and the Constitutionalisation of the European Union, In. Schroeder, W., Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation, Hart Publishing, Oxford.

Wennerström, E. O., (2007), The Rule of Law and the EU, Iustus Förlag, Uppsala.

FRAMING AN IMPROVED MODEL FOR JUDICIAL REFORM IN ASPIRING MEMBER STATES OF THE EUROPEAN UNION

Vesna Ćorić

Institute of Comparative Law, Belgrade,
Terazije 41, 11000 Belgrade, Serbia
vesnacoric@yahoo.com

&

Ana Knežević Bojović

Institute of Comparative Law, Belgrade,
Terazije 41, 11000 Belgrade, Serbia
akbojovic@gmail.com

Abstract

The European Commission in the course of recent years published a set of relevant documents related to the strengthening of the rule of law within the EU. These targeted initiatives are focused on EU Member States, while they almost completely fail to address the negotiations within the accession process of the aspiring Member States. Bearing this in mind, this article aims to challenge the approach taken by some authors who claim that the European conditionality can undermine the rule of law and lead to regulatory fragmentation and fragmented governance. To that end, the paper offers a hybrid model, which the authors want to use to assess the quality of the internal process of strengthening of the rule of law in EU Member States, as well as the quality of the ongoing rule of law related negotiation process in the Republic of Serbia. The offered theoretical model combines elements of the external conditionality, the social learning and lesson-drawing models. Finally, the paper provides certain proposals aimed at improving the framework for judicial reform in aspiring Member States of the European Union.

Key words: *EU accession, external conditionality, rule of law, judicial reform*

INTRODUCTION

The principle of the rule of law is evolving and taking on a new relevance in the European Union (EU). This trend became particularly apparent after the European Commission in the course of recent years published a set of important documents related to the strengthening of the rule of law within the EU. The other EU institutions also contributed to this issue, but the European Commission played its full part "as guardian of the Treaties" given that the rule of law is one of the founding values of the EU.[COM, 2019a: 17] These initiatives are primarily devoted to the rule of law as a European post-accession topic, while their implications for the enlargement process are not clearly outlined.[Nikolaidis, Kleinfeld 2012: 35]

In spite of the strengthened support to the rule of law, there are still, in legal and political theory, voices claiming that the European conditionality can undermine the rule of law and lead to regulatory fragmentation and fragmented governance. [Slapin 2015: 627-648] These authors rely on the commonly accepted understanding of the notion of external conditionality, which employs a rationalist bargaining model, in which the independent actors, in this case, states and supranational organisations, exchange information, threats and promises in order to achieve their desired goals. [Schimmelfennig, Sedelmeier 2004: 671] In the EU accession process, the EU sets the adoption of its norms and rules as a condition, which the target states have to fulfil in order to receive a reward. [Knežević Bojović, Ćorić, Višekruna 2019: 233-253] However, as Schimmelfennig and Sedelmeier point out, the EU remains free to choose both the conditions and the rewards. [Schimmelfennig, Sedelmeier 2019: 3] An illustrative example of the wide discretion on the side of the EU came in October 2019, when, despite the declarations made by the President-elect of the European Commission, in which she reaffirmed the European perspective of the Western Balkans, the European Council failed to make the anticipated decision and rejected North Macedonia's and Albania's bid for membership. [Parliament 2019] [EUCO, 2019] [Nikolaidis, Kleinfeld 2012: 7]

In this paper, the authors will assess whether the new developments achieved within the EU in the area of the rule of law make the arguments brought by defenders of the aforementioned theoretical approach futile. Therefore, it will be particularly examined to which extent the introduced EU developments can be assessed as positive, as well as whether they are in line with the hybrid theoretical model, proposed by the authors of this paper. The envisaged hybrid model combines elements of the external conditionality model, the social learning model, as well as the lesson-drawing model. [Schimmelfennig, Sedelmeier 2004: 673] The social learning model assumes a resonance between the norms and values in the target candidate state and the norms and values espoused by the EU, while the lesson-drawing model assumes that the candidate countries would be expected to adopt the EU rules if they considered these to be effective remedies to domestic challenges and needs. [Schimmelfennig, Sedelmeier 2004: 673]

After an analysis of the potential implications for the aspiring Member State arising from the new documents related to the rule of law , the authors will assess whether the ongoing reform of the judiciary in the Republic of Serbia, conducted in the context of Chapter 23 negotiations is in line with the rule of law standards as determined in the recent documents of the EU. In addition, it will be examined to what extent the proposed hybrid model, which combines elements of the external conditionality, the social learning and lesson-drawing models, is applicable to the judiciary reform.

Although the rule of law, as an EU concept, does have a broad meaning, which pertains to values that have to be achieved by all public authorities, this paper will focus on one of its aspects, an independent judiciary.

1. STRENGTHENED SUPPORT TO THE RULE OF LAW –TO WHOM IT MAY CONCERN?

The European Commission has published three relevant communications aimed at strengthening the protection of the rule of law in all Member States.[COM 2014] [COM 2019] [COM 2019a] All of them stress the importance of the rule of law for all EU citizens and for the EU as a whole, while they almost do not mention the relevance of the rule of law toolboxes for aspiring Member States.

The first communication of 2014 was meant to complement the existing instruments (infringement procedures and mechanisms under Article 7 of the Treaty on European Union) as, at that time, it was observed that there were situations, in which threats relating the rule of law could not have been effectively addressed by the said two mechanisms.[1][COM 2014: 6] This communication sets out the Framework to address threats to the rule of law, which are of a systemic nature.[2][COM, 2019a: 7] The given framework is envisaged as a three-stage process (a Commission assessment, a Commission recommendation and a follow-up to the recommendation) and is set to apply equally in all Member States, on the basis of the same benchmarks as to what is a systemic threat to the rule of law. However, the framework is almost of no relevance for the aspiring Member States. When it comes to pre-accession situations, this communication only refers to the importance of the Cooperation and Verification Mechanisms for tackling systemic deficiencies related to the rule of law.[3][COM 2014: 6]

The remaining two rule-of-law-related communications were subsequently published by the European Commission in 2019, and again, they are addressed to Member States only. Both underline that effective enforcement of the rule of law in the EU Member States requires a toolbox which would rest on three pillars: promotion, prevention and response. Relating activities promoting the rule of law, the documents identify the need for a stronger engagement of political groups, national parliaments, the civil society and the private sector in promotional activities, as well as in developing grassroots discussions on the rule of law issues.[COM, 2019] In addition, the two communications insist on the need to promote the rule of law standards developed by the Court of Justice of the EU in its case law, including the compilation of the relevant findings of this Court. Those standards developed by the Court can serve as "a compass to flag" reforms.[COM 2019a]

With regard to preventive activities, the communications rightly point to the need for further development of the existing tools, as to improve the assessment of the state of the rule of law. In that regard, they recognized a specific necessity for improvement

[1] Namely, it was argued that the thresholds for activating both existing instruments are too high as well as that those mechanisms are not always appropriate to quickly respond to threats to the rule of law in Member States.

[2] The Court of Justice of the EU and the European Court on Human Rights do have relevant case law in that regard. See.

[3] The Cooperation and Verification Mechanism (CVM) was introduced as a transitional measure for the monitoring of judicial reform and fight against corruption in Romania and Bulgaria at the time of their accession to the EU in 2007. Monitoring will continue under horizontal instruments, once this special mechanism ends.

of the EU's capacity building of a more profound and comparative knowledge base on the rule of law in Member States, to make dialogue more productive, as well as to enable potential problems to be acknowledged at an early stage.[COM 2019] In that context, the following mechanisms were identified: the European Semester cycle of economic, fiscal and social policy coordination, which provides country analysis reports and makes recommendations for structural reforms encouraging growth in areas such as an effective judicial system; the annual EU Justice Scoreboard as a comparative tool assessing the independence, quality and efficiency of national judicial systems based on a range of indicators, and Commission's Structural Reform Support Service, which provides technical support for structural reforms in Member States, in areas relevant to strengthening the respect for the rule of law.[COM 2019] [COM 2019a]

Both promotion and prevention activities seem in line with the models of social learning and lesson-drawing which claim that national perspectives on the adequacy of EU rules to tackle domestic issues are the underlying incentive for adherence to such rules. Furthermore, the engagement of national authorities and civil society representatives in promotional activities will strengthen their knowledge of the benefits of the EU framework for the rule of law and will further encourage them to apply the given EU framework. Additionally, preventive activities which are aimed at providing comparative tools, such as the EU Justice Scoreboard, will additionally strengthen the knowledge at national level about the comparative level of compliance of other national systems with rule of law standards as well as about best practices which should be followed in that regard.

On the other hand, when it comes to the third pillar of the so-called response activities, the communications consider strengthening the cooperation with the Council of Europe and reinforcing the cooperation with other international organizations dealing with rule of law issues, such as the Organisation for Security and Cooperation in Europe and the Organization for Economic Cooperation and Development. [Ćorić, Zirojević 2015: 371-393] This idea constitutes a positive development given that it will preclude the development of regulatory fragmentation and fragmented governance, which might emerge as one of potential adverse consequences of the EU conditionality approach.

Finally, it is noteworthy that both communications recognize the need to introduce the strengthened consequences, or in other words specific mechanisms including rule-of-law-related conditionalities, in case a Member State refuses to avoid or remedy specific risks to the implementation of EU law or policies.[COM 2019] [COM 2019a] This clearly reflects the previously discussed theoretical concept of the EU conditionality. However, it seems that the proposed EU conditionalities do not pose any threat to the rule of law, neither lead to fragmentation as long as the concept of the rule of law and the systematic cooperation is clearly defined and protected.

However, although all these communications do provide relevant ideas on how to further develop an effective and meaningful rule of law toolbox in the future, their application has remained mostly limited to the Member States. When it comes to aspiring Member States, those communications only stress that the rule of law has become progressively more central to the EU accession process further referring to the Western Balkan Strategy of February 2014 and the Sibiu commitment in Strategic Agenda of the European Council of 21 June 2019. Both documents are not primarily focused on strengthening the rule of law framework. While the latter document does not introduce any clarification in that regard, the same is not true for the Western

Balkan Strategy, which pertains to an enlargement perspective for an enhanced EU engagement with the Western Balkans. Namely, after the general finding that efforts to engage in rule of law-related reforms in the region should be intensified, the Western Balkan Strategy stipulated that the tools developed during the negotiations with Montenegro and Serbia within the rule of law chapters should also be used in other Western Balkan countries "as a stimulus for early adoption of key reforms". [COM 2018:10]

It is envisaged that those tools will include analysis of legislation and practice in this field, leading to the establishment of detailed action plans prioritising key issues, and close monitoring of implementation and delivery of concrete results. Moreover, the European Commission in that context underlines that the negotiating frameworks for Montenegro and for Serbia insist on the need for rule of law reforms to be addressed early in the negotiations. Therefore, a substantial improvement should be required on the rule of law and its related results, which include the judicial reform before technical talks on other accession negotiation chapters can be provisionally closed. [COM 2018:10] The given enlargement "fundamentals first" approach was already heralded in the European Commission's Enlargement Strategy for 2011-2012. [COM 2012:6]

The main shortcoming that should be addressed to all these EU documents is that it remained unclear why they failed to establish a clear link between the rule of law tools and criteria, which are applicable for Member States, and those states which are only aspiring. Given that the rule of law is equally post-accession and pre-accession concern, the developed toolbox and benchmarks should be more inter-connected.

In the following section of the paper, the authors will try to show that the reform of the judicial system which is to be conducted in the context of the Chapter 23 negotiatians in the Republic of Serbia may offer some additional tools beyond those mentioned in the Western Balkan Strategy. They may be replicated in other aspiring Member States on their road of strengthening the rule of law in the accession negotiation process.

2. SERBIAN MODEL OF EU ACCESSION AND JUDICIAL REFORM: SEGMENTS THAT MAY GUIDE FUTURE JUDICIAL REFORMS IN ASPIRING MEMBER STATES?

The state of affairs in the ongoing accession talks with the six remaining non-EU Western Balkan countries confirms the central position of the rule of law within the process of EU enlargement, but it also shows that there is much to be attained.[Kmezic 2019: 88] Since late 2015, the European Commission has taken additional measures to foster rule of law transformation changes first through strengthened progress reporting methodology and then through the introduction of non-papers, six-month Commission reports to the European Council on the state of play in Chapters 23 and 24, under the EU negotiation frameworks with Serbia and Montenegro. [Knezevic 2015: 67-78]

Those measures aimed at fostering the rule of law are welcomed as they are intended to deepen the monitoring of rule of law related developments in the EU candidate countries and thus to acquire a deeper understanding of their practices. This apparently helps strengthening a proactive role that is played by the Republic of Serbia as an EU candidate country. This principle is in line with the rule of law framework, introduced for all EU Member States, according to which it is of utmost

importance for the EU to enhance its capacity to build a more profound and comparative knowledge base on the rule of law situation in Member States, to make dialogue more productive, as well as to enable early detection of any backsliding in reforms. [COM 2019]

Although meaningful, those measures are possibly, to some extent, hindered by political messages that full membership, even in the case of frontrunners, such as Serbia and Montenegro, may not come in 2025 at the earliest, but may not come at all.[Zivanovic 2019] This lack of a clear and credible enlargement perspective can seriously hinder reformatory processes in Western Balkan countries, and undermine EU credibility and any remaining leverage that the EU conditionality may have in fostering the rule of law. This is an issue that may have serious implications not only in terms of shifts in international relations in the region, but also have a profound effect on citizens, as it may slow down the pace of reforms.[Savic Filipovic 2019] Therefore, it is of utmost importance to introduce measures aimed at strengthening a sense of ownership on the part of key national stakeholders.

Before getting to the measures introduced in the ongoing accession negotiation process with the Republic of Serbia, it is important to bear in mind some specific features of the judicial reform in the Republic of Serbia, as it precedes the EU accession process. Initially, reforms in the judiciary in Serbia have been mostly driven by internal demands and shifts in values and paradigms attempting to confirm discontinuity with the Milosevic regime. [Knežević Bojović 2019: 381-412] [Pavlović 2005: 183-196] [Hasanbegović 2005: 55-65] [Žilović 2012: 87-108] [Rakić Vodinelić, Knežević Bojović, Reljanović 2012] Following the adoption of three national judicial reform strategies, the opening of Chapter 23 in July 2016 led to fragmentation of the judicial reform in Serbia, as the Action Plan for Chapter 23 (AP 23) became the focal document for reforms in the judiciary, side-lining the national judicial reform strategy. That state of play was in stark contrast with the approach advocated by the European Commission in its recent documents, according to which development of regulatory fragmentation and fragmented governance and the lack of systematic cooperation hinder the achievement of the rule of law standards. [COM 2019a:8]

However, a positive trend became apparent in the case of the Republic of Serbia in the past two years, given that the Serbian government, led by the Ministry of Justice, has started mitigating the level of fragmentation of the key public policy documents related to the justice sector through streamlining the efforts and synchronising and coordinating actions and outputs. Given that the National Judicial Reform Strategy has expired and that AP 23 needed revision because timelines for implementation of a number of activities have expired, while other activities needed adjustment, Serbia has embarked on the comprehensive task of revising the AP23 and developing a new strategy document for the judiciary, at the same time. The decision to develop both documents can be further interpreted as a clear policy commitment to address the internal needs of the judiciary in the national policy document, while responding to EU requirements in a separate, dedicated document. By doing so, it seems that the Serbian accession model is going to include elements of the EU conditionality approach, along with elements of social learning and lesson-drawing models, in driving the reforms forward particularly in cases where internal demands for reform exist together with the external conditionality demands.

In early 2019, the Ministry of Justice has presented the Draft Revision of the AP 23. The proposed interventions range from deletion of completed activities, through adjustment of deadlines for implementation and introduction of more relevant

indicators, to updating of planned activities. [Ministerstvo pravde 2019] Following interventions in the working text prompted by public consultations, the Draft Revision of AP23 was forwarded to the European Commission.

Almost at the same time, in the spring of 2019, the Ministry of Justice presented the Working text of the 2019-2024 National Judicial Development Strategy.[4] The Strategy envisages that the monitoring mechanism for the implementation of the Action Plan for Chapter 23 shall also be utilised to monitor the implementation of the Strategy, using the same methodology. Following a round of public consultations, in summer 2019, the Ministry of Justice presented the final Working Draft of the 2019-2024 National Judicial Development Strategy, reiterating the decision to streamline the implementation process through the AP23. The taken approach is of great importance because it not only fosters ownership on the part of the key national stakeholders, but it also enables needed synergetic planning and delivery of activities and outputs and eliminates the existing fragmentation by driving the reforms forward.

Some of the recent European Commission's comments given as a feedback with regard to the Draft Revision of the AP23 are particularly important in the context of overcoming the box-ticking approach to EU conditionality.[5] Namely, the European Commission stressed that it would welcome if the Serbian authorities decided to fundamentally improve the impact indicators across the board. More concretely, it was recommended that indicators be improved, for example, by drawing upon the forthcoming regional measurement projects with CEPEJ [CEPEJ] and the World Bank ("Dashboard Western Balkans" and "regional justice survey").

The relevance of the given comments can be, in part attributable to the fact that indicators set in the AP23 too often resort to positive assessments made in annual Progress Reports. Due to that, those indicators not only set the reform agenda directly in the realm of EU conditionality, but they also rely on an assessment that might be changed annually just to demonstrate that the candidate country has fulfilled the requests set in interim benchmarks. Moreover, it seems that the given comments derive from the approach of the European Commission on fostering systematic cooperation among different international organizations, which was employed in its documents aimed at strengthening the rule of law in Member States.

3. A WAY FORWARD

The presented measures, which were recently applied in the judiciary reform in the context of the Chapter 23 negotiations in the Republic of Serbia, do apparently constitute significant developments which are in line not only with the approach taken in the recent set of rule of law documents tailored for all EU Member States. At the same time, those measures are in line with the proposed theoretical hybrid model,

[4] The Working text of the Strategy is organised around the following objectives: judicial independence, judicial impartiality and accountability, advancement of judicial competence, advancement of judicial efficiency, e-judiciary and judicial transparency and accessibility.

[5] The European Commission comments related to the AP23 include a set of general and recurrent comments, and more specific comments, incorporated in the text of the Draft with regards to the three parts of the AP23: Judiciary, Fight Against Corruption and Fundamental Rights. One major Commission recommendation is to structure the AP23 around interim benchmarks rather than around screening report recommendations, as is currently the case, while also including the actions aimed at implementing recommendations of the screening report that are not reflected in an interim benchmark. This change would require extensive intervention in the Draft Revision of the AP23, but, if taken up by the Serbian government, might help re-kindle the reformatory efforts across the complex body stakeholders.

which combines elements of the external conditionality, the social learning and lesson-drawing models.

This being said, it seems that as long as the EU targeted rule of law initiatives are primarily devoted only to EU Member States, the external rule of law conditionality will not be fully improved. Legally speaking, the internal process of strengthening the rule of law of EU Member States and external rule of law conditionality remain formally unrelated.

It seems that the EU failed to clarify why it did not regulate the rule of law toolbox available to aspiring Member States in more detail. It would be beneficial for aspiring Member States if the European Commission extended, as much as possible, the application of the existing rule of law toolbox to them as well, particularly given that the approach has already been adopted in the field of economy through the European Semester Light process. [COM 2014]

By doing so, the aspiring Member States including the Republic of Serbia would be encouraged to rely on tools such as the EU Justice Scoreboard. The Justice Scoreboard has already been recognized as a governance instrument and determined as one of the relevant tools available for strengthening the rule of law in all EU Member States.[Dori, 2015] [Strelkov 2019: 15-27] The Justice Scoreboard may serve as a main source of information, which would help the judiciary of the aspiring Member States to measure themselves against the judiciaries of the current EU Member States. By doing so, aspiring Member States will ensure that the judicial reform and rule of law efforts do not deviate significantly from the efforts that are taking place in EU Member States aimed at improving the functioning of their judiciary.[6] It is interesting that the Serbian Supreme Court of Cassation has already adopted this framework as a point of reference for its reports.

Finally, it would be beneficial for aspiring Member States to rely more closely on promotional activities which are set out in the targeted communications on the strengthening of the rule of law of Member States. Such reliance would encourage aspiring Member States inter alia to get more acquainted with and to promote the rule of law standards developed by the Court of Justice of the EU. This approach would be to some extent in line with a recommendation made by Kmezic, that the way forward for the EU in the engagement with Western Balkan countries is in reaching deeper beyond the institutional state structure, and providing the wider public with the skills necessary to hold elites accountable.[Kmezic 2019:105] A stronger engagement of national authorities, representatives of the civil society and the private sector in promotional activities would significantly improve their knowledge of the benefits of the EU framework related to the rule of law and further strengthen the ownership of the judicial reform process on the part of national stakeholders and consequently, its sustainability. This would further enable the enlargement process to address at the same time the internal needs of the judiciary as well as the EU requirements. In this way, it meets the requirements of the envisaged theoretical hybrid model, which combines elements of the external conditionality, the social learning and lesson-drawing models.

6 For instance, currently in the EU, procedural law remains an area of particular attention in a number of Member States and a significant amount of new reforms have been announced for legal aid, alternative dispute resolution methods (ADR), court specialization, and judicial maps. In addition, efforts are invested in issues like court fees, administration, and ICT development. These are, therefore, the trends that Serbia needs to take into account in its judicial reform design and implementation.

REFERENCES

Ćorić, V. and Zirojević M., (2015), Strengthening the Cooperative Security through Enhancing Cooperation between the OSCE and Other International Organizations. In: Zirojević M. and Ćorić, V. Forty Years since the Signing of the Helsinki Final Act. Institute of Comparative Law. pp. 371-393.

Dori, A., (2015), The EU Justice Scoreboard - Judicial Evaluation as a New Governance Tool (August 14, 2015). MPI Luxembourg Working Paper Series, 2. Available online: http://dx.doi.org/10.2139/ssrn.2752571.

Nikolaidis, K. and Kleinfeld, R., (2012), Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma. SIGMA Paper No. 49. 2012. pp. 9-38. Available online: http://www.sigmaweb.org/publicationsdocuments/SIGMA_SP49_061112_Eng.pdf.

Mendelski, M., (2019), The Revival of Balkanization: How Externally-Driven Reforms Reinforce the Fragmentation of Governance in South Eastern Europe.2017. Available online: www://ssrn.com/abstract=3001231, 17/04/2019, pp. 3-12.

Richter, S. Wunsch, N.: Money, Power, Glory (2019), The Linkages Between EU Conditionality and State Capture in the Western Balkans. Journal of European Public Policy, Routledge, pp. 1-22.

Schimmelfennig, F. and Sedelmeier, U., (2004), Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe. Journal of European Public Policy. Routledge. 4/2004. p. 671.

Schimmelfennig, F. and Sedelmeier, U., (2019), The Europeanization of Eastern Europe: The External Incentives Model Revisited. Journal of European Public Policy. Routledge. 2019. pp. 3-26.

Slapin, J. B., (2015), How European Union Membership Can Undermine the Rule of Law in Emerging Democracies. West European Politics. Vol. 38. Issue 3, pp. 627-648, Available online: https://doi.org/10.1080/01402382.2014.996378.

Knežević Bojović, A., (2019), Institutional Transplants in Serbia – the Stories of Success and Failure, in: Common Law and Civil Law Today Convergence and Divergence (ed. Marko Novaković), Vernon Press, pp. 381-412.

Knežević Bojović, A. Ćorić, V. Višekruna, A., (2019), Spoljašnje uslovljavanje Evropske unije i regulatorni odgovori Srbije. Srpska politička misao. No. 3/2019, pp. 233-253, Available online: https://doi.org/10.22182/spm.6532019.10,

Hasanbegović, J., (2005), Ostvarivanje i zaštita ljudskih prava u Srbiji – normativni okvir i pravna stvarnost. Zbornik radova Pravnog fakulteta u Splitu 42. No. 1-2. pp. 55-65 .

Knežević Bojović, A., (2015), New EU enlargement strategy and country progress reports: a motor for change? Strani pravni život. No. 4/2015. pp. 67-78.

Kmezic, M., (2019), EU Rule of Law Conditionality: Democracy or 'Stabilitocracy' Promotion in the Western Balkans? in: Džankić, J., Keil, S. and Kmezić, M. The Europeanisation Of The Western Balkans – A Failure of EU Conditionality. Palgrave Macmillan. 2019. pp. 81-96.

Pavlović, D., (2005), Srbija za vreme i nakon Miloševića. Sociološki pregled 39. No. 2, pp. 183–196.

Rakić Vodinelić, V., Knežević Bojović, A., Reljanović, M., (2012), Judical Reform in Serbia: 2008-2012. Center for Advanced Legal Studies. Belgrade. (in Sebian).

Savic, M. and Filipovic, G., (2019), Serbia Inks Deal with Russia's Answer to the EU Following Snub. Bloomberg, October 25, 2019. Available online:

https://www.bloomberg.com/news/articles/2019-10-25/serbia-to-ink-deal-with-russia-s-answer-to-the-eu-following-snub.

Strelkov, A., (2019), EU Justice Scoreboard: a new policy tool for deepening. European integration?' Journal of Contemporary European Studies. Volume 27, 2019 - Issue 1, pp. 15-27. Available online: https://doi.org/10.1080/14782804.2018.1534729.

Žilović, M., (2012), Demokratska neizvesnost i nezavisnost pravosudja u Srbiji nakon 2000. godine. Sintezis 4. no. 1. pp. 87-108.

Zivanovic, M., (2019), Macron Dampens Serbia's Hopes of Rapid EU Membership. July 2019. Available online: https://balkaninsight.com/2019/07/16/macron-dampens-serbias-hopes-of-rapid-eu-membership/.

Internet sources

CEPEJ. Council of Europe European Commission for the efficiency of justice, https://www.coe.int/en/web/cepej.

Ministarstvo pravde, (2019), Ministarstvo pravde je objavilo prvi nacrt revidiranog Akcionog plana za Poglavlje 23. 2019 (in Serbian). Available online: https://www.mpravde.gov.rs/vest/22183/ministarstvo-pravde-objavilo-prvi-nacrt-revidiranog-akcionog-plana-za-poglavlje-23.php.

Parliament, (2019), Parliament elects von der Leyen as Commission President. 2019. Available online: http://www.europarl.europa.eu/news/en/hearings2019/commission-president-2019/20190711STO56846/video-parliament-elects-von-der-leyen-as-commission-president.

Normative acts

COM(2012), Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2012-2013. Brussels, 10.10.2012 600 final.

COM(2014), Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. Brussels. 11.3.2014 158 final.

COM(2014a), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Enlargement Strategy and Main Challenges 2014-15 700 final.

COM(2018), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A credible enlargement perspective for and enhanced EU engagement with the Western Balkans. Strasbourg, 6.2.2018 65 final. p. 10.

COM(2019), Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union. State of play and possible next steps Brussels, 3.4.2019 163 final. p.6.

COM(2019a), Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Strengthening the Rule of Law within the Union. A Blueprint for Action. Brussels. 17.7.2019. 343 final.

EP (2015/2254(INL)), European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights

EP (2018/2886(RSP)), European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights

EUCO (2019), European Council meeting (17 and 18October 2019)–Conclusions EUCO 23/19;

Nikolaidis, K. and Kleinfeld, R., (2012), Available online: http://www.sigmaweb.org/publicationsdocuments/SIGMA_SP49_061112_Eng.pdf.

RULE OF LAW ASSESSMENT – CASE STUDY OF PUBLIC PROCUREMENT

Hana Kováčiková

Comenius University in Bratislava,
Faculty of Law, Institute of European Law,
Šafárikovo nám. 6, 810 00 Bratislava, the Slovak Republic
hana.kovacikova@flaw.uniba.sk

&

Ondrej Blažo

Comenius University in Bratislava,
Faculty of Law, Institute of European Law,
Šafárikovo nám. 6, 810 00 Bratislava, the Slovak Republic
ondrej.blazo@flaw.uniba.sk

Abstract

This article deals with the concept of Rule of Law in the process of public procurement. Authors analyse various aspects of the topic from the various points of view. The research is focused on finding, whether and how the rule of law is applied in the process of public procurement, and what are the consequences for its breach.

Key words: *rule of law, EU Law, public procurement, principle of sound administration*

INTRODUCTION

The Rule of law. This value is one of the fundamental principles, upon which the European Union is founded. It is present (in its full performance or at least partially) in all policies and areas of law. Referring to the checklist provided by the Venice Commission of the Council of Europe (2016), the rule of law contains various aspects, such as legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, access to justice, the conflict of interest. The EU, closely linked to the concepts developed within the Council of Europe [Varga 2019: 166], recognises a wider concept, as it counts also on a right to good administration, proportionality, right to defend, transparency, right to be heard, effectivity and efficiency.

The Rule of law is expressed in primary law[1] as well as in all sorts of secondary law. However, as rule of law is a general principle, its applicability emanates just from its material content.

In this paper, authors verify the hypothesis that the rule of law is generally applicable and applied without the necessity of its verbalising in the form of secondary law relating to public procurement. Authors chose the area of public procurement because it is not the traditional branch of the administrative law with traditional administrative rules and principles. Therefore, it will be a good example on which they can verify or refute the above-mentioned hypothesis. During the research, authors used scientific methods such are analyses, comparison and deduction.

1. RULE OF LAW IN PUBLIC PROCUREMENT – FROM PRIMARY LAW TO SECONDARY LAW

The rule of law as a common value of the Member States and the EU [Mokrá 2013: 233], as enshrined in Article 2 of the Treaty on European Union (TEU) must be applied without any doubt, not only in all areas covered by EU law but also in areas that remain the competence of the Member States [Schroeder 2016: 59]. Nevertheless, without any enforcement mechanisms the value of the rule of law can remain an empty declaration. Indeed, the "nuclear bomb" solution under Article 7 TEU does not seem to be an appropriate and proportionate measure for day-to-day application and a system for the evaluation of the adherence to the values of the EU. Moreover, an actual application of Article 7 TEU can hardly lead to an effective remedy and, in fact, it can rather lead to anti-Brussels sentiments in the "delinquent" state than to real aligning with the values of the EU again. The only direct legal measure for enforcement of rule of law as a value of the EU is, henceforth, more a "bludgeon" than a "nuclear bomb" [Nagy 2018: 8-9]. Without an effective "direct" remedy, the values of the EU, including the rule of law, are taken into account while being applied in respective rules or dealing with possible violation of rules, duties and rights stipulated by the Treaties. The recent case Commission v Poland (2019)[2] can serve as an example of such indirect enforcement of rule of law. Moreover, rule of law and its features (e.g. procedural safeguards, legal certainty, limited powers of government) must be considered in every decision and action of EU institutions as well as Member States' authorities. In extreme cases, honouring the value of rule of law, including legal certainty, can lead to "exemptions" or extraordinary disapplication of measures aimed to protect the internal market (Cf. case CIF).[3]

In primary law, alongside other fundamental rights and freedom, the value of rule of law is particularly linked to the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union (hereinafter "Charter"). However, the scope of Article 41 of the Charter is limited: it explicitly covers merely rights of persons vis-à-vis the EU's institutions and agencies as well as duties of the EU itself as an "umbrella right" including a set of particular rights (e.g. right to be heard) (for detail see e.g. Friedery 2018). However, case law extended the right to good

[1] See for example the Article 2 of the Treaty on European Union, or the Preamble to the Charter of Fundamental Rights of the European Union.

[2] Judgment of the Court of 24 June 2019, Case C-619/18 *Commission v Republic of Poland,* ECLI:EU:C:2019:531.

[3] Judgment of the Court of 9 September 2003, Case C-198/01 *Consorzio Industrie Fiammiferi* (*CIF) v Autoritá Garante della Concorrenza e del Mercato*, ECLI:EU:C:2003:430.

administration as a duty of the Member States because it constitutes a general principle of the EU [Groussot et al. 2016].
Regarding ratione personae, the scope of Article 47 of the Charter is broader since it covers both remedies – by European as well as national judiciary. On the other hand, the scope is narrower since it covers judicial remedies, while Article 41 of the Charter takes into account the administration of public affairs as a whole. Article 41 of the Charter is an EU counterpart to the body of rules of the Council of Europe focused on good administration. Although the Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration is not a binding instrument, content of the recommendation can be linked to rights and freedoms stipulated in the European Convention on Human Rights [Stelkens and Andrijauskaitė 2017: 18-24]. The body of case law explaining the content of the right to good administration developed mainly in the area of competition, anti-dumping, state aid and customs [e.g. Lanza, 2008: 488]
The Court also stated in H.N.[4] (2014), that the right to sound administration, enshrined in Article 41 of the Charter, reflects a general principle of EU law. Its inherent part is the duty of care or diligence. Duty of diligence applies generally to the actions of the (EU) administration in its relations with the public and requires that administration act with care and caution [Masdar[5] 2018]. In its essence, it obliges the relevant institution to examine carefully and impartially all the relevant facts of the case [Randa Chart v EEAS[6] 2015: 113].
Hence, both, the EU and the Member States are bound by the principles of good administration via the Charter (the EU) and via the European Convention on Human Rights (the Member States). These requirements must be reflected in secondary legislation and secondary legislation must be seen and interpreted trough the prism of values of the EU, including rule of law, which contains the right for good administration and effective judicial remedies. Moreover, violation of rule of law as a general legal requirement is a reason for annulment of an act of an institution (Article 263 of the Treaty on the Functioning of the European Union; TFEU) and might be a solid base for a claim for damages caused by maladministration, too.
The original aim of the directives on public procurement is to remove internal barriers for free movement of goods and services via transparency and non-discrimination on a basis of nationality. The very scope of the directives is given by "universal" harmonisation provision of Article 114 TFEU. Since directives deal with the relationship between public bodies (contracting authorities) and private entities (economic operators), requirements of the right for good administration, as a specific feature of rule of law are immanent. Although public procurement represents a specific form of administrative procedures, the principle of good administration shall be obeyed. The specific character of public procurement does not limit the scope of application of these principles but requires considering other additional aspects, such as free competition and effectiveness of procurement procedures.

[4] Judgement of the Court of 8 May 2014, Case C-604/12 *H.N. v Minister for Justice, Equality and Law Reform, Ireland,* ECLI:EUC:2014:302, point 49.
[5] See to that regard for example judgement of the Court of 16 December 2008 *Masdar Ltd v Commission of the European Communities*, ECLI:EU:C:2008:726.
[6] Judgement of the General Court of 16 December 2015, T-138/14 *Randa Chart v European External Action Service*, ECLI:EU:T:2015:981, point 113.

2. PRINCIPLES OF PUBLIC PROCUREMENT AS AN IMPLEMENTATION MECHANISM OF RULE OF LAW

Public procurement is an area of law of significant importance. In so far, as it concerns, inter alia, public services, supplies contracts and works contracts, it is intended to ensure of freedoms of the Internal market and the opening-up towards competition in Member States [Cf. Petr 2016: 100-101], which shall be undistorted and as wide as possible.[7] According to the Court's settled case law, the purpose of coordinating the procedures for the award of public contracts at European Union level is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State which wishes to offer goods or services to contracting authorities established in another Member State [P.M.[8] 2019]. Public procurement is at the same time one of the key market-based instruments to be used to achieve smart, sustainable and inclusive growth whole ensuring the most efficient use of public funds. Under statistics provided by the European Commission[9], over 250 000 public authorities in the EU spend around 14% of GDP on the purchase of services, works and supplies every year. It is therefore crucial to ensure that this process would be effective.

Efficiency and Efficacy

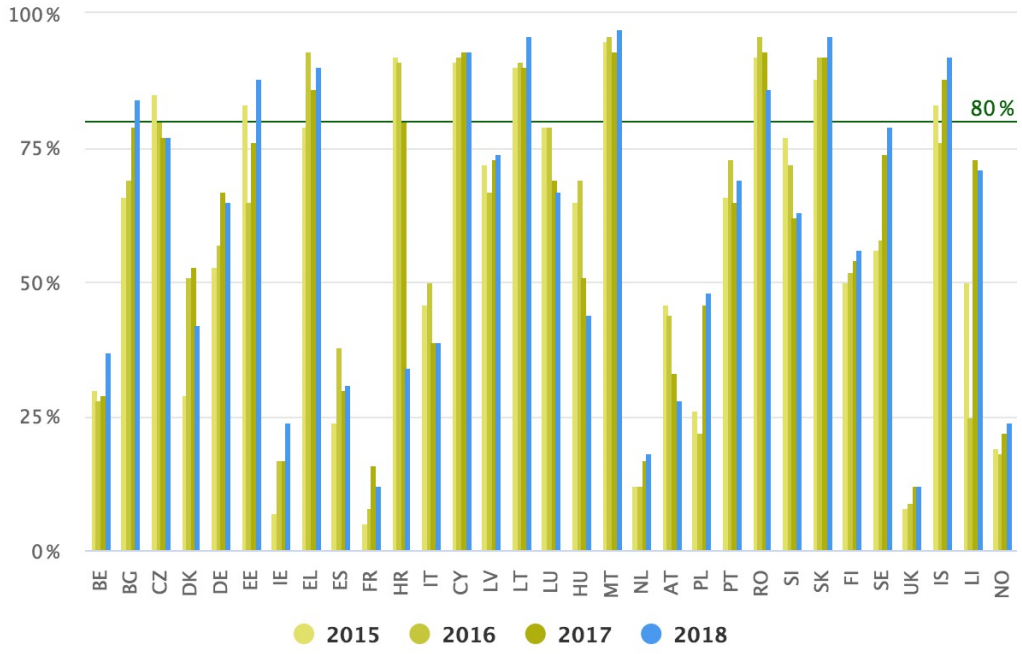
The public procurement directives enable contracting authorities to design award criteria merely on the basis of price or they can consider also other criteria. Non-inclusion of other criteria into the award process can lead to ineffectiveness because qualitative criteria can be omitted from the process. Belgium, Estonia, Greece, Cyprus, Lithuania, Malta, Romania, Slovakia and Iceland rely mainly on the lowest price, while Austria, Belgium, Ireland, Italy, Spain, France, the Netherlands, the United Kingdom and Norway almost regularly include also criteria other than the lowest price of purchase in tenders [European Commission 2019] (see Graph 1).
Such Member States´ behavioural pattern can be closely linked to good (sound) administration. Slack compliance with the duty of due diligence, when procuring public supply may lead to ineffective spending of public resources, or worse, even to maladministration.

Principles of public procurement

Public procurement procedures, by their character, belong to the area of administrative law. However, due to the particular features of public procurement, not all aspects and legal institutes of "traditional" administrative procedure are applicable to these procedures and specific procurement rules are used instead.
First of all, the award of public contracts by contracting authorities shall comply with the principles of the TFEU, as well as the principles deriving therefrom[10]. Pursuant

[7] See to this effect for example the judgement of the Court of 11 December 2014, C-113/13 Azienda sanitaria locale n. 5 'Spezzino' and Others v San Lorenzo Soc. coop. Sociale and Croce Verde Cogema cooperativa sociale Onlus, ECLI:EU:C:2014:2440.
[8] Judgement of the Court of 6 June 2019, Case C-264/18 *P.M. and Others v Ministerrad*, ECLI:EU:C:2019:472, point 24.
[9] Available at: https://ec.europa.eu/growth/single-market/public-procurement_en.
[10] Those are identified in Public Procurement Directive or in the case-law.

Graph 1: Award criteria - % of tenders in which award was based on the lowest price only (source, European Commission, 2019)



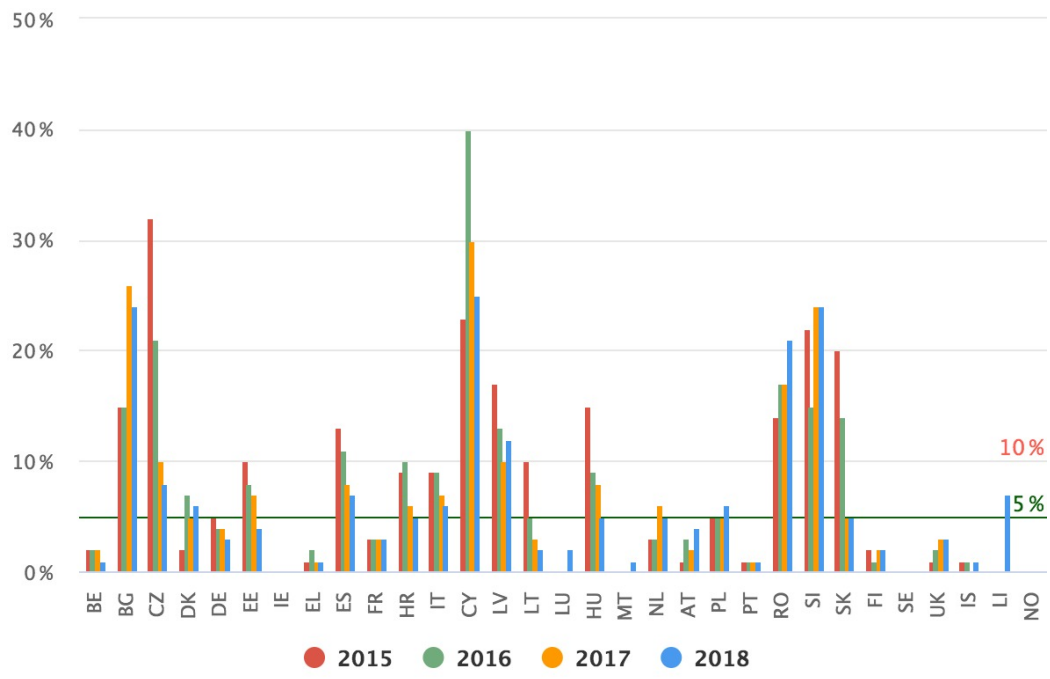
to Article 18 of the Public Procurement Directive[11], contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

According to the Court's settled case-law, the principle of equal treatment means that tenderers must be on an equal footing both when they prepare their tenders and when those tenders are evaluated by the contracting authority [Communicaid Group v Commission[12] 2014: 580]. In other words, principle of equal treatment, as a general principle of EU law, requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless such treatment is objectively justified. The comparability of different situations must be assessed with regard to all the elements which characterise them. Those elements must, in particular, be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field, to which the act relates must also be taken into account [P.M. 2019: 24, 29]. The principle of equality also requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. It is the obligation of contracting authority to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers [Evropaïki Dynamiki v Commission[13] 2007: 45]. If equality of opportunity between the various

[11] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65-242).
[12] Judgement of the General Court of 11 June 2014, Case T-4/13 *Comminciaud Group Ltd v European Commission*, ECLI:EU:T:2014:437
[13] Judgement of the Court of First instance of 12 July 2007, Case T-250/05 Evropaiki Dynamiki – Proigmena Systimata Tilepikinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities, ECLI:EU.T:2007:225

economic operators is secured, a system of undistorted competition, as laid down in the Treaties, can be guaranteed.
The obligation of transparency requires there to be a degree of publicity (on the part of the contracting authority) sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed [UNIS and Beaudout Père et Fils[14] 2015]. However, level of transparency varies from state to state. Graph 2 shows different situations in the EU Member States as well as non-EU state of the European Economic Area (EEA). Some Member States maintain level very low level of non-transparent tenders, while Belgium, Latvia, Cyprus, Romania and Slovenia exceed 20 % level of tenders without calls. In Czechia, Hungary, Ireland and Slovakia dramatical improvement of this category is visible. Despite several improvements and development, the divergence gap between the Member States is substantial: from 0 % to 25 %.

Graph 2: No call for bids - % of tenders without calls (source European Commission, 2019)



Therefore, obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their

[14] Judgement of the Court of 17 December 2015, Joined case C-25/14 and C-24/14 Union des syndicats de l'immobilier (UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social et Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social and Others, ECLI:EU:C:2015:821, point 39

exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question [Pizzo[15] 2016].

Prohibition of discrimination on grounds of nationality is a specific expression of the principle of equal treatment with regard to the application of Articles 49 and 56 TFEU in the field of public procurement [Anodiki Services[16] 2018].
The principle of equal treatment and the obligation of transparency must be then interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts [Lavorgna[17] 2019]. Together with the obligation of transparency they preclude also any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned [Partner Apelski Dariusz[18] 2016].

Principle of proportionality as a general principle of EU law [Mokrá 2011: 401] is presented specifically also in Public procurement law. According to this principle, legislation must not go beyond what is necessary to achieve the intended objective. In this connection, EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition. Principle of proportionality is applied mostly relating the exclusion of a tenderer from the tendering procedure. In this regard, principle of proportionality requires, for example in the case of conflict of interest, that the contracting authority is required to examine and assess whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure [Lloyd´s of London[19] 2018: 38]. Only a finding of such influence, in any form, is sufficient for those undertakings to be excluded from the procurement procedure (i.e. automatic exclusion without through assessment would mean a breach of this principle). Furthermore, legislation and contracting authorities cannot intentionally narrow competition or try to circumvent requirements stipulated by the directives. Moreover, this "intent" seems to be interpreted in an "objectified" manner, rather than under literal interpretation based on the context of authority's behaviour [Sanches-Graells 2016].

[15] Judgement of the Court of 2 June 2016, Case C-27/15 Pippo Pizzo v CRGT Srl, ECLI:EU:C:2016:404, point 36.
[16] Judgement of the Court of 25 October 2018, Case C-260/17 Anodiki Services EPE c G.N.A. O Evangelismos - Ofthalmiatreio Athinon – Polykliniki and Geniko Ogkologiko Nosokomeio Kifisias – (GONK) 'Oi Agioi Anargyroi, ECLI:EU:C:2018:864, point 36.
[17] Judgement of the Court of 2 May 2019, Case C-309/18 Lavorgna Srl v Comune di Montelanico, Comune do Supino, Comune di Sgurgola, Comune do Trivigliano, ECLI:EU:C:2019:350, point 20.
[18] Judgement of the Court of 7 April 2016, Case C-324/14 Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, ECLI:EU:C:2016:214, point 62.
[19] Judgement of the Court of 8 February 2018, Case C-144/17 Lloyd´s of London v Agenzia Regionale per la Protezione dell´Ambiente della Callabria, ECLI:EU:C:2018:78, point 38.

When mentioning the conflict of interest, the Public Procurement Directive obliges Member States to ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

Regarding the review of the compliance with the procurement principles and right of tenderer to an effective judicial protection, we refer to Article 1(3) of the Remedy Directive[20], pursuant to which Member States shall ensure that the review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In the absence of detailed procedural rules laid down by EU law for giving effect to a right, in accordance with settled case-law of the Court, it is for the national legal system of each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law. Those rules must not, however, be less favourable than those governing similar domestic remedies (principle of equivalence) and must not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness) [Rudigier[21] 2018]. This rule undoubtedly covers reference to the rule of law, too.

Principles of public procurement as required by the directive as well as developed by the case law can be aligned to different partial aims of public procurement legislation, which protect or shall protect three types of interests: integration of internal market, protection of rights of an individual and effective public policies (Table1).

Table 1: Principles of public procurement and aims of public procurement legislation

Principle	Integration of internal market	Protection of rights of an individual	Effective public policies
Equal treatment	X	X	
Transparency	X	X	X
Non-discrimination	X	X	
Proportionality	X		
Conflict of interest	X	X	X
Judicial protection and effective remedies		X	
Efficiency and efficacy			X

[20] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395 30. 12. 1989, p. 33.

[21] Judgement of the Court of 20 September 2018, C-518/17 *Stefan Rudigier v. Salzburger Verkersverbund GmbH*, ECLI:EU:C:2018:757, point 61.

3. RULE OF LAW AND SOUND MANAGEMENT OF PUBLIC AFFAIRS

Specific features of public procurement are caused the "two-faced" character of interference of public authority with private sector and citizens. On the one hand, the contracting authority shall obey administrative safeguards vis-à-vis economic operators when selecting bids or excluding bidders. This point of view also covers policies of internal market, i.e. non-discrimination and free movement of goods and services. In this case, the obligation of due diligence requires that the contracting authorities act with care and caution [Masdar 2008: 93] and implies the obligation to examine all the relevant elements of the individual case carefully and impartially and to give an adequate statement of the reasons for its decision [Netherlands v Commission[22] 2008: 56].

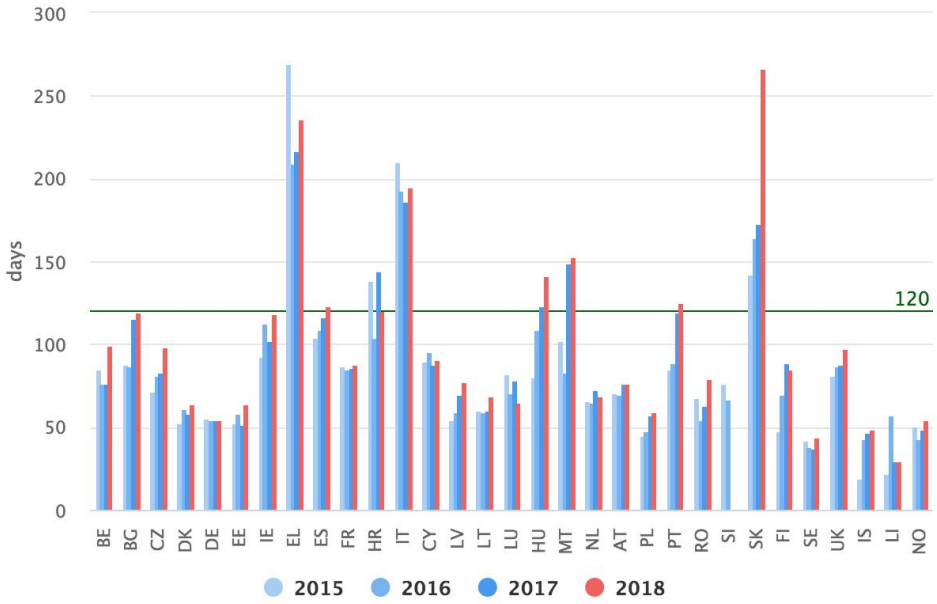
On the other hand, the contracting authorities, as a public bodies, directly or indirectly fulfil public policies by providing public goods to the general public, i.e. consumption of public bodies is linked to policy activities of central or local government itself. Principles of efficiency and effectiveness are substantial in this context.

Proper administration of public affairs inevitably includes the requirement that the public authority shall spend public funds in the most effective manner when purchasing or otherwise acquiring goods and services necessary for the performance of its duties. Indeed, more vigorous competition between bidders can generate more favourable conditions for a contracting authority. Therefore, contracting authority shall stimulate such a competition, even though the Public Procurement Directive allows contracting authorities procure without call for bids (Article 32 Directive 2014/24/EU) (see Graph 2). Efficiency of public procurement can be also undermined by inclination to the lowest price as the only criterion for award of a contract. As it was mentioned before, in such cases qualitative criteria are omitted and best value-for-money ratio can be unacquired. The pattern of behaviour of contracting authorities varies among the Member States (see Graph 1) and imbalances are significant.

The third quantitative evaluation of public procurement procedures, which is directly bound to rule of law and good administration, is the length of procurement procedures. Very lengthy procedures lead to ineffectiveness on both sides because of raising uncertainty. It cannot be excluded that such uncertainty can be included into the bid price by an economic operator as a risk margin. On the other hand, the contracting authority, as a public body, cannot perform its tasks without required goods and services and it cannot provide public goods. Thus, lengthy public procurement procedures can frustrate the performance of public services, public security etc. and thus it can undermine reliability of the functioning of public administrations. Moreover, such failure can lead to interference to the right of citizen for good administration due to delays in providing public services. In this context, right for good administration shall be seen not only as a negative commitment (i.e. non-interference into individual's rights) but also as a positive commitment (i.e. proper fulfilment of duties of public authority). In 2018, the average length of tender procedure exceeded six months in three Member States (Graph 3) which could have had serious impact on the possibility to purchase or otherwise acquire goods and services necessary for performing public duties within the fiscal year.

[22] Judgement of the Court of 6 November 2008, Case C-405/07 P *Kingdom of the Netherlands v Commission of the European Communities*, ECLI:EU:C:2008:613.

Graph 3: Decision speed (in days) (source, European Commission, 2019)



Observance of all abovementioned requirements for sound administration can be enforced by economic operators and public procurement surveillance authorities during procurement procedures. An economic operator can employ all legal tools provided by the directive and by national law. In this way administrative and private law remedies can be obtained. In this context, rule of law enforced via protection of rights of economic operators may be safeguarded effectively. Such protection of the rights of economic operators, including remedies and right to damages, is enshrined in directives and in the corresponding case law.

The finding of an irregularity, which in comparable circumstances would not have been committed by a normally prudent and diligent administration, permits the conclusion that the conduct of the institution has constituted an illegality, which leads to the non-contractual liability. For the non-contractual liability for unlawful conduct of a public body (EU institution as well as national authority), three conditions must be fulfilled cumulatively: (1) the unlawfulness of the acts alleged against the institutions, (2) the fact of damage and (3) the existence of a causal link between that conduct and the damage complained of.

With regard to the condition relating the unlawful conduct of an institution, it is required that there be established a sufficiently serious breach of a rule of law intended to confer rights on individuals. A decisive test for finding that a breach of EU law is sufficiently serious is whether there was a manifest and grave disregard by the institution of the limits on its discretion. Factors, which shall be taken into account are, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation or margin of discretion available to the author of the act in question.

As regards the requirement relating the reality of the damage, liability can incur only if the harmed person has actually suffered a real and certain loss. The burden of proof in this regard stays with the harmed person (claimant), who shall produce

conclusive evidence produce to the court in order to establish both the fact and the extent of such loss.

As regards the condition that there be a causal link, it is satisfied if there exists a direct link of cause and effect between the unlawful act committed by the institution concerned and damage invoked, a link which is for the claimant to prove. Liability exists only for damage which is sufficiently direct consequence of the wrongful conduct of the contracting authority.[23]

Consequences for the breach of duty of sound administration of a contracting authority in public procurement may be demonstrated on the case Vakakis kai Synergates (2018). The subject matter of this case was the inadequacy of the supervision of the tendering procedure by a contracting authority and the existence of a conflict of interest resulting in the breach of the principle of equality and sound administration. The court established that the contracting authority infringed a rule of law intended to confer rights on individuals emanated from the principle of protection of legitimate expectations and the principle of equal treatment as well as the principle of sound administration and Article 41 of the Charter (namely the right to have one's affairs handled impartially and fairly).

As regards the existence of sufficiently serious infringements, the court rejected the claims based on the existence of a sufficiently serious infringement of the principle of protection of legitimate expectations with the reasoning that the award of a public contract takes place following a comparative assessment of the tenders by the contracting authority and no tenderer is entitled to be awarded contracts automatically. On the other hand, when regarding the infringement of the principle of sound administration, the Court established that the contracting authority committed an irregularity (1) by accepting statements made by the winning tenderer that it was not in a situation of a conflict of interests without any ex officio investigation so as to determine whether that winning tenderer was in a situation of a conflict of interests and (2) by omitting to conduct an investigation of this matter. Such an irregularity would not have been committed, in similar circumstances, by an administrative authority, exercising ordinary care and diligence. Such an irregularity must be classified as a manifest and serious breach of the obligation of due diligence and, therefore, as a sufficiently serious infringement of that obligation, of the principle of sound administration and of Article 41 of the Charter.

The court then considered the damage and the causal link. The applicant claimed that it suffered five different heads of damage constituted, (1) by loss of profit, (2) by the cost incurred in contesting the lawfulness of the tendering procedure, (3) by the loss of an opportunity to participate and win other tenders, (4) by the loss of an opportunity to be awarded the contract and (5) by costs relating to the participation in the tendering procedure. The Court rejected claims for damages (1)-(3). On the rest, however, the Court ordered to pay compensation[24] for the damage in relation to

[23] See to this regard Judgement of the General Court of 28 February 2018, Case T-292/15 Vakakis kai Synergates — Symvouloi gia Agrotiki Anaptixi AE Meleton v European Commission, ECLI:EU:T:2018:103, points 62-67

[24] As parties did not reach settlement to the amount of compensation, the General Court in this case (T-292/15) with later judgement of 12 Feburary 2019, ECLI:EUT:2019:84 fixed he amount of compensation to be paid by the European Commission to Vakakis kai Synergates at EUR 234 353, together with default interest with effect from 28 February 2018 until full payment, at the rate set by the European Central Bank (ECB) for its principal refinancing operations, increased by 2%; and order the Commission to pay the costs incurred with respect to the proceedings giving rise to the judgment of 28 February 2018.

the loss of an opportunity to be awarded the contract (4) and for the costs and expenses incurred in participating in that call for tenders (5).
In this case, the Court considered that, during the tendering procedure, the contracting authority committed several unlawful acts in the context of the investigation relating to the existence of the conflict of interests. Such unlawful acts in the conduct of the tendering procedure fundamentally vitiated that procedure and affected the chances of the applicant, whose tender was ranked in second position, to be awarded the contract. If the contracting authority had fulfilled its obligation of due diligence and adequately investigated the extent of expert's involvement in the drafting of the Terms of Reference, it is not excluded that it might have established the existence of a conflict of interests in favour of his (winning) company justifying its exclusion from the procedure. Therefore, by deciding to award the contract to this company without having conclusively established that it was not in a situation of a conflict of interests even though significant evidence suggested the existence of an apparent conflict of interests, the contracting authority affected the chances of the applicant being awarded the contract. In those circumstances, the damage invoked with respect to the loss of an opportunity was considered as actual and certain, because there is evidence that, since an unsuccessful tenderer definitively lost an opportunity to be awarded the contract and that that opportunity was real and not hypothetical. The damage directly and immediately resulted from the unlawful acts committed by the contracting authority. The condition relating to the existence of a causal link was assessed in the light of the loss alleged. Due to the inadequacies of the investigation and the award of the contract to the winning company, the contracting authority vitiated the tendering procedure and, consequently, directly affected the tenderer's chances of being awarded the contract.
The above mentioned example proves that principle of sound administration as an integral part of the rule of law can be enforced in public procurement vis-à-vis to contracting authority through the claims for damages. Paradoxically, maladministration of public affairs, despite the possible wider negative effect on general public, cannot be remedied effectively, as consequences may have only political character .

CONCLUSION

Written or not, the applicability of the rule of law depends on the one who applies it. Even when applying the rule of law value, it is not a rare situation that human activities slide to just "value formalism". [Hodás 2015: 367].
Following the actual legislation and the case law we can conclude that public procurement rules complies with the principles of rule of law, even in situations, in which its individual aspects are not explicitly specified in the written law. Due application of the principles or rule of law verbalised in the Treaties, Public Procurement Directives and case law of the EU Courts shall result in effective purchase of services, goods and works by contracting authorities.
Paradoxically, despite the fact that actual common legislation tends to guarantee a more effective procurement, the research proved, that Member States approached harmonised procurement rules differently, which resulted in less effective procurement.
Even economic competition itself was impeded by those disparities (see Graph 2). And this is an interesting paradox. Competition, which is an exclusive competence of the EU, is regulated in primary law and directly applicable law, thus it shall be protected

and developed uniformly in the whole EU. However, disparities between Member States were obvious. The same rules work for some Member States, for others they do not. Therefore, it is not a surprise that public procurement, which is regulated only in directives and relevant case law, shows even higher disparities relating to three most important parts – transparency, award criteria and length of procedure.
Failure of proper implementation of public procurement rules, as well as principles of rule of law is not a question of good/bad design of the EU legislation, but a result of the failure of enforcement by Member States (Graph 3). The possible solution may be presented in a "procurement" version of the Directive ECN+[25], which introduces particular steps to ensure, that national competition authorities have the necessary guarantees of independence, resources and enforcement powers to be able to effectively apply competition rules. The Directive ECN+ was introduced also due to ineffectiveness of public enforcement of competition rules by national competition authorities which caused, inter alia, disparities between the Member States. The procurement enforcement directive then may set common rules for uniform and effective enforcement of procurement rules which would help to strengthen the rule of law in this area of law. However, the action form the European Commission is not likely in short time, since the European Commission did not find its reports (2017a, 2017b) failure of EU law and it attributed disparities to the Member States. Hence, quite broad wording of the Remedies Directive that contains no details of enforcement powers of review bodies (compared to the Directive ECN+) de facto relies on effective and comprehensive national legislation and enforcement rules rather that European framework of Public Procurement Directives. Another obstacle for the adoption of "Public Procurement Enforcement" Directive can be found in the different legal basis, compared to competition law. While competition rules on internal market are exclusive competence of the European Union (Article 3 TFEU) and are stipulated in Article 101 et seq TFEU explicitly, public procurement is based on a "general" harmonisation provision aimed to remove obstacles to free movement of goods and services (Article114 TFEU). In this context, facing the principle of proportionality and the principle of subsidiarity, any action of the European Union may have legal basis only if different enforcement of the Public Procurement Directives and ineffectiveness of public procurement procedures create real and potential obstacles to free circulation within the internal market.
Regarding the hypothesis that the rule of law is generally applicable and applied without the necessity of its verbalising in the form of secondary law relating public procurement, we can conclude that our research verifies this presumption. However, the fact that rule of law is generally applicable does not mean that it is generally applied in the same way.

THE ACKNOWLEDGMENT

This contribution presents some results from research projects: APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context", Jean Monnet project No. 600587-EPP-1-2018-1-SK-EPPJMO-MODULE: „Clinical Education in Selected Areas of European Union's

[25] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

Internal Market“ and VEGA project No. 2/0167/19: „The real convergence in the European union: empirical proofs and implications“.
The authors acknowledge to anonymous reviewer for their thoughtful suggestions and comments.

REFFERENCES

Friedery, R., (2018), Good Administration through the Lens of the CJEU: Direction for Administrative Bodies. Bratislava Law Review, Vol. 2, Issue 1, pp. 116-122.

Groussot, X., Hettne. J. and Petursson, G.T., (2016), General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union, In Vogenauer, S., Weatherill, S. (eds), General Principles of Law. European and Comparative Perspectives, Hart Publishing.

Hodás, M., (2015), Konflikt záujmov – hodnotový formalizmus či účinná ochrana pred nepotizmom?, in Štát a právo, Vol. 4/2015, Vydavateľstvo Bellianum, Banská Bystrica

Lanza, E. M., (2018), The Right to Good Administration in the European Union: Roots, Rationes and Enforcement in Antitrust Case-Law Teoria del Diritto e dello Stato 1-2-3, 2008. Available at SSRN: https://ssrn.com/abstract=1593523

Mokrá, L., (2011), Evropská unie a základní lidská práva. In: Evropské právo, Plzeň:Aleš Čeněk, 2011

Mokrá, L., (2013), Koncepcia Európskeho unijného práva ľudských práv. In: Ústavné garancie ľudských práv. - Bratislava : Univerzita Komenského, Právnická fakulta, 2013

Nagy, C. I., (2018), The EU Bill of Rights' Diagonal Application to Member States: Comparative Perspectives of Europe's Human Rights Deficit. In. Nagy, C. I. (ed.) The EU Bill of Rights' Diagonal Application to Member States, Eleven International Publishing, the Hague, ISBN: 9789462368699 (book), 9789462749153 (e-book). Available at SSRN: https://ssrn.com/abstract=3245761 or http://dx.doi.org/10.2139/ssrn.3245761

Petr, M., (2016), Complex Relations between EU Competition and Public Procurement Law. European Studies – The Review of European Law, Economics and Politics, Vol. 3/2016, pp. 100-114.

Sanchez-Graells, A., (2016). Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows? Cambridge Yearbook of European Legal Studies, 18, 93-121. doi:10.1017/cel.2016.4.

Schroeder, W., (2016), The EU Founding Values – Constitutional Character and Legal Implications. European Studies – The Review of European Law, Economics and Politics, Vol. 3/2016, pp. 50-64.

Stelkens, U. and Andrijauskaitė, A., (2017), Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and Their Impact on the Administrative Law of Its Member States FÖV Discussion Paper No. 86. Available at SSRN: https://ssrn.com/abstract=3105263

Varga, A. Zs., (2019), Rule of Law in the 21th Century. Bratislava Law Review, Vol. 3, Issue 1, pp. 163-169.

Legal documents, case-law

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33–35)

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14.1.2019, p. 3–33).

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65-242)

Judgement of the Court of 2 June 2016, Case C-27/15 Pippo Pizzo v CRGT Srl, ECLI:EU:C:2016:404

Judgment of the Court of 24 June 2019, Case C-619/18 Commission v Republic of Poland, ECLI:EU:C:2019:531

Judgement of the Court of 2 May 2019, Case C-309/18 Lavorgna Srl v Comune di Montelanico, Comune do Supino, Comune di Sgurgola, Comune do Trivigliano, ECLI:EU:C:2019:350.

Judgement of the Court of 16 December 2008 Masdar Ltd v Commission of the European Communities, ECLI:EU:C:2008:726

Judgment of the Court of 9 September 2003, Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v Autoritá Garante della Concorrenza e del Mercato, ECLI:EU:C:2003:430.

Judgement of the Court of 8 May 2014, Case C-604/12 H.N. v Minister for Justice, Equality and Law Reform, Ireland, ECLI:EUC:2014:302

Judgement of the General Court of 16 December 2015, T-138/14 Randa Chart v European External Action Service, ECLI:EU:T:2015:981

Judgement of the Court of 20 September 2018, C-518/17 Stefan Rudigier v. Salzburger Verkersverbund GmbH, ECLI:EU:C:2018:757

Judgement of the Court of 7 April 2016, Case C-324/14 Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, ECLI:EU:C:2016:214

Judgement of the Court of 25 October 2018, Case C-260/17 Anodiki Services EPE c G.N.A. O Evangelismos - Ofthalmiatreio Athinon – Polykliniki and Geniko Ogkologiko Nosokomeio Kifisias – (GONK) 'Oi Agioi Anargyroi, ECLI:EU:C:2018:864

Judgement of the Court of 11 December 201, C-113/13 Azienda sanitaria locale n. 5 'Spezzino' and Others v San Lorenzo Soc. coop. Sociale and Croce Verde Cogema cooperativa sociale Onlus, ECLI:EU:C:2014:2440

Judgement of the Court of 17 December 2015, Joined case C-25/14 and C-24/14 Union des syndicats de l'immobilier (UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social et Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social and Others, ECLI:EU:C:2015:821

Judgement of the Court of 6 June 2019, Case C-264/18 P.M. and Others v Ministerrad, ECLI:EU:C:2019:472

Judgement of the Court of 8 February 2018, Case C-144/17 Lloyd´s of London v Agenzia Regionale per la Protezione dell´Ambiente della Callabria, ECLI:EU:C:2018:78

Judgement of the Court of First instance od 12 July 2007, Case T-250/05 Evropaiki Dynamiki – Proigmena Systimata Tilepikinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities, ECLI:EU.T:2007:225

Judgement of the General Court of 11 June 2014, Case T-4/13 Comminciaud Group Ltd v European Commission, ECLI:EU:T:2014:437

Judgement of the Court of 6 November 2008, Case C-405/07 P Kingdom of the Netherlands v Commission of the European Communities, ECLI:EU:C:2008:613

Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration (Adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies). Available at: https://rm.coe.int/16807096b9.

Report from the Commission to the European Parliament and the Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement (COM/2017/028 final)

Venice Commission of the Council of Europe (2016), The Rule of Law Checklist, Available at: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

European Commission (2014), Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM (2014)158 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN

European Commission (2019), Single Market Scoreboard, Public Procurement, Reporting period: 01/2018 – 12/2018. Available at: https://ec.europa.eu/internal_market/scoreboard/_docs/2019/performance_per_policy_area/public_procurement_en.pdf

European Commission (2017a), Report from the Commission to the European Parliament and the Council on the Effectiveness Of Directive 89/665/EEC And Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement. COM/2017/028 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0028

European Commission (2017b), Commission Staff Working Document Evaluation Of The Modifications Introduced By Directive 2007/66/EC To Directives 89/665/EEC and 92/13/EEC Concerning the European Framework for Remedies in the Area of Public Procurement/ Refit Evaluation Accompanying the Document Report from the Commission to the European Parliament and the Council on the Effectiveness Of Directive 89/665/EEC And Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement, SWD/2017/013 final, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017SC0013

RULE OF LAW IN THE ITALIAN LEGAL ENVIRONMENT: A PRINCIPLE STILL IN FORCE?

Raffaele Caroccia

University of Naples "Federico II",
Department of Political Science,
Via Leopoldo Rodinò, 22, 80138 Naples, Italy
raffale.caroccia@libero.it

Abstract

This paper deals with the meaning of the Rule of Law in the Italian legal system and tries to identify two possible recent legislative interpretations. In particular, there will be a brief description of the differences between the Rule of Law and the principle of legality, followed by a summary about the binding role of precedents and the soft law, as introduced in the legal systems in recent years. These can be identified as two attempts to embody the Rule of Law in the Italian legal environment.

Keywords: *Rule of Law, legality principle, stare decisis, guidelines*

1. CENTRAL RESEARCH QUESTION

The aim of this paper is to identify and to assess the current role of the Rule of Law principle in the Italian legal system and its content.
In order to reach this goal, the methodology that will be followed here is an analysis of the main legal sources, from a historical perspective, too. A brief reference to the major scientific views on the given problem will be also made, as it is necessary for a proper and precise mise au point of the research question.
The paper will be structured as follows: in the first stage we are going to outline possible interpretations of the Rule of Law concept in the Italian legal environment; then we are going to analyse two contemporary legislative examples of its enforcement, i.e. the recently acknowledged role of the rulings (decision-making practice) of superior judges in the Italian legal system, and the concept of soft law, in particular the so-called guidelines of independent authorities.

2. TRADITIONAL STATUS OF THE RULE OF LAW IN THE ITALIAN LEGAL ENVIRONMENT

Traditionally, in the Italian legal system the Rule of Law has been identified among public law scholars as a principle of a more political and philosophical rather than a juridical value and as a concept not belonging to the national tradition. [Bin 2018] [Ancora 2018] [Sandulli 2018]

Despite the fact that Gaetano Filangieri was one of the first authors suggesting the importance of the Rule of Law principle during the Enlightenment in his "Science of Legislation", the concept of the Rule of Law has had quite a different and narrower understanding in legislative terms comparing to other countreis and it caused widespread unease among scholars.

As a matter of fact, we can point out that the Rule of Law has been identified mainly as a general legal protection of citizens from actions and orders made by public authorities, rather than a way of organising public bodies themselves or framing the relationship between citizens and government on a stable and fair basis. To fulfil this goal, laws adopted by the parliament became of the centre of the government's interest.

As a result, in the Italian juridical discourse, the main element has always been the legality principle, which is more similar to the German concept of Rechtsstaat, rather than the Rule of Law.

The incomprehensive and partial interpretation of the Rule of law concept in the Italian legal system can been identified as follows: Parliament is entitled to the rule-making power, as it is the representative of the will of the people; law itself is a warrant for citizens, as long as it is clear, general, abstract and self-sufficient; if the citizens think they have suffered any harm caused by a public body, their protection is assured by the judicial power, which simply applies legal commands of the parliament.

The view is in line with a rigid version of the principle of separation of powers, with a central role of law in the legal system, which is typical for the post-revolutionary French juridical tradition, and with considering judges simple os legis or bouche de la loi. Therefore, judges have to apply law, not broaden or even interpret it.

This scenario – typical of civil law systems - was thought to be enough to assure citizens' protection since legal certainty was the result of such a setting.

The importance of the state is strongly accented here; the State is the source and the warden of rights at the same time. According to this view, it is sufficient that parliament confers power to a public body to verify whether the principle of legality is respected. Only in certain cases (mainly concerning property protection), it is necessary for law to describe, how a public body can use its power. Therefore, legality has a formal nature, and its substantive version is limited to few areas of law. This ideological construction was mainly aimed at protecting the bourgeoisie, who used it as well as the principle of legality in order to limit actions of state. This approach was successful from the nineteenth century until after the Second World War.

This concept, which is maybe the best illustration of the Rule of Law in the Italian legal order, was reflecting the state of the legal environment in the country, following by preferable private interest protection as its indirect consequences.

According to this, the Rule of Law in the Italian legal system has its original distinctive features in an objective understanding.

We must say that, apart from the historical evolution of the legal system, legal certainty has always kept its constant primary role. It is to be noted that this concept is so deeply rooted in the legal environment, that there had not been any legislative provision of it until 1990, when for the first time, it was established by the General Administrative Procedure Act that public bodies must follow the goals which they are given by law [General Administrative Procedure Act: A1] .

Before this, the Italian Constitution has stressed only the judicial protection of citizens in a variety of provisions [Constitution of the Italian Republic: A24, A103, A113]. It can be noted, that for the first time the right to oppose an administrative act is identified as a fundamental right. Mentioned Constitution's articles were focused on civil and administrative law. Although there is difference in criminal law concerned. In this limited field, the Constitution expressly stipulates that nobody can be punished without a previous law identifying the behaviour as a crime. However, this provision is in line with the Roman tradition, according to which nullum crimen, nulla poena sine lege, rather than with the Rule of Law principle itself. Instead, the provision of Art. 111 on compulsory motivation of sentencing judgments is something more similar to the concept of the Rule of Law.

Anyway, generally the source of the principle of legality in the Constitution is identified in Art. 101, which declares that judges are subject to law only. This provision, rather than being a guarantee of independence of judicial power established for citizens, has been seen as a limit to judges themselves and it resulted in commanding them to enforce law as enacted by parliament.

In this way, we can conclude that even the Italian constitutional legal environment has at its centre the original and limited version of the legality principle.

The evolution towards a different meaning has been first made possible by other norms of the fundamental law. These dealt with general freedoms that are ensured to individual and to collective entities either from state intervention (negative freedoms) or from actions of public bodies (positive freedoms, typical for a welfare state). Human rights and freedoms were not defined by the Art. 2 of the Constitution, however this provision with its general clause has enabled judges to overcome the rigid limits given by the legislator and to enforce human and social rights, even before they were recognized by the parliament. Anyhow, starting from the 1970s and together with building a welfare state, the fundamental value of the Constitution, as far as human rights are concerned, turned out to be a powerful tool given to judges to detect, in the social environment and in its evolution, new rights that could be promoted according to values gradually emerging in the society, in order to ensure substantial equality. An example of this evolution is the protection of privacy. It has been said that in this way, the normative cycle started to move from legislative acts to social realities; this has been identified as the first attempt to narrow the distance between the principle of legality and the Rule of Law, which is deeply rooted in society.

But the real engine that made the Italian legal system more inclined to the Rule of Law was the principle of effectiveness advocated by international courts (mainly by EU judges and by the European Court for Human Rights). This resulted in shaping subjective rights attributed to every member of the legal system and identifiable in a predictable behaviour of public bodies. In fact, both the EU legislation and the Human Rights Convention have at their core the protection of the individual, which has to be guaranteed and exercised by State authorities. So the new version of the principle of legality can be identified as a right to certainty: each individual must be assured of the content and the quality of his legal rights which cannot be modified by public

bodies without a priori defining their power, which has to be used in a proportional way and in at a given time. After the definite time lapses, the individual has a vested right which cannot be overthrown by public bodies. This is a interpretation of the French droit de sureté juridique and its implementation in the Italian legal system is very recent (2015).

The integration of the Italian legal environment into supranational legal systems put first instance courts' judges again to the position of the first applicant of the supranational legal acts: so there has been some critical views of this change according to which the Italian legal system is moving from Rechtsstaat to Richterstaat. This shift has been also identified as a consequence of both the crisis of political representation and the evolution of legal reasoning from syllogism towards more refined hermeneutical procedures.

Moreover, in the Italian legal system, the concept of the Rule of Law has been fostered by globalization. Given the fact that the source of legitimacy no more relies on the parliament only, and economic matters are not solved at a national level anymore, the state – which was, as we have already seen, the central element of the Rule of Law as interpreted in the Italian legal tradition – has weaker powers to regulate society and cannot provide stable guarantees any longer.

In fact, the state does not have the monopoly of laws adoption anymore, thus making the principle of legality old-fashioned. Therefore, a need of adopting legislation to prevent abuse of power by private bodies against other individuals should be adopted. This happens again by implementation practice in this area As a result, the source of juridical strength is no more found inside the legislative environment but in the self-regulation of market actors (so called lex mercatoria), in judicial rulings or in acts and practice of other bodies.

This framework is characterized by shortening the distances between common law and civil law legal systems, resulting in a kind of global law, which is a blend between the traditional two types of legal systems. Its core should be the Rule of Law, now interpreted as a source of promotion of economic and social growth and not only as a tool to protect individuals. This change has created further deviations from the Italian constitutional tradition, according to which the main value to promote should be personal dignity.

As a result of this transformation, the Rule of Law has been interpreted in the contemporary Italian legal discourse as one component of a cluster of ideas, which are the core of contemporary western political identity together with human rights, democracy and free market. This approach is in line with the opinion that the Rule of Law is mainly coherent with the promotion of free market, as it has been interpreted by the EU Courts, in whose legal reasoning there is small or no space for social rights which caused the first evolutionary factor in legal certainty mutation that made possible the rise of the welfare state. This is an additional cause for unease among Italian scholars.

3. THE NEW BINDING ROLE OF PRECEDENTS

Despite the worries of scholars, the Italian legislator has recently tried to embody some elements thought to be part of the Rule of Law into the legal environment. [Oggianu 2011] [Pesce, 2012] [Follieri, Barone 2015]

The first element, which can identified as a shift of the Italian legal system towards the Rule of Law, is the new role assumed by the rulings of superior courts, which

were made partly binding as an imitation of stare decisis rule. To fully understand the value of this novelty, we have to say, that in the Italian legal system judges are traditionally subject only to the laws and the rulings by other judges – no matter their importance or instance – have merely a rhetorical/persuasive meaning and are not legal sources. This means that such rulings can be used as a tool which can make legal reasoning more predictable, but they can never have a binding function.

As an attempt to make rulings more predictable, to promote uniformity and equal treatment and in order to reduce disparities and to make appeal to superior courts less attractive, starting from 2009, there has been a significant change in procedural legislation: plenary rulings of the Supreme Court became binding for chambers or chambre that are part of the Supreme Court. The divisions of the court cannot judge differently; if they think that the legal solution of the plenary ruling is not correct or persuasive, it can only submit the question again to the plenum trying to get an overruling decision with a different reasoning. This rule was first created for civil cases, then it expanded to both administrative and public revenue cases (it has to be noted that in this area of law, the rule is rigid, because the binding role affects even the judges of the first instance, who in all other cases, are free not to follow the stare decisis rule) and finally was extended to criminal law. This complex semi-binding mechanism was completely unknown to the Italian legal system and was thought to be an useful tool to raise legal certainty; it has to be noted that the tradition of the Supreme Court was to guarantee legal certainty in general not to particular individuals, which was again a common point of both the Italian legal system and the post-revolutionary French one. On the contrary, it resulted in further complications: on the one hand, the divisions tried to provoke a change in the solution by the plenum more frequently; on the other one, they are more comfortable to submit the case to EU judges, assuming that the plenary solution is not coherent with the EU legislation and hoping to alter the plenary ruling in this way with a binding judgment. Thus, the new system has fostered uncertainty. For instance, as far as administrative cases are concerned, in 2006 14 decisions were pronounced by the plenum of Supreme Court, in 2007 12, in 2008 13, in 2009 5, in 2010 3, in 2011 (the year in which the institute became fully operational) 24, in 2012 38, in 2013 29, in 2014 34 , in 2015 11, in 2016 24, in 2017 13. As a matter of fact, there was no promotion of predictability.

Apart from this factual delusion, there has been a widespread criticism, because the new role attributed to precedents is seen as a transplant of a foreign legal tradition.

4. THE GUIDELINES BY INDEPENDENT AUTHORITIES

The second element that caused a confusion between the principle of legality and the Rule of Law was the introduction of guidelines created by independent authorities at the market.

From this point of view, the Rule of Law is understood preferably as an advocacy to go over the traditional catalogue of legal sources in an effort to keep more in touch with fast changing decisions required by the global economy. In order to be compliant with them, law has to become flexible and easily changeable. This new interpretation of the principle of legality is focused on the enterprises as its main beneficiaries, which request an assured trust on stability of decisions taken both by public bodies and judges – legal certainty in its general and wide interpretation. As a result, legal regulation of economic phenomena should become simpler, thus resulting in

challenge of the traditional principal of legality, the core of which was parliament-made law.

Here, certainty is viewed as an objective to be guaranteed to citizens in a more coherent and sensitive way; a general and abstract law is not considered to be able to fulfil this goal anymore. Legal regulation in this new version of the principle of legality become possible by the pre-determination of choices of public bodies, whose actions should be driven by rulings, internal sources, such as operative practice and international standards. This change is more evident in economic activities, but it also effects rights of the individual (e.g. transparency). This evolution of the legal system should in fact be the answer to social changes, which cannot be followed by the legislator's initiative that retreats in favour of guidelines, the main representative of the so-called soft law.

This expression [Mostacci 2008] [Morettini 2011: 11] [Torchia 2016: 16] [Morbidelli, 2016: 16] [Ramajoli 2017: 147-167] [Deodato 2016] is referred to as a broad and not well-defined variety of acts that do not have a binding effect. They appeared for the first time in the 1990s in international law, consequently also in the national legal context in the last ten years.

Their birth is generally linked to a phenomenon of self-regulation and to the awareness that traditional legal sources are no longer able to regulate contemporary global transactions effectively (e. g. lex mercatoria). The subjects in a legal environment with loose regulations (e.g. international law system), consequently decide to create a framework in which they consensually lay down basic operational rules, and thus shaping a common and predictable operative framework. This process is voluntary and it relies on self-compliance. Generally, there are no tribunals to which disputes on such legal rules can be submitted.

In the national legal environment, on the other hand, soft law has became somewhat typical for independent authorities and its aim could be described as a moral suasion. As a consequence, from the theoretical point of view it should not enter hierarchy of the legal sources and should only clarify previous legal prescriptions, answer questions raised by subjects of law and enhance and promote best practices. Soft law has a role, which can be described as a compass, which is capable to orientate both enterprises and administrations to the same goal [Mital 2016: 96].

Soft law has a regulatory effect, at least as a "tertiary law". Due its character it is supposed to be adopted only after a notice and comment procedures among stakeholders, especially when its effectiveness refers to a plurality of cases. As a consequence, it is, in fact, a crypto-hard law if considered more closely [Ramajoli 2016: 16]. This feature is immediately visible in the national legal context – as the Italian one – where acts of public bodies have a traditionally binding effect; so the difference between soft law and the traditional legal sources is made less perspicuous.

In order to justify soft law in the administrative legal system, two proposals have been made.

The procedure of a public consultation before the adoption of a guideline is thought to be an effective tool to get some legitimacy to the regulatory act by bodies which do not rely on the will of the people. Furthermore, there must always be a judicial review of soft law, as a consequence of the general protection against all acts of public administration.

There is no doubt that guidelines have regulatory content, no matter what kind of legal sources they resemble, and no matter being set by an authority, which does not

rely on a direct democratic legitimacy. Nevertheless, it can pose limitations and burdens on subjects of law.
In order to fix the flaws presented by these two features, it has been unanimously suggested that a deep judicial review can make this kind of source of law more compliant with the traditional configuration of a modern democracy.
The judicial review, in fact, can help overcome the missing link with general will and grant control, even if it is performed post factum only. It can also create a barrier from the phenomenon of soft regulation, whose unwilled result can be a supremacy of economy and technical power over political authorities. In this way, the right to file an action by subjects of law can give an equilibrium the whole system; in order to be true, it must be added, on the other hand, there is not a clear standard upon which guidelines can be reviewed by a judge.
The expansion of regulation based on guidelines in the Italian legal environment dates back to 2016, when the Anti-Corruption Authority was given a governance role on the regulation of public tender procedures.
We need to stress that the new sources did not prove to be a workable solution; in fact, in 2019, the legislator has acknowledged the failure of this new type of legal regulation and decided to return to the traditional ones with a new reform of public tender legislation. The regulative scenario, in fact, has been once again thought to be completed by an act adopted by the Government in order to substitute guidelines, which proved to be vague and quite instable. These two features were criticized by Courts and private subjects a withdrawal of such a regulation was suggested.

CONCLUSION

To sum up, the concept of the Rule of Law is quite unaccustomed to the Italian legal system; as noted above, both the binding role of precedents and the soft law have not proven to be proper instruments and at least one of these two novelties has soon declined.
So - to conclude - we can say that the Italian legal system is acquainted with the traditional and minimal meaning of the principle of legality, while the concept of the Rule of Law is far from being permanently embodied as a core principle both in legislation and in legal reasoning.

REFERENCES

Ancora F., (2019), Rule of law, Stato di diritto e certezza del diritto, available at http://cds.sentenzeitalia.it/uploads/news_attachment/file/518/518/RULE_OF_LAW.pdf, acces on 2019-10-12.

Bin R., (2018), Il diritto alla sicurezza giuridica come diritto fondamentale, Federalismi.it, no. 17, available at https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=37059, access on 2019-10-11.

Bin R. ,(2011), Stato di Diritto, in Enciclopedia del Diritto, Annali, VI, Milano.

Deodato C., (2016), Le linee guida dell'ANAC: una nuova fonte del diritto?, Giustizia Amministrativa, available at https://www.giustizia-amministrativa.it%2Fdocuments%2F20142%2F62321%2Fnsiga_4083067.docx%2F4ef0761e-84e2-0f2a21c98b8967f74036%2Fnsiga_4083067.docx&usg=AOvVaw0eC__aqn7sNQRHVP48oOXC, access on 2019-10-05.

Follieri E., Barone A., (2015), I principi vincolanti dell'adunanza plenaria del Consiglio di Stato sul Codice del processo amministrativo, Milano: Cedam.

Mital O., (2018), The Impacts of Globalisation Processes on the Execution of Public Administration Functions, in Politicke vedy, 21 (4), 96-117.

Morbidelli G., (2016), Linee guida dell'ANAC: comandi o consigli? in Diritto Amministrativo, 3 (16) 273-295.

Morettini S., (2011), Il soft law nelle Autorità indipendenti: procedure oscure e assenza di garanzie?, Osservatorio AIR, 4, 1-29.

Morrone A., (2017), Le Linee Guida dell'Autorità Nazionale Anticorruzione nel sistema della fonti, in Rivista trimestrale di diritto pubblico, 3 (17), 743-768.

Mostacci E., (2008), La soft law nel sistema delle fonti: uno studio comparato, Padova: CEDAM.

Oggianu S., (2011), Giurisdizione amministrativa e funzione nomofilattica. L'Adunanza Plenaria del Consiglio di Stato, Roma: CEDAM.

Pesce G., (2012), L'Adunanza Plenaria del Consiglio di Stato ed il vincolo del precedente, Napoli: CEDAM.

Ramajoli M., (2016), Self regulation, soft regulation e hard regulation nei mercati finanziari, in Rivista della regolazione dei mercati, 2, available at http://www.rivistadellaregolazionedeimercati.it/index.php/saggi-2-2016/margherita-ramajoli-self-regulation-soft-regulation-e-hard-regulation-nei-mercati-finanziari, access on 2019-10-02.

Sandulli M. A., (2018), Processo amministrativo, sicurezza giuridica e garanzia di buona amministrazione, available at https://www.giustizia-amministrativa.it/studi-e-contributi/-/asset_publisher/M2jdZL26fejg/content/sandulli-processo-amministrativo-sicurezza-giuridica-e-garanzia-di-buona-amministrazione-13-dicembre-2018, access on 2019-10-12.

Torchia L., (2016), La regolazione del mercato dei contratti pubblici, in Rivista della regolazione dei mercati, 2, available at: http://www.rivistadellaregolazionedeimercati.it/index.php/saggi-2-2016/luisa-torchia-la-regolazione-del-mercato-dei-contratti-pubblici, access on 2019-10-02.